

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Case No. 13-16554

---

PRESIDIO HISTORICAL ASSOCIATION;  
and SIERRA CLUB,

Plaintiffs-Appellants,

v.

PRESIDIO TRUST, a federal government  
corporation,

Defendant-Appellee.

---

**UNOPPOSED MOTION FOR LEAVE TO FILE  
CORRECTED *AMICUS CURIAE* BRIEF**

---

On Appeal from the United States District Court  
for the Northern District of California  
Hon. Laurel Beeler  
Case No. 3:12-cv-00522-LB

Elizabeth S. Merritt, Deputy General Counsel  
National Trust for Historic Preservation  
1785 Massachusetts Ave., NW  
Washington, DC 20036  
Tel: (202) 588-6026  
Fax: (202) 588-6272  
Email: [emerritt@savingplaces.org](mailto:emerritt@savingplaces.org)  
*Attorney for Amicus Curiae*  
*National Trust for Historic Preservation*

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the National Trust for Historic Preservation in the United States (“National Trust”) hereby moves this Court for leave to file a Corrected *Amicus Curiae* Brief, for the reasons stated below. Prior to filing this Motion, the National Trust contacted counsel for all parties, and counsel did not express any opposition to the motion.

The National Trust’s original *Amicus Curiae* Brief, filed with this Court on December 27, 2013, contained errors in the Table of Authorities.<sup>1</sup> The errors in the Table of Authorities included inaccurate page numbers to identify the location of the citations within the brief. The National Trust seeks this Court’s permission to correct these errors in order to assist the Court and the parties in using the Table of Authorities to find citations within the *Amicus Curiae* Brief. Rather than list each of the corrections individually in an errata sheet, the National Trust proposes to file the attached Corrected *Amicus Curiae* Brief, for the convenience of all parties, which contains a corrected Table of Authorities with accurate cross-references to indicate the location of each citation within the brief. No changes or corrections have been made to any other portion of the *Amicus* Brief, including the Table of Contents or the body of the brief (other than the Cover, and the date at the

---

<sup>1</sup> In addition, the case number (13-16554) was listed incorrectly (as 13-16544) on the cover of the *Amicus Curiae* Brief. This error has also been corrected.

end of the brief and in the Certificate of Service, which have been revised to reflect today's date).

For the reasons stated above, the National Trust respectfully requests that this Court grant it leave to file the accompanying Corrected *Amicus Curiae* Brief.

Dated: January 18, 2014

Respectfully submitted,

s/ Elizabeth S. Merritt  
Elizabeth S. Merritt, Deputy General Counsel  
National Trust for Historic Preservation  
1785 Massachusetts Ave., NW  
Washington, DC 20036  
Tel: (202) 588-6035  
Fax: (202) 588-60  
Email: [emerritt@savingplaces.org](mailto:emerritt@savingplaces.org)

*Counsel for the Proposed Amicus Curiae  
National Trust for Historic Preservation*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing Motion for Leave to File Corrected *Amicus Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on January 18, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

s/ Elizabeth S. Merritt  
Elizabeth S. Merritt, Deputy General Counsel  
National Trust for Historic Preservation  
1785 Massachusetts Ave., NW  
Washington, DC 20036  
Tel: (202) 588-6026  
Fax: (202) 588-6272  
Email: [emerritt@savingplaces.org](mailto:emerritt@savingplaces.org)

*Counsel for Amicus Curiae*  
*National Trust for Historic Preservation*

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Case No. 13-16554

---

PRESIDIO HISTORICAL ASSOCIATION  
and SIERRA CLUB,

Plaintiffs-Appellants,

v.

PRESIDIO TRUST, a federal government  
corporation,

Defendant-Appellee.

---

**CORRECTED *AMICUS CURIAE* BRIEF OF THE  
NATIONAL TRUST FOR HISTORIC PRESERVATION**

---

On Appeal from the United States District Court  
for the Northern District of California  
Hon. Laurel Beeler  
Case No. 3:12-cv-00522-LB

Elizabeth S. Merritt, Deputy General Counsel  
National Trust for Historic Preservation  
2600 Virginia Ave., NW, Suite 1100  
Washington, DC 20037  
Tel: (202) 588-6026  
Fax: (202) 588-6272  
Email: [emerritt@savingplaces.org](mailto:emerritt@savingplaces.org)  
*Attorney for the National Trust for Historic Preservation*

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Trust for Historic Preservation states that it is a not-for-profit organization and has no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

INTERESTS OF *AMICUS CURIAE* ..... 1

ARGUMENT..... 3

I. **THE PRESIDIO TRUST’S INTERPRETATION OF SECTION 110(F) OF THE NATIONAL HISTORIC PRESERVATION ACT IS CONTRARY TO LAW**..... 3

    A. Section 110(f) Imposes a Stringent Substantive Standard for Any Project that Will Adversely Affect a National Historic Landmark, Such as the Project at Issue in this Case ..... 4

    B. The Requirement to “Minimize Harm” to the “Maximum Extent Possible” is Most Closely Analogous to Section 4(f) of the Department of Transportation Act ..... 6

II. **CASES CONSTRUING NHPA SECTION 110(a) ARE NOT APPLICABLE TO SECTION 110(f), WHICH EMPLOYS COMPLETELY DIFFERENT STATUTORY LANGUAGE**..... 8

III. **THE ADVISORY COUNCIL ON HISTORIC PRESERVATION IS NOT THE AGENCY CHARGED WITH IMPLEMENTING SECTION 110(F), AND THUS SHOULD NOT RECEIVE GREATER DEFERENCE FROM THIS COURT THAN THE NATIONAL PARK SERVICE**..... 11

CONCLUSION..... 15

**TABLE OF AUTHORITIES**

*Association of Amer. RRs v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977) ..... 13

*City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106 (C.D. Cal. 1999) ..... 13

*Coalition Against A Raised Expressway (CARE) v. Dole*,  
 No. 84-1219-C, 1985 U.S. Dist. LEXIS 30976, 17 *Env'tl L. Rev.* 20,466  
 (S.D. Ala. Oct. 20, 1986), *aff'd*, 835 F.2d 803 (11th Cir. 1988) ..... 7

*Concerned Citizens Alliance v. Slater*, 176 F.3d 686 (3d Cir. 1999) ..... 14

*Delta Air Lines v. Civil Aeronautics Bd.*, 543 F.2d 247 (D.C. Cir. 1976) .....13

*Florida Key Deer v. Stickney*, 864 F. Supp. 1222 (S.D. Fla. 1994) ..... 14

*Lee v. Thornburgh*, 877 F.2d 1053 (D.C. Cir. 1989) ..... 10

*National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908 (D.D.C. 1996),  
*aff'd on other grounds*, U.S. App. LEXIS 29703, 203 F.3d 53  
 (D.C. Cir. Oct. 22, 1999) ..... 9-10

*Sierra Club v. Marsh*, 816 F.2d 1376 (9<sup>th</sup> Cir. 1987) ..... 13

*Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983) ..... 13-14

*Silva v. Lynn*, 482 F.2d 1282 (1<sup>st</sup> Cir. 1973) ..... 14

*State of Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978) ..... 13

**STATUTES**

16 U.S.C. §§ 468-468d ..... 1

16 U.S.C. § 470a(a)..... 4

16 U.S.C. § 470a(g) ..... 11, 14

16 U.S.C. § 470f ..... passim



16 U.S.C. § 470h-2(a) ..... 8-9

16 U.S.C. § 470h-2(b) ..... 10

16 U.S.C. § 470h-2(d) ..... 10

16 U.S.C. § 470h-2(f) ..... passim

16 U.S.C. § 470i(a)(8) ..... 1

16 U.S.C. § 470s ..... 11

16 U.S.C. § 470w(11)..... 11

49 U.S.C. § 303..... 6

49 U.S.C. § 303(c)..... 6

**REGULATIONS**

36 C.F.R. §§ 60.5-60.9..... 4

36 C.F.R. § 65.2(a)..... 4

36 C.F.R. § 65.5(d)-(e)..... 4

36 C.F.R. § 800.6(c)(3)..... 2

**OTHER AUTHORITIES**

63 Fed. Reg. 20,495 (Apr. 24, 1998) ..... 5-6

H.R. Rep. No. 96-1457 (1980) ..... 5, 7

National Historic Preservation Act Amendments of 1980,

Pub. L. No. 96-515, 94 Stat. 2981 (1980) ..... 4

Section 213 Report: Presidio of San Francisco National Historic Landmark,  
Advisory Council on Historic Preservation, Jackson-Retondo, E.,

National Park Service, Pacific West Region (Apr. 6, 2009) ..... 13

## INTERESTS OF *AMICUS CURIAE*

This *amicus curiae* brief is submitted<sup>1</sup> on behalf of the National Trust for Historic Preservation in the United States,<sup>2</sup> which was chartered by Congress in 1949 as a private non-profit organization to further the historic preservation policies of the United States and to “facilitate public participation” in the preservation of our nation’s heritage. 16 U.S.C. §§ 468-468d. Congress has also designated the Chairman of the National Trust as a member of the President’s Advisory Council on Historic Preservation, which is an independent agency responsible for overseeing federal agency compliance with Section 106 of the National Historic Preservation Act. *Id.* § 470i(a)(8).

Backed by hundreds of thousands of members and supporters around the country, the National Trust works to protect significant historic sites and to advocate for historic preservation as a fundamental value in decisions that affect our national heritage at all levels of government. The mission of the National Trust is to provide leadership, education, and advocacy to save America’s diverse

---

<sup>1</sup> Pursuant to Ninth Circuit Rule 29-3, counsel for the National Trust contacted counsel for all parties to advise them of the National Trust’s interest in filing this *amicus curiae* brief. Counsel for both parties consented to the filing of an *amicus* brief by the National Trust.

<sup>2</sup> Pursuant to Fed. R. App. P. 29(c)(5), the National Trust certifies that its counsel authored this *amicus curiae* brief in its entirety. No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

historic places and revitalize our communities.

In light of its interest and expertise, the National Trust also frequently participates as an advocate in the administrative process when specific projects are reviewed, in order to encourage greater consideration of alternatives to avoid, minimize, and mitigate harm to historic properties. In the instant case, the National Trust participated as a “consulting party” under Section 106 of the National Historic Preservation Act during the review process for the management plan ultimately approved by the Presidio Trust in 2010. That advocacy included participation by staff at the National Trust’s headquarters as well as our San Francisco Field Office. The National Trust also “concurred” in the Programmatic Agreement (PA) that was negotiated as a result of that consultation.<sup>3</sup>

Although the National Trust does not object to the content of the management plan itself, the National Trust submits this *amicus curiae* brief for consideration by this Court because the interpretation of Section 110(f) of the National Historic Preservation Act, 16 U.S.C. § 470h-2(f), raises important legal and policy issues of first impression. The National Trust disagrees with the arguments raised by the Presidio Trust before the district court regarding the interpretation of Section 110(f), and disagrees with the district court’s apparent

---

<sup>3</sup> See 36 C.F.R. § 800.6(c)(3) (“*Concurrence by others.* The agency official may invite all consulting parties to concur in the . . . agreement. . . . The refusal of any party invited to concur in the . . . agreement does not invalidate the . . . agreement.”)

assumptions regarding the meaning and application of Section 110(f). We urge this Court to reverse the district court's interpretation of this section of the statute.

### ARGUMENT

#### **I. The Interpretation of Section 110(f) of the National Historic Preservation Act Adopted by the District Court is Contrary to Law.**

Section 110(f) of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470h-2(f), mandates that federal agencies have affirmative, substantive responsibilities to protect National Historic Landmarks to the “maximum extent possible.” Section 110(f) provides as follows:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible agency shall, *to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark* and shall afford the Advisory Council a reasonable opportunity to comment on the undertaking.

16 U.S.C. § 470h-2(f) (emphasis added).

The district court correctly characterized the dispute between the parties surrounding the interpretation of Section 110(f): the Plaintiffs-Appellants contend (and the National Trust agrees) that Section 110(f) establishes a substantive standard, which governs federal agency decisions that adversely affect National Historic Landmarks, while the federal agency argues that Section 110(f) merely imposes heightened *procedural* requirements, but not a substantive mandate. The district court purported to dodge this fundamental issue, by stating, for example,

“[r]egardless of whether 110(f) is substantive or procedural, the court cannot see what else the Trust could have done besides not build the hotel at all.” However, the district court’s comments and discussion reflect a serious misinterpretation of the statute.

**A. Section 110(f) Imposes a Stringent Substantive Standard for Any Project that Will Adversely Affect a National Historic Landmark, Such as the Presidio in this Case.**

The National Historic Landmark program was authorized by Congress in order to recognize “properties of exceptional value to the nation as a whole rather than to a particular State or locality.” 36 C.F.R. § 65.2(a); *see* 16 U.S.C. § 470a(a). In contrast to properties listed on the National Register of Historic Places, which are nominated by state historic preservation officers and federal agencies, 36 C.F.R. §§ 60.5-60.9, National Historic Landmarks are designated by the Secretary of the Interior based upon the Department’s own research. Each property considered for National Historic Landmark status must be approved and recommended by the National Park System Advisory Board. *Id.* § 65.5(d)-(e).

Section 110(f) was enacted in 1980 as part of a comprehensive set of amendments to the NHPA. *See* Pub. L. No. 96-515, 94 Stat. 2981 (1980). The amendments significantly expanded the statutory responsibilities of federal agencies to preserve and protect historic properties.

The legislative history of Section 110(f) explicitly states that it “establishes a

higher standard of care to be exercised by federal agencies” with respect to National Historic Landmarks, as compared to the standard under Section 106 of the NHPA, which applies to all sites listed in, or eligible for, the National Register of Historic Places (National Register). H.R. Rep. No. 96-1457, at 38 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6401. Section 106, part of the original 1966 NHPA, only requires that federal agencies “take into account” the effect of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation an opportunity to comment in advance on any such proposed undertakings. 16 U.S.C. § 470f. Section 110(f) requires more than that. “This section does not supersede Section 106, but complements it by setting a higher standard for agency planning in relationship to [National Historic] landmarks before the agency brings the matter to the [Advisory] Council.” H. Rep. No. 96-1457, *supra*, 1980 U.S. Code Cong. & Admin, News at 6401.

This higher standard was codified by the National Park Service (NPS) in *The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act of 1966* (“Section 110 Guidelines”), which state that “Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs [National Historic Landmarks].” 63 Fed. Reg. 20,495 (Apr. 24, 1998). The

Section 110(f) Guidelines further direct agencies to “consider all prudent and feasible alternatives to avoid an adverse effect on the NHL.” *Id.* at 20,503.<sup>4</sup> This language, as will be discussed below, mirrors that of Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. The explicit terms of the statutory language of Section 110(f), as well as its legislative history, provide clear guidance as to the statute’s strict mandate—to set the strongest and highest standard possible for protection for the nation’s historic landmarks.

**B. The Requirement to “Minimize Harm” to the “Maximum Extent Possible” is Most Closely Analogous to Section 4(f) of the Department of Transportation Act.**

The language of Section 110(f) is markedly similar to preexisting provisions in Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), which has received much judicial attention. The language of Section 110(f) that requires “such planning and actions as may be necessary to minimize harm” to landmarks is nearly identical to that in the second proviso of Section 4(f), which requires “all possible planning to minimize harm.” 49 U.S.C. § 303. Indeed, the legislative history of Section 110(f) is replete with reference to Section 4(f), and confirms that Congress intended to incorporate this approach into the statutory terms of Section

---

<sup>4</sup> Thus, contrary to the district court’s assumption, the Presidio Trust was indeed required to consider the feasible and prudent alternative of not building the hotel at all.



110(f).<sup>5</sup>

The National Trust's direct involvement in the enforcement of Section 110(f) through litigation dates back to the mid-1980s and our successful lawsuit as a co-plaintiff to stop the construction of an elevated waterfront highway in downtown Mobile, Alabama. *Coalition Against a Raised Expressway (CARE) v. Dole*, No. 84-1219-C, 1986 U.S. Dist. LEXIS 30976, at \*49 (S.D. Ala. Oct. 20, 1986), *aff'd on other grounds*, 835 F.2d 803 (11th Cir. 1988).<sup>6</sup> The proposed highway would have come within 40 feet of the Mobile City Hall, a National Historic Landmark, thus triggering the requirements of both Section 110(f) of the NHPA and Section 4(f) of the Department of Transportation Act. The federal district court in that case recognized that Section 110(f) "significantly expanded the statutory responsibilities of federal agencies" for preservation. The court repeatedly emphasized that Section 110(f) establishes a "higher standard of care" than Section 106, and cautioned that "[c]ompliance with Section 106 does not necessarily satisfy the mandate of Section 110(f) with its higher standard of care." However, the court ultimately concluded that it was not necessary to formally

---

<sup>5</sup> Although Section 110(f) itself does not repeat the first proviso of Section 4(f) (that historic sites may be used only if "no prudent and feasible alternatives" exist, the legislative history explicitly states that Congress intended agencies to "*consider* prudent and feasible alternatives." H. Rep. No. 96-1457, *supra*, 1980 U.S. Code Cong. & Admin. News at 6401 (emphasis added).

<sup>6</sup> The district court's opinion in *CARE v. Dole* is also published at 17 *Env't'l L. Rep.* 20,466.

reach the issue of whether the agency had violated Section 110(f). The court ruled instead that the proposed elevated highway would “substantially impair,” and “constructively use,” the Mobile City Hall, thus triggering the clearly substantive mandate of Section 4(f) to avoid and incorporate “all possible planning to minimize harm.” Ultimately, the court’s reasoning made it clear that the court considered the substantive scope of Section 110(f) to be very similar to Section 4(f), by concluding that “compliance with Section 4(f) will moot the Section 110(f) claim.”

## **II. Cases Construing NHPA Section 110(a) Are Not Applicable to Section 110(f), Which Employs Completely Different Statutory Language.**

In its briefing before the district court, the Presidio Trust attempted to rely on cases construing Section 110(a) of the NHPA in an effort to bootstrap those interpretations onto Section 110(f). However, it is important for this Court to recognize that cases interpreting Section 110(a) are not dispositive and do not govern Section 110(f).

Section 110(a) is the provision that applies to federal agency stewardship of historic properties, and includes phrases such as:

- “*assume responsibility for the preservation of historic properties which are owned or controlled*” by the agency, 16 U.S.C. § 470h-2(a)(1);
- “[p]rior to acquiring, constructing, or leasing buildings . . . each Federal agency shall *use, to the maximum extent feasible, historic properties available* to the agency, *id.*”

- “ensure” that “properties under the jurisdiction or control of the agency . . . are managed and maintained in a way that *considers* the preservation of their historic . . . values in compliance with section 106 and gives *special consideration to the preservation* of such values in the case of properties designated as having National significance,” *id.* § 470h-2(a)(2)(B);
- “ensure” that “the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given *full consideration in planning*,” *id.* § 470h-2(a)(2)(C);

(Emphasis added).

One of the early cases addressing Section 110(a) was a case brought by the National Trust challenging the Army’s neglect of the National Park Seminary Historic District at the Walter Reed Army Medical Center. The federal district court rejected the argument that the language in Section 110(a) imposes a “substantive” standard that is stronger than compliance with Section 106. *National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908 (D.D.C. 1996), *aff’d on other grounds*, 203 F.3d 53 (D.C. Cir. Oct. 22, 1999) (mem.).<sup>7</sup> However, the language of the district court’s opinion in the *Blanck* case makes it clear that the court’s ruling was strictly limited to Section 110(a), and did not attempt to reach Section 110(f). After reviewing the language of Section 110(a) in detail, 938 F. Supp. at 920, the court stated, “[t]he Court concludes that Section *110(a)* cannot be read to create new substantive preservationist obligations separate and apart from

---

<sup>7</sup> The appellate opinion is reported in full at 1999 U.S. App. LEXIS 29703 (D.C. Cir. Oct. 22, 1999).

the overwhelmingly procedural thrust of the NHPA . . . .” *Id.* at 922 (emphasis added).

The court in *Blanck* also repeatedly pointed out that the earlier ruling in *Lee v. Thornburgh*, 877 F.2d 1053 (D.C. Cir. 1989), involved two *different* provisions of Section 110—namely, Section 110(b), which calls for the recordation of historic properties prior to demolition, and Section 110(d), which calls for agencies to “carry out agency programs and projects. . . in accordance with the purposes of [the NHPA],” and to “give consideration to programs and projects which will further the purposes of [the NHPA].” 16 U.S.C. §§ 470h-2(b), 470h-2(d). *See* 938 F. Supp. at 921, 922. None of these provisions is remotely as strong as the language of Section 110(f), which requires agencies to “minimize harm” to the “maximum extent possible.” *Id.* § 470h-2(f).

The Presidio Trust’s argument, which was apparently adopted by the district court, relied on cases such as *Blanck* and *Lee v. Thornburgh*, which involved provisions of Section 110 *other than* 110(f), in order to make the leap of extending those rulings to a different provision of the statute with language that is much stronger. There is simply no legal basis for reducing Section 110(f) to the lowest common denominator.

**III. The Advisory Council on Historic Preservation is Not the Agency Charged With Implementing Section 110(f), and Thus Should Not Receive Greater Deference from this Court than the National Park Service.**

The district court erred in finding the stringent standard of Section 110(f) as being satisfied by the existence of a Section 106 Programmatic Agreement (PA) simply because the Advisory Council on Historic Preservation (ACHP) attempted to pronounce the outcome as satisfactory. The district court's reliance on the language of the PA, however, is misplaced. Under the NHPA, the Secretary of the Interior (and thus the National Park Service<sup>8</sup>)—***not*** the Advisory Council on Historic Preservation—has been given the authority by Congress to interpret Section 110 of the NHPA. 16 U.S.C. § 470a(g) (“the Secretary shall promulgate guidelines for Federal agency responsibilities under section 470h-2 of this title.”) By contrast, the ACHP's authority is limited to Section 106. *Id.* § 470s (“[t]he Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act”) (emphasis added).

The district court appeared to assume, in its comments in footnote 12, that the Section 106 Programmatic Agreement (PA) could be bootstrapped into a certificate of compliance with the more stringent substantive standards of Section

---

<sup>8</sup> *See* 16 U.S.C. § 470w(11) (“‘Secretary’ means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified”).

110(f). This was a source of controversy during the administrative process. For example, in drafting the “execution clause” at the end of the PA, one early draft attempted to state that the signatories agreed that the Presidio Trust had “taken into account the effects of this Undertaking on historic properties in compliance with 36 C.F.R. Part 800 *and Section 110(f)* of the NHPA.” AR037831 (Emphasis added). Based on objections from the consulting parties, however, this provision was revised in the final PA to clarify that the Presidio Trust had only “afforded the ACHP a reasonable opportunity to comment on the Undertaking,” since that requirement is identical in both Section 106 and Section 110(f). AR000223. This revision is significant because it illustrates a recognition by all parties that the Section 106 agreement cannot properly serve to confirm compliance with the substantive standard of Section 110(f).

In other words, Section 110(f) includes both a substantive standard *and* a procedural requirement (affording the ACHP a reasonable opportunity to comment). The language in the execution clause of the PA addressed only the procedural component of Section 110(f), and did not purport to address the statute’s substantive mandate.

Statements made by the NPS in the Section 213 Report similarly confirm the substantive requirements of Section 110(f). In the Section 213 Report, the NPS acknowledged the strict standards of Section 110(f) and recommended seven

changes to the proposed undertaking to avoid, minimize or mitigate the negative effect on the Presidio NHL. The NPS strongly encouraged the Presidio Trust to take its recommendations, “[g]iven the significance of the resource and *the obligation of the [Presidio Trust] to minimize harm to this National Historic Landmark District to the maximum extent possible.*” Section 213 Report: Presidio of San Francisco National Historic Landmark. Prepared for the Advisory Council on Historic Preservation by Elaine Jackson-Retondo, Ph.D. National Park Service, Pacific West Region (Apr. 6, 2009), at ix (emphasis added). In typical Section 106 reviews, an agency need not fulfill this added obligation.

Reviewing courts should defer to the agencies with special expertise regarding particular resources or issues, when those agencies disagree with the lead agency—a principle that has been repeatedly affirmed both in this and other circuits.<sup>9</sup> The agency assigned by Congress to implement and interpret Section

---

<sup>9</sup> See *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (court deferred to the “more appropriate expertise” of Fish & Wildlife Service, rather than Army Corps of Engineers, regarding protection of endangered species from highway and flood control project); *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1126-27 (C.D. Cal. 1999) (court enjoined freeway project where other agencies, including the Advisory Council on Historic Preservation, objected to its destructive impacts); *State of Alaska v. Andrus*, 580 F.2d 465, 474 n.44 (D.C. Cir. 1978) (heightened obligation to respond to the contrary views of “mission oriented Federal agencies”); *Association of Amer. RRs v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977) (court refused to defer to lead agency’s statutory interpretation when three other federal agencies with relevant expertise disagreed); *Delta Air Lines v. Civil Aeronautics Bd.*, 543 F.2d 247, 260 (D.C. Cir. 1976) (“in general we believe that the Board should defer to the safety expertise of its sister agencies”); *Sierra Club v.*

110 is the National Park Service, not the ACHP. 16 U.S.C. § 470a(g). *See also Concerned Citizens Alliance v. Slater*, 176 F.3d 686, 696-97 (3d Cir. 1999) (declining to defer to the ACHP's views on which alternative represented the one that would "minimize harm" under the language in Section 4(f) that parallels Section 110(f)).

This Court should defer to the agency with the statutory authority and special expertise to interpret Section 110, which is clearly the NPS through the Secretary of the Interior. The NPS acknowledged the Presidio Trust's additional requirements under Section 110(f) in the Section 213 Report as previously discussed.

---

*U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) ("the court may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting view of other agencies having pertinent expertise." "Although the FEIS purported to respond to these comments, no new studies were performed, no additional information was collected, no further inquiry was made; and the FEIS essentially reiterated or adopted the statements in the DEIS."); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (HUD project drew "heavy" criticism from 3 federal agencies--Agriculture, Commerce, & EPA) ("[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response."); *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1231-38 (S.D. Fla. 1994) (court deferred to Interior Department rather than FEMA in an Endangered Species Act dispute, due to Interior's paramount expertise, even though Interior was assessing the impacts of a FEMA project).



## CONCLUSION

For the reasons stated above, the National Trust respectfully urges this Court to reject the district court's apparent assumption that Section 110(f) of the National Historic Preservation Act is limited to procedural requirements, and can be satisfied by the execution of an agreement under Section 106 of the Act. Instead, this Court should recognize that Section 110(f) establishes a more stringent substantive standard, which must be applied by the Court in evaluating whether the record substantiates compliance with the Act.

DATED: January 18, 2014

Respectfully submitted,

/s/ Elizabeth S. Merritt  
Elizabeth S. Merritt, Deputy General Counsel  
National Trust for Historic Preservation  
2600 Virginia Ave., NW  
Washington, DC 20037  
Tel: (202) 588-6026  
Fax: (202) 588-6272  
Email: [emerritt@savingplaces.org](mailto:emerritt@savingplaces.org)

## STATEMENT OF RELATED CASES

Counsel for the National Trust for Historic Preservation is not aware of any related cases.

## CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 4,211 words, exclusive of tables and cover sheet.

s/ Elizabeth S. Merritt \_\_\_\_\_  
Elizabeth S. Merritt, Deputy General Counsel  
National Trust for Historic Preservation  
2600 Virginia Ave. NW, Suite 1100  
Washington, DC 20037  
Tel: (202) 588-6026  
Fax: (202) 588-6272  
Email: [emerritt@savingplaces.org](mailto:emerritt@savingplaces.org)  
*Counsel for the National Trust for Historic Preservation*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing Corrected *Amicus Curiae* Brief of the National Trust for Historic Preservation with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on January 18, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

s/ Elizabeth S. Merritt

Elizabeth S. Merritt, Deputy General Counsel

National Trust for Historic Preservation

2600 Virginia Ave. NW, Suite 1100

Washington, DC 20037

Tel: (202) 588-6026

Fax: (202) 588-6272

Email: [emerritt@savingplaces.org](mailto:emerritt@savingplaces.org)

*Counsel for the National Trust for Historic Preservation*