

Strengthening Federal Agency Mediation in Public Sector Disputes: A Model from Historic Preservation

I. INTRODUCTION

The last twenty years have seen few federal agencies consider dispute resolution techniques when planning for potential conflicts with public interests.¹ A unique and particularly successful example of a federal agency dispute resolution program was authorized in the National Historic Preservation Act of 1966 (NHPA).² This Act created the Advisory Council on Historic Preservation (Advisory Council), an independent mediating body which facilitates settlements between historic preservation interests and any federal agency whose operations affect historically significant buildings or sites.³ Over a twenty-five year period the Advisory Council, through its regulatory consultation procedure, has successfully resolved thousands of public challenges to agency actions. In so doing the Council has produced a dispute resolution forum that has been promoted as a model for other federal, state, and private groups.⁴ Yet despite increasing public interest and investment in historic preservation, as well as the Advisory Council's strong record, the consultation process has been consistently eroded by the frequent refusal of many federal agencies either to abide by its requirements or to fully integrate the process into their respective operations. This Note will focus on finding the optimal means to modify the procedure so as to remedy this agency disrespect and create an effective model for public policy conflict resolution. The Note will initially discuss the nature and effectiveness of the NHPA approach, as well as judicial enforcement of resulting agreements. The agency enforcement dilemma will then be analyzed together with the question of whether this negative attitude is generated by a distaste of required negotiation or of preservation in general. Next, the Note will review proposed and enacted alterations to

1. Charles Pou, Jr., *Federal Agency Use of "ADR": The Experience to Date, in SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 101* (Office of the Chairman Administrative Conference of the United States 1987).

2. National Historic Preservation Act of 1966, as amended, Pub. L. No. 96-515, 94 Stat. 2987 (1966) (codified as amended at 16 U.S.C. § 470-470w-6 (1988)).

3. 16 U.S.C. § 470i (1988). The Advisory Council is comprised of nineteen members, most of them Presidential appointees, and is charged with developing and implementing regulations concerning the review process of the NHPA. The Council is also directed to advise the President, Congress, and state governments on the current range of federal preservation activity and concerns. *Id.*

4. See, e.g., Thomas F. King, *Resolving Environmental Disputes: A Model from Historic Preservation, in THE HISTORIC PRESERVATION YEARBOOK 186* (Russell V. Keune ed., 1984-1985); Brit A. Storey, *The Advisory Council on Historic Preservation: Its Role in the Developing American Preservation Program, in CULTURAL RESOURCE MANAGEMENT 21, 40-41* (Ronald W. Johnson & Michael G. Schene eds., 1987).

the program and then conclude by advocating a revision to the NHPA to buttress the consultation program, including a partial adoption of the substantive requirements of the Department of Transportation Act of 1966 as they affect historic properties.⁵

II. THE "SECTION 106" CONSULTATION PROCESS

The scope of permissible aesthetic regulation under the police power includes the ability of governmental bodies to adopt guidelines to protect buildings, landscapes, and archeological sites of significant historic value.⁶ Congress expressly advocated such a custodial approach in Section 106 of the NHPA, which afforded the Advisory Council review opportunity to ensure that federal agencies consider the potential impact their respective projects might have on these properties.⁷ The triggering mechanism for Section 106 review is an "undertaking," carried out by a federal agency or designated substitute. The statute provides that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in

5. Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966) (current version at 49 U.S.C. § 303 (1988)).

6. See Louis H. Masotti & Bruce I. Selson, *Aesthetic Zoning and Police Power*, 46 U. DET. J. URB. L. 773 (1968-1969); Grace Blumberg, Comment, *Legal Methods of Historical Preservation*, 19 BUFF. L. REV. 611 (1970). See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (United States Supreme Court recognition of historic preservation as a valid exercise of governmental police power).

7. 16 U.S.C. § 470j (1988). In this section, Congress requires federal agencies to "take into account the effect" of federal projects on historic properties, and to "afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking." *Id.* § 470f. Congress gave no indication as to the manner in which this review should be accomplished, though the Council was authorized to issue regulations to carry out the NHPA. *Id.* § 470s. During the early 1970s, the Advisory Council formulated the present consultation program to effectively carry out its review of agency activities. Under its grant of authority, the Council issued regulations in 1974 which included this process, commonly referred to as "Section 106" consultation (referring to the original NHPA section number.) See 36 C.F.R. § 800.1 (1991); King, *supra* note 4, at 187.

STRENGTHENING FEDERAL AGENCY MEDIATION

or eligible for inclusion in the National Register.⁸

While the scope of an undertaking has been the source of much litigation, the application of Section 106 has been upheld in a wide array of federal agency activities, including project funding (both direct and indirect),⁹ building leases,¹⁰ and the issuance of permits.¹¹ Originally, agencies needed to focus on only those properties officially listed on the National Register of Historic Places,¹² though the scope has since been increased to embrace buildings and sites eligible for enrollment.¹³ If a non-listed structure is impacted, the agency must conduct an evaluation utilizing the criteria for National Register nomination.¹⁴ If there is disagreement from any quarter concerning the historical significance of a certain site or structure, the agency must seek a definitive pronouncement from the Secretary of the Interior.¹⁵ After *Macht v. Skinner*¹⁶ a project may also be segmented, so that for large projects only those portions

8. 16 U.S.C. § 470f (1988). The Advisory Council regulations further specify what will be considered to be a federal "undertaking" in 36 C.F.R. § 800.2(o) (1991). While the question of what constitutes a "federal agency" in this context has not been problematic, some courts have examined programs of other governmental entities and labeled them "agencies" for the purposes of the NHPA. For instance, although Federal Reserve operations parallel that of a private corporation in many ways, it has been termed a "federal agency" for Section 106 consultation. ADVISORY COUNCIL ON HISTORIC PRESERVATION, AN OVERVIEW OF FEDERAL HISTORIC PRESERVATION LAW: 1966 TO 1985, *reprinted in* ALI-ABA, HISTORIC PRESERVATION LAW AND TAX PLANNING FOR OLD AND HISTORIC BUILDINGS 245, 251 (1987); *see, e.g.*, Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank of Atlanta, 497 F. Supp. 504 (N.D. Ala. 1980).

9. *See, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (federal funding for dam project); WATCH v. Harris, 603 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979) (indirect funding through urban renewal grant). *But cf.* Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985 (6th Cir. 1989) (highway project did not require Section 106 consultation as it was not principally a federally funded undertaking).

10. *See, e.g.*, Birmingham Realty Co. v. General Serv. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980) (building lease).

11. *See, e.g.*, National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 552 F. Supp. 784 (S.D. Ohio 1982) (permit for barge-loading facility near historic ferry). Even with a broad application, if the effects of the undertaking are too remote, the mediation process may not apply. *See, e.g.*, Petterson v. Froehlke Ice, 354 F. Supp. 45 (D. Or. 1972), *vacated and remanded sub nom.* Citizens Comm. for Columbia River v. Callaway, 494 F.2d 124 (9th Cir. 1974) (effect on historic site ten miles from airport construction site did not trigger review); *see also* Cobble Hill Ass'n v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979) (rerouting of traffic through historic neighborhood due to highway construction did not require review).

12. The National Register of Historic Places is an inventory of officially-recognized buildings, sites, and districts deemed worthy of preservation due to their historic or architectural significance. 16 U.S.C. § 470a(a)(1)(A) (1982). While inclusion does not guarantee preservation, it does qualify owners for limited tax benefits. *See, e.g.*, 26 U.S.C. §§ 48(g)(3), 170(f)(3)(B)(iii) (1988).

13. Pub. L. No. 94-422, 90 Stat. 1320 (1976).

14. 36 C.F.R. § 800.4(c) (1991).

15. *Id.* § 800.4(c)(4).

16. 916 F.2d 13 (D.C. Cir. 1990).

which adversely affect a property will be subject to negotiation.¹⁷ A counterpart section of the NHPA, Section 110, deals with National Historic Landmarks, and imposes a slightly higher standard for agency consideration.¹⁸

The consultation program authorized under the NHPA is a multi-tiered method to assess and mitigate potential negative impact by agency operations. Initially, the federal agency will contact the State Historic Preservation Officer¹⁹ (SHPO) of the state in which an undertaking will take place as part of a "reasonable and good faith effort" to identify qualifying properties.²⁰ Historic sites may be impacted by activities that do not involve demolition, if new construction is somehow incompatible with the structure or area's historic integrity.²¹ An agency assessment of the level of impact will follow. If there is none, the project may continue.²² If there is an effect on an historic property, the agency will further classify the impact as adverse or non-adverse.²³ For a non-adverse effect, the agency must either obtain SHPO concurrence or notify the SHPO and Advisory Council of its decision, the latter of which has the right to object to the non-adverse classification.²⁴ If the effect is deemed adverse, mandatory consultation commences involving the agency and the SHPO, which attempt to negotiate through differences to arrive at a settlement that mitigates the adverse impact.²⁵ The Advisory Council has the option to enter the consultation on its own initiative, or it may be

17. *Id.*

18. See 16 U.S.C. § 470h-2 (1988). National Historic Landmarks are properties with architectural, historic, or cultural significance on a national level, with more demanding designation criteria than that for listing on the National Register. ADVISORY COUNCIL ON HISTORIC PRESERVATION, *Section 106, Step-By-Step*, reprinted in ALI-ABA, HISTORIC PRESERVATION LAW AND TAX PLANNING FOR OLD AND HISTORIC BUILDINGS 62, 105 (Supp. 1988). Agency officials are directed to conduct all planning and activity "as may be necessary to minimize harm" to the landmark. 36 C.F.R. § 800.10 (1991).

19. The SHPO in each state is appointed by the governor, and maintains an office that is partially funded by federal monies under the NHPA. Each office is charged with implementing the respective state preservation program, as well as serving as a central state source for preservation assistance and information. In addition, each SHPO is integrally involved in the Section 106 consultation process, as well as the nomination of potential National Register and National Historic Landmark candidates. 11 HIST. PRESERVATION L. & TAX'N (MB) § 1.06[4] (1986).

20. 36 C.F.R. § 800.4(b) (1991).

21. *Vieux Carre Property Owners, Residents and Assocs., Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991).

22. 36 C.F.R. § 800.5(b) (1991). SHPOs have 15 days after notice to object to this finding. *Id.*

23. The presence or absence of an adverse effect is determined by the agency's application of criteria set out by the Advisory Council. 36 C.F.R. § 800.9(b) (1991). Each conclusion must be fully documented. *Id.* § 800.8.

24. *Id.* § 800.5(d). The Advisory Council can challenge this classification if accomplished within thirty days. *Id.* § 800.5(d)(2).

25. *Id.* § 800.5(e).

STRENGTHENING FEDERAL AGENCY MEDIATION

invited to do so by either party.²⁶ As a mediator, the Council functions not as a single-minded activist, but as an independent party who can fully appreciate and communicate historic preservation values.

A settlement will take the form of a Memorandum of Agreement (MOA), which is enforceable between the parties based on contract principles.²⁷ Should the mediation prove unproductive and no MOA is issued, there is a final review by the Advisory Council followed by its official commentary, which must be considered before the agency can proceed.²⁸ Advisory Council regulations provide as well for three alternatives to this consultation - a negotiation between the agency and the Advisory Council with the aim of formulating a Programmatic Memorandum of Agreement (PMOA),²⁹ an agency can develop comparable regulations which may be sanctioned by the Council, or an agreement between the Advisory Council and a state may be substituted for a Section 106 consultation.³⁰

The consultation process closely parallels traditional non-binding mediation. Originally, the Advisory Council was a mediating party in every negotiation. Since 1986, however, it participates only when it considers it necessary or another party requests its intervention.³¹ As the author of regulations providing the negotiating forum, the Advisory Council clearly sees itself in the role of mediator.³²

The Section 106 program has had a marked effect in the field of preservation law that demonstrates its effectiveness. As a useful technique for out-of-court settlement of disputes often fueled by strong public opinion, the process satisfies a high number of goals for an effective mediation program,³³ and has been a source of ideas for several state

26. *Id.* Certain other interested parties must be invited to take part in the consultation process, depending on the type of adverse impact involved. These include heads of local government, prospective permit recipients, owners of land in question, or Native American tribal representatives if reservation lands are affected. *Id.* § 800.5(e)(1)(i)-(iii).

27. 36 C.F.R. § 800.6(c) (1991). See also 11 HIST. PRESERVATION L. & TAX'N (MB) § 3.06 (1986).

28. 36 C.F.R. § 800.6(a)(2) (1991). Comments must be provided by the Advisory Council within sixty days of the end of unsuccessful negotiations. *Id.* § 800.6(b).

29. A PMOA is entered into for the purpose of integrating acceptable preservation impact management guidelines into a specific agency program. Should future adverse impacts fall within the scope of an approved PMOA, the regulations of Section 106 consultation will have been met. ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 8, at 250.

30. 36 C.F.R. §§ 800.7, 800.15 (1991). See ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 18, at 72.

31. 36 C.F.R. § 800.5(e) (1991).

32. 11 HIST. PRESERVATION L. & TAX'N (MB) § 3.10[2][b] (1986).

33. Many studies have promulgated ideal criteria to assess the effectiveness of mediation programs. One set of goals for public sector mediation include: (1) negotiated agreements need to be acceptable to all parties, (2) results should appear fair; (3) judged by disinterested observers, the result should optimize joint gains; (4) past precedent should be involved in the result; (5) the agreements should be reached with minimal time and expense,

advisory bodies and private negotiation centers.³⁴ The consultation process has produced MOAs in ninety-five percent of all controversies submitted to it, and consequently mitigates harm to numerous significant structures annually.³⁵ The vast majority of MOAs have never been the source of litigation. Between the years 1977 and 1983, for example, out of the 1,340 MOAs issued, only four were subsequently challenged in court, each was upheld, and no MOA was overturned on appeal.³⁶ By contrast, over nine percent of Environmental Impact Statements were targets of litigation during the same period.³⁷

With the recent passage of the Administrative Dispute Resolution Act, federal agencies are now required to integrate dispute resolution methods into their operations.³⁸ One author has expressly advocated the use of a substantially similar procedure to replace the current dispute settlement procedures authorized by the National Environmental Policy Act of 1969 (NEPA), for instance, saying that "[t]he Council's experience . . . indicates that such a mechanism can and does work."³⁹ However, the value of Section 106 consultation as a model for adoption, especially for those agencies which must address similar public impact concerns, is tempered by the proclivity of certain agencies to ignore or purposefully violate the regulations' specifications.

and (6) the process should work to improve the relationship between the participants. Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector: Mediator Accountability and the Public Interest Problem*, AM. BEHAV. SCIENTIST 255, 263-64 (1983-1984). The Section 106 program has been compared favorably to public sector mediation goals. See, e.g., King, *supra* note 4, at 187.

34. One such program is that of the University of Virginia Institute of Environmental Negotiation, which recently was instrumental in successfully mediating a dispute between preservation groups and the City of Atlanta and producing a far-reaching historic preservation program. See *Virginia Environmental Endowment Awards \$300,000 Grant*, UPI, Dec. 26, 1988, available in LEXIS, Nexis Library, UPI File; Constance Beaumont, *Preservation Through Mediation: The Atlanta Process*, PRESERVATION FORUM, Winter 1989-90, at 6, 6-7. A similar state program exists in California, where the SHPO is responsible for referring to the Office of Planning and Research for mediation any state agency that refuses to "eliminate or mitigate adverse effects on historic resources. . . ." CAL. PUB. RES. CODE § 5024.5 (West 1984).

35. King, *supra* note 4, at 187 of the 2,943 agency undertakings reviewed by the Advisory Council in fiscal year 1990, in 1,151 there was a finding of no adverse effect, in 287 instances MOAs were finalized, and 100 Programmatic Memoranda of Agreements were reached. A federal agency terminated consultation in only 6 cases, necessitating the Advisory Council's official comments. 1990 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 84-85.

36. King, *supra* note 4, at 188. See also *State of Washington v. City of Seattle*, 615 P.2d 461 (Wash. 1980) (en banc) (MOA upheld).

37. 1982 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 75.

38. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, 2736-48 (1990).

39. King, *supra* note 4, at 190.

STRENGTHENING FEDERAL AGENCY MEDIATION

III. PROBLEMS WITH AGENCY EXCLUSION

Despite the benefits derived from this consultation program, there has been a steady reluctance on the part of many agencies to incorporate the requirement of Section 106 consultation into their respective agendas. One important source of criticism was the Reagan Administration, which expressly questioned the Advisory Council's legal authority while promoting several revisions to cut back or curtail any mediation role for the Council.⁴⁰ This negativism permeated many federal agencies, resulting in disparate treatment of Section 106 requirements when actions affected historic properties.

A. A Review of Federal Agency Treatment of Section 106 Mediation

Numerous federal agencies potentially impact structures of historic importance in carrying out their missions. Several departments have embraced the consultation process, and many have developed internal guidelines that mesh well with the Advisory Council regulations.⁴¹ One department with obvious parallels to preservation concerns is the Environmental Protection Agency (EPA), working under the mandates of the National Environmental Policy Act (NEPA)⁴² and other statutes.⁴³ The close interrelationship between the NEPA and the NHPA has been widely recognized. Courts have routinely allowed agency environmental impact assessments, completed to meet the requirements of NEPA, to assist in meeting Section 106 of the NHPA.⁴⁴ Also, the EPA was the first department to actually include mediation as a device for conflict resolution.⁴⁵ The EPA, together with the Office of Surface Mining

40. *See Preservation Dispute Erupts*, ENGINEERING NEWS-REC., Feb. 28, 1985, at 15. One clear manifestation of this attitude of the Reagan Administration was a series of funding battles waged by the Advisory Council against the Office of Management and Budget. *See generally Storey, supra* note 4, at 34-37.

41. 1990 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 84.

42. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-35 (1988)).

43. Numerous statutes provide a role for the Environmental Protection Agency. These include the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1287 (1988), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i (1988), among others.

44. 36 C.F.R. § 800.14(a) (1991) requires agencies to integrate compliance with NEPA with requirements under NHPA; the regulations of NEPA, issued by the Council on Environmental Quality, echo this call for compliance. *See* 40 C.F.R. § 1502.25 (1991). *See, e.g., Boston Waterfront Residents Ass'n v. Romney*, 343 F. Supp. 89, 91 (D. Mass. 1972).

45. William French Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 MO. J. ON DISP. RESOL. 8, 17-18.

(OSM), has recently focused attention on the use of "Superfund"⁴⁶ monies to clean up toxic wastes at abandoned gold and silver mines, which are often located in historic districts in the Intermountain West. In two recent instances, the agency, in cooperation with the Advisory Council under Section 106, successfully formulated MOAs that merged interests while mitigating damage to historic districts.⁴⁷ The Advisory Council has also initiated successful discussions with other federal departments, concluding in programmatic agreements with enforceable guidelines that redirect impact on historic properties. These talks have created mutually agreeable programs with entities such as the U.S. Army (confronted with "peace dividend" base closings)⁴⁸ and the Bureau of Land Management, which accepted an expedited Section 106-style mediation proceeding.⁴⁹ The U.S. Forest Service has unilaterally undertaken to perform an internal audit of policies that conflict with Section 106.⁵⁰ Cities and other local government entities have also proven to be enthusiastic supporters of consultation when receiving Community Block Development Grants from the Department of Housing and Urban Development.⁵¹

Contrasted with this embrace of Section 106 consultation is the indifference or indignation of several federal agencies where this process is concerned. Often this antipathy is aggravated by external factors, such as the participation of private developers. The overall problem of inadequate compliance may be broken down into three major areas that have prompted the Advisory Council's heightened concern. These include tension between preservation and other congressional mandates, insincere compliance on behalf of agency participants, and difficulties with federal licensing and permit programs. With the latter two, the failure to comply may take place prior to an agency's mediation appearance, which makes any definitive MOA issuance rate potentially deceptive.

While federal courts have demonstrated a basic knowledge of the

46. The "Superfund" is a federal trust fund created as part of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988). CERCLA places the burden for cleaning waste disposal sites on parties responsible for the pollution and provides government seed money. These "Superfund" monies assist in governmental responses. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 614-15 (1990).

47. See 1987 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 48. These successful examples of mediation involved the Gregory Incline Gold Mine in Colorado and the cleanup of tailings at the Butte National Historic Land District in Montana. *Id.*

48. *ACHP Weighs Base Preservation*, PRESERVATION NEWS, Nov. 1989, at 2.

49. See *An Agreement Designed to Simplify the Permitting of New Mines*, INSIDE ENERGY/WITH FEDERAL LANDS, Sept. 17, 1990, at 12.

50. See 1987 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 48. This audit produced greater participation by the agency, including the installation of an internal training program. *Id.*

51. 1985 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 16; 1990 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 84.

STRENGTHENING FEDERAL AGENCY MEDIATION

Section 106 process, they have also been hesitant to enlarge the limits of its application, especially when confronted with conflicting governmental mandates.⁵² In *Boarhead Corp. v. Erickson*,⁵³ a federal district court held that an action brought against the EPA under the Comprehensive Environmental Response, Compensation and Liabilities Act (CERCLA)⁵⁴ deprived the court of jurisdiction to hear the plaintiff's claim under Section 106.⁵⁵ In addition to signifying a judicial willingness to subordinate the mediation process established under the NHPA where Congress has created other express provisions governing review, this decision suggests that some tension remains between preservation and other issues which the courts have not resolved.⁵⁶

Insincere compliance has taken many forms. The most overt examples involve instances where agencies fail to abide by negotiated agreements. The Office of Surface Mining, a division of the Department of the Interior, was charged in 1986 with failure to integrate the provisions of Section 106 in enacting and carrying out the Surface Mining Control and Reclamation Act⁵⁷ in violation of the Programmatic Memorandum of Agreement (PMOA) entered into between the parties six years earlier.⁵⁸ At various other times, similar charges have been advanced against the Coast Guard,⁵⁹ the U.S. Army,⁶⁰ the United States Forest Service,⁶¹ the Urban Mass Transportation Administration,⁶² and the Federal Communications Commission,⁶³ and others.

Another type of failure to follow Section 106 regulations occurs when the agency engages in delayed compliance, postponing engagement

52. 1989 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 99.

53. 923 F.2d 1011 (3rd Cir. 1991).

54. See *supra* note 46.

55. *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3rd Cir. 1991). The Court held that NHPA does not provide an independent grant of subject matter jurisdiction to district courts when it conflicts with a specific CERCLA statutory provision governing jurisdiction. *Id.*

56. *Litigation Update*, PRESERVATION FORUM, Summer, 1990, at 20.

57. Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1221-1328 (1988).

58. See 1987 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 52-53.

59. See, e.g., *Ferris v. United States Dep't of Transp.* (historic lighthouse lens removed without compliance) as profiled in *Litigation Update*, *supra* note 56.

60. See 1985 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 17 (U.S. Army proceeded with demolition without conducting test to determine historic nature of buildings).

61. See 1987 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 48 (archeological sites impacted by logging).

62. 1985 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 23 (change in plans for improvement project not discovered until project completed; change affected historic district with no Section 106 review).

63. See, e.g., *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), *cert. denied sub nom. Bywater Neighborhood Ass'n v. FCC*, 494 U.S. 1004 (1990) (neighborhood group charged Federal Communications Commission with failure to engage in Section 106 consultation when it constructed a television transmitter and relay station in a national historic district).

in Section 106 review until late in project planning. This delay makes it impossible to consider alternatives without also contemplating major time delays and added cost.⁶⁴ A typical compliance-defeating delay occurred in the demolition of a portion of the Gold Coast Historic District in Chicago. The Department of Housing and Urban Development postponed Section 106 consultation until all project designs were completed, prompting the Advisory Council to urge changes in the Department's mortgage guarantee program.⁶⁵ Agencies can also delay past the point when the undertaking itself is under way, eliminating the need to proceed with consultation or receive Advisory Council comments.⁶⁶

Permitting programs have resulted in the largest source of litigation concerning compliance with Section 106 consultation. Several federal departments administer various permit or licensing procedures, which form complex relationships between private parties and government agencies. Among the agencies which have generated the most concern are the U.S. Army Corps of Engineers, the Federal Communications Commission, the Interstate Commerce Commission, and the Federal Energy Regulatory Commission.⁶⁷ The Corps of Engineers, in fact, has been labeled the "worst offender" in terms of recognition and incorporation of the Section 106 requirements.⁶⁸ In several instances, the Corps has been charged with complete non-compliance.⁶⁹ The Corps of Engineers also recently became the first federal agency charged by a state government with failure to comply with Section 106, as the Commonwealth of Kentucky alleged that the agency failed to allow for official Advisory Council comments before proceeding with demolition.⁷⁰

The most pervasive dilemma surrounding permit issuance and Section 106 compliance centers on the issue of anticipatory demolition, in which agencies or private developers demolish buildings in a conscious attempt to avoid consultation. This dilemma was also a concern in the

64. See 1987 ADVISORY ON HIST. PRESERVATION REP. 42.

65. See *id.* at 41.

66. For a discussion of three recent examples in which agency delay precluded Advisory Council commentary, see 1985 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 22-23.

67. See 1990 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 85.

68. *Preservation Dispute Erupts*, *supra* note 40, at 15 (statement of J. Rodney Little, President of the National Conference of State Historic Preservation Officers).

69. See, e.g., *National Trust for Historic Preservation v. United States Army Corps of Eng'rs*, 552 F. Supp. 784 (S.D. Ohio 1982); *Vieux Carre Property Owners, Residents and Assocs., Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991).

70. See *Litigation Update*, *supra* note 56, at 21. In this instance, the Commonwealth alleged that the Corps of Engineers proceeded with plans while resisting all SHPO input and disregarding Advisory Council comment. *Id.*

STRENGTHENING FEDERAL AGENCY MEDIATION

Gold Coast action,⁷¹ and was alleged in *PROUD v. ICC*,⁷² litigation surrounding the leveling of historic industrial warehouses in Omaha. The practice of anticipatory demolition had become so widespread by 1987 that in June of that year the Advisory Council issued a special policy statement, calling on federal agencies to "ensure that anticipatory demolition does not occur with projects they undertake, and do everything feasible to discourage it with respect to projects in which Federal assistance or permits may be directly or indirectly involved."⁷³ The problem with anticipatory demolition can also be seen as a derivative of a hazily defined relationship between the agency and the permit holder, as occasionally demolition occurs before the actual petition for federal assistance is made.⁷⁴

Some agencies have also attempted to "pass-through" responsibility for identifying affected properties to state regulatory bodies which they oversee. When the state bodies have failed to perform this task, needless destruction of historic properties has occurred.⁷⁵ Certain other permitting programs have also been held to be outside the scope of Section 106. The National Trust for Historic Preservation (NTHP)⁷⁶ recently brought an action to require the U.S. Army Corps of Engineers to change its method of permit issuance. In a series of actions culminating in *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*,⁷⁷ the NTHP sought to halt the construction of a large aquarium and park in an historic New Orleans urban district. The Fifth Circuit's holding indicated that courts will not recognize Section 106 applicability in nationwide (general) permit programs, those in which permits "authorize truly inconsequential activities."⁷⁸

71. See *supra* note 64, at 41.

72. 1988 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 69.

73. 1987 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 42.

74. In situations where there is a combination of federal and non-federal actors, this reaction could be viewed as ignorance or non-concern over the regulations of the NHPA. However, this attitude is only a reflection of the refusal of federal agencies to integrate Section 106 consultation into their internal guidelines, which provide the primary source of reference for the non-federal actor.

75. 1985 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 30.

76. The National Trust for Historic Preservation is a private, non-profit institution which is the principle national preservation advocate. The NTHP is a repository of preservation information and provides legal services as well as financial and advisory assistance to interested parties. (Courts have recognized the standing of the NTHP to initiate actions challenging compliance with Section 106 consultation.) See 11 HIST. PRESERVATION L. & TAX'N (MB) § 1.06[1] (1989).

77. 948 F.2d 1436 (5th Cir. 1991).

78. *Id.* at 1441.

B. A Search for Non-Compliance Motivation

The motivation that compels agency resistance to NHPA consultation appears to be rooted in dislikes of both historic preservationism and forced mediation. As one expression of aesthetic land use controls, preservationism has come under criticism addressed to this category of the police power.⁷⁹ The failure of federal agencies to integrate the requirements of Section 106 mediation with their other respective missions can be viewed as a reflection of the fact that few preservation advocates hold agency policy-making positions.⁸⁰ Also, few agencies permit personnel in different administrative divisions to cooperate on professional matters, producing discrepancy between individual agency treatment of historic preservation issues.⁸¹

Yet an equally plausible basis for this aversion seems to be a distaste for required negotiation, which is often seen as an unnecessary hinderance for effective operations. Many factors contribute to federal agency mediation use, yet there are certain disadvantages that stand out as potential reasons for insincere bargaining or complete non-compliance. These include the time-intensive nature of mediation (including an allowance of time for mediator review and commentary), the lack of enforcement mechanisms outside of the court (although final agreements are enforceable based on contract principles), and the fact that the entire process depends on voluntary, good faith negotiation.⁸² With Section 106 consultation in particular, agencies may also face other statutorily required reviews that may overlap in scope, and which may occur at different times during the project or involve a perceived duplication of effort.⁸³

A major component of agency motivation is the presence of factors which foster a less than enthusiastic approach to the consultation process. One characteristic of effective mediation is a balance of bargaining power between the participants. However, "where the parties do not have sufficient power to frustrate each other, good-faith bargaining is unlikely

79. See generally Louis H. Masotti & Bruce I. Selson, *Aesthetic Zoning and Police Power*, 46 U. DET. J. URB. L. 733 (1968-1969) (a general review of criticism of aesthetic land-use regulation). See also FRANK SCHNIDMAN ET AL., *HANDLING THE LAND USE CASE* 359-60 (1984).

80. Storey, *supra* note 4, at 99.

81. *Id.*

82. National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, in SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 5, 22 (1987). Possible motivation for agency reluctance to utilize alternative forms of conflict resolution also includes: (1) the fact that agencies are often little concerned with the costs of possible litigation, (2) the fear that in using informal dispute resolution, the agency will be open for criticism, and (3) government lawyers are reluctant to embrace them as they remain unsure as to whether they are actually authorized by Congress. Smith, *supra* note 45, at 21.

83. See 1985 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 30-31.

STRENGTHENING FEDERAL AGENCY MEDIATION

to take place"⁸⁴

The hazards accompanying an imbalance of power are also intensified when a government official is involved.⁸⁵ With Section 106 consultation agencies are somewhat pressured to comply; an inflexible body can face crippling delays and planning impediments.⁸⁶ When the end result of non-binding mediation is an unhindered ability to proceed, however, an agency that is willing to absorb these risks has little incentive to compromise, which is an essential element of productive mediation.⁸⁷

IV. THE SEARCH FOR A REMEDY

A. *Efforts at Modification*

The courts have not proved to be thorough enforcers of Section 106 consultation, and have hesitated to enforce the Advisory Council regulations to the letter.⁸⁸ In terms of review of agency actions, the agency cannot act "arbitrarily or capriciously," according to the guidelines of the Administrative Procedure Act.⁸⁹ This level of arbitrariness has been found where agencies have completely disregarded the NHPA, or have proceeded with an operation without receiving or considering Advisory Council comments.⁹⁰

A review of efforts to redress the obstacles to effective mediation suggests that a more complete answer lies elsewhere. While legislative modification of the NHPA and the Section 106 process has been accomplished, the minor revisions constitute only a small portion of the numerous proposals advocated by various parties. The most comprehensive regulatory alteration was passed in 1986.⁹¹ The adopted changes to Section 106 mediation were concentrated in two principal areas. First, the Advisory Council's role in mediation was changed from

84. DOUGLAS J. AMY, *THE POLITICS OF ENVIRONMENTAL MEDIATION* 142 (1987).

85. *Id.* at 150.

86. King, *supra* note 4, at 188.

87. WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT* 22 (1988).

88. King, *supra* note 4, at 189.

89. *See* 5 U.S.C. § 706(2) (1988).

90. *See, e.g.,* National Trust for Historic Preservation v. United States Army Corps of Eng'rs, 552 F. Supp. 784 (S.D. Ohio 1982) (issuance of permit prior to completion of Section 106 requirements); *see also* Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3rd Cir. 1983) (HUD's continuing ability to demand alterations in urban renewal project triggered continued review after initial grant).

91. The proposed regulations were published at 50 Fed. Reg. 41,828 (Oct. 15, 1985) with final regulations, after revision, published at 51 Fed. Reg. 31,115 (Sept. 2, 1986). The regulations became effective on October 1, 1986. For an overall profile of the 1986 changes *see* Charlotte R. Bell, *Historic Preservation: A New Section 106 Process*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10002 (Jan. 1987).

mandatory to optional, and the negotiation process itself was decentralized to allow for greater participation by the various state historic preservation officers.⁹² This change permitted a conservation of resources, eliminated many delays, and preserved the right of the Advisory Council to demand greater involvement when necessary.⁹³ Secondly, the revisions also added a section calling for renewed cooperation between federal agencies, but only in a general and non-mandatory manner.⁹⁴

This adjustment in Section 106 mediation failed to clarify its future. Certainly, decentralization of the Advisory Council's functions has strong positive aspects; regional, state, or local historic preservation experts would undoubtedly be better equipped to assess cultural significance as it relates to sites in their respective areas. Yet the presence of a strong central entity is of vital importance as a repository of mediation and preservation expertise, and also as an active lobbyist for historic preservation concerns in the nation's capital. Together with the refusal to mandate agency adoption, these changes clearly did not remedy the problem of interagency compliance with Section 106.

B. Section 4(f) of the Department of Transportation Act

If an answer lies in an adjustment of the mediation process, it might be useful for legislators to examine the most extensive substantive statute to govern a federal agency's impact on historic properties, Section 4(f) of the Department of Transportation Act of 1966.⁹⁵ Section 4(f) imposes both procedural and substantive restraints on the Secretary of Transportation. The statute prohibits approval of departmental projects that require the "use of historic site[s] of national, State, or local significance" unless "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm"⁹⁶ Here the concept of site "use" is not limited to unimproved grounds (e.g., battlefields), but also includes

92. 36 C.F.R. § 800.5(d) (1991).

93. See Bell, *supra* note 91, at 10002.

94. 36 C.F.R. § 800.14 (1991). This provision has been criticized for failing to mandate integration with other statutes that affect historic properties. See 51 Fed. Reg. 31,117 (1986).

95. Section 4(f) of the Department of Transportation Act of 1966, as repealed and recodified at 49 U.S.C. § 303 (1988). Many component agencies of the Department of Transportation are subject to this section including, among others, the Federal Aviation Administration, the Urban Mass Transportation Administration, and the Federal Highway Administration. 11 HIST. PRESERVATION L. & TAX'N (MB) § 4.03[1][b] (1989).

96. 49 U.S.C. § 303(c) (1988).

STRENGTHENING FEDERAL AGENCY MEDIATION

buildings and other structures.⁹⁷ As with NHPA Section 106, assessment of historic value can be made by state officials, usually by official state preservation agencies or a SHPO. Failures to nominate sites to the National Register can be challenged to the Secretary of the Interior who has jurisdiction in the matter.⁹⁸

Courts have interpreted the requirements of Section 4(f) very broadly.⁹⁹ The trend in Section 4(f) litigation has resulted in a wider scope of affected properties, reflected in decisions such as *Coalition Against a Raised Expressway v. Dole*.¹⁰⁰ These cases have indicated that constructive use of the site, encompassing effects such as noise, visual impact, and restricted access, causes the imposition of Section 4(f) requirements.¹⁰¹

C. A Possible Solution

In looking for an answer to the dilemma of interagency refusal to follow the mandate of Section 106, Congress might consider the possibility of eliminating the mediation aspect of the Advisory Council regulations. Yet the advantages of mediation, including the mitigation of tension, cost savings, and the ability to focus on the important underlying issues, are even more consequential in public interest disputes, where court proceedings do not always expose or resolve the root controversy.¹⁰² Moreover, Congress has expressly promoted the utilization of informal resolution techniques for administrative agencies with the recent passage of the Administrative Dispute Resolution Act of 1990 (ADRA).¹⁰³ The Act's provisions require each federal agency to formulate a dispute resolution policy, designate and train an internal dispute resolution specialist, and conduct an analysis of permits, grants, and other

97. See Gary W. Wilburn, *Transportation Projects and Historic Preservation: Recent Developments under Section 4(f) of the Department of Transportation Act*, 2 PRESERVATION L. REP. 2017, reprinted in ALI-ABA, HISTORIC PRESERVATION LAW AND TAX PLANNING FOR OLD AND HISTORIC BUILDINGS 122, 126 (Supp. 1987).

98. *Id.* at 127.

99. See 11 HIST. PRESERVATION L. & TAX'N (MB) § 4.03[2][a] (1989). For a thorough discussion of the general trends in judicial recognition of Section 4(f), see Barbara Miller, Comment, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation*, 36 AM. U.L. REV. 633, 637 (1987).

100. *Coalition Against a Raised Expressway v. Dole*, 835 F.2d 803 (11th Cir. 1988) (in elevated highway construction project, effects on air quality and potential noise problems triggered Section 4(f)).

101. See, e.g., *Adler v. Lewis*, 675 F.2d 1085 (9th Cir. 1982) (court expressly rejected the requirement of a physical effect, saying that these restrictions apply whenever plans threaten a site's prior enjoyment value). See also Miller, *supra* note 99, at 646.

102. National Institute for Dispute Resolution, *supra* note 82, at 22.

103. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990).

agreements to include these techniques wherever possible.¹⁰⁴ While program guidelines do not supersede those of the NHPA and regulations,¹⁰⁵ they appear to provide hope for a positive readjustment in the tenor of agency responses to required mediation.

Authors have singled out the Section 106 procedure in particular as one worthy of emulation for meeting the entire spectrum of mediation objectives. As has been discussed, elimination would result in the abolition of a program whose influence is witnessed by the judicial enforcement of MOAs, an abundance of successful copies, and its role in successful preservation. Section 106 consultation has also been the primary tool for education on preservation issues throughout the federal bureaucracy. Consultation also can serve to avoid radical solutions, and can serve as a balance between preservation and other private and public policy concerns.¹⁰⁶ During the procedure, for instance, agencies are often exposed to information which actually provides them with cost savings.¹⁰⁷ Searching for an appropriate model in other federal agency mediation programs would be difficult; no other programs concerning social impact disputes are of comparable scope.¹⁰⁸

A solution to achieve agency inclusion of Section 106 as well as good faith negotiation might lie in the inclusion of a substantive component to the consultation process. The outright adoption of Section 4(f) of the Department of Transportation Act of 1966 would not provide the advantages of mediation, and would insert a non-flexible standard when some compromise is often essential for the maximum benefit of all parties.¹⁰⁹ A more practical approach would enhance the position of the Advisory Council in the mediation process. By endowing the official comments of the Advisory Council with binding force, the entire complexion of negotiation would change. At present, if an agency fails to reach an MOA with the SHPO and other parties, the agency can continue the project, charged only with first acquiring and considering the Advisory

104. *Id.* § 3(a)-(d).

105. *Id.* § 4(b).

106. See 11 HIST. PRESERVATION L. & TAX'N (MB) § 3.10[2][b].

107. See 1982 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 76. See also 1983 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 22-23 (chart of cost savings enjoyed by various federal agencies as a direct result of engaging in Section 106 consultation).

108. The most extensive non-historic preservation dispute resolution programs in this area have been initiated in environmental law, where there has been some limited use of mediation and arbitration. For general reviews of environmental dispute resolution, see ANDERSON ET AL., *supra* note 46, at 80-82; NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 208-10 (1989).

109. "Public sector disputes are special. They differ from conventional two-party disputes in that they involve choices with substantial spillover effects or externalities that often fall most directly on diffuse, inarticulate, and hard-to-represent groups (such as future generations)." Susskind & Ozawa, *supra* note 33, at 257.

STRENGTHENING FEDERAL AGENCY MEDIATION

Council's comments.¹¹⁰ However, if the NHPA provided that substantive guidelines were placed on the agency, key elements of the compliance problem would disappear.

One means by which the Advisory Council's official comments could become binding, without sacrificing the overall flexibility of the consultation process, would consist of a revision of the NHPA involving the adoption of Section 4(f)'s "feasible and prudent" standard for agencies seeking to avoid compliance with the terms of the comments. Should an agency seek to proceed in a manner opposed to the terms which the Advisory Council has set out, it would have to demonstrate that the plan of action described in the official comments is itself neither feasible nor prudent. This type of modification was included in a recent Senate bill introduced in the 100th Congress by Arkansas Senator Dale Bumpers, which also proposed the adoption of the complete Section 4(f) standards for properties designated as National Historic Landmarks.¹¹¹ In order to fully implement this revision, however, the Advisory Council's role in the mediation process should be increased to enable it to gain maximum exposure to the viewpoints of both sides to the negotiation. This could easily be accomplished by modifying the Section 106 regulations to require that the Advisory Council again take part in every consultation.¹¹²

This proposed revision to the NHPA has several advantages beyond the fact that the addition of a substantive component would allow for judicial challenges to agency operations on more than procedural grounds. First, a viable exemplar of agency mediation would be retained and strengthened. Certainly agencies would also be inclined to take part at an earlier point in the designing phase of the proposed venture, as mediation could well prove less expensive and time-consuming than detailing why an Advisory Council plan would not be viable. Agencies inclined to abuse the process in any fashion would have added reason to engage in good faith participation, as the default requirements might well prove a greater obstacle to their long-range plans.¹¹³ The power imbalance inherent in the process would be substantially reduced by removing the opportunity to

110. 36 C.F.R. § 800.6 (1991).

111. 1990 ADVISORY COUNCIL ON HIST. PRESERVATION REP. 119-20. This two-tiered adoption of the substantive standard of Section 4(f) would help meet commentators' objections to its inflexibility. See, e.g., John M. Fowler, *The Federal Government As Standard Bearer*, in *THE AMERICAN MOSAIC: PRESERVING A NATION'S HERITAGE* 35, 60-61 (Robert E. Sipe & Antoinette J. Lee eds., 1987).

112. At present, the Advisory Council receives only the documentation profiled in 36 C.F.R. § 800.8(d) (1991), prior to issuing its official comments.

113. King, *supra* note 4, at 188.

exploit an advantage, as well as in creating a more active mediator.¹¹⁴

Also, these substantive requirements have been consistently upheld by the courts in conjunction with the operation of Section 4(f),¹¹⁵ providing a solid indication that similar treatment would be afforded here.

This proposal makes sense not only to render the consultation process a more effective instrument of dispute resolution, but also to further protect and safeguard historic properties. Present Section 106 parties emphasize mitigation of damages and rarely consider the option of terminating an undertaking due to its effects on historic properties; evening the playing field may allow for further gains for the entire range of preservation ideals. With the enhanced authority of the Advisory Council, there is also the benefit of a centralized impact assessment and control mechanism for federal agency impact on historic properties, placed in a body with a full understanding of preservation and development goals.

V. CONCLUSION

In light of the numerous examples of vital national historic resources that have been saved from destruction with little impact on the overall aim of many federal programs, it would appear that Section 106 has performed well in achieving its goals. Agency misgivings concerning the process, exhibited through hesitation to fully comply with its terms, have so far thwarted any possibility of complete evaluation of the effectiveness of the mediation. Only by reducing non-compliance motivation can the process function as intended.

Of course, revisions to the NHPA depend on the current political make-up and orientation of Congress. Although there are some suggestions that the Bush Administration initially continued the Reagan Administration's dislike for the Advisory Council,¹¹⁶ there are many indications that the support for the goals of historic preservation remains strong.¹¹⁷ What is certain is that a modification of the present Section 106

114. Giving a mediator an active role in a mediation process is one remedy for an imbalance of negotiating power. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 47 (1981). The revised Section 106 consultation process would, in fact, closely resemble Susskind's ideal environmental mediation program. See *id.* at 46-47.

115. See *supra* note 100 and accompanying text. There appears to be no reason why adverse effects on historic properties resulting from transportation projects should be singled out for substantive criteria, especially when constructive uses are recognized.

116. See *Preservation Dispute Erupts*, *supra* note 35, at 15.

117. One indicator of this support was the record funding for historic preservation that Congress authorized for fiscal year 1991, which represented the highest level in over two decades. PRESERVATION NEWS, Dec. 1990, at 1, 3.

STRENGTHENING FEDERAL AGENCY MEDIATION

system, supported by substantive standards such as those suggested herein, would best provide for uniform treatment of historic properties by all federal agencies. The strengthened operation would assist in realizing the objectives set forth by executive order: "The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch shall administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations."¹¹⁸

Thomas N. Palmer

118. Exec. Order No. 11,593, § 1, 3 C.F.R. § 154 (1971), *reprinted in* 16 U.S.C. § 470 note (1988).

