

TESTIMONY FOR THE RECORD

**SUBMITTED BY JOHN L. NAU, III
CHAIRMAN, ADVISORY COUNCIL ON HISTORIC PRESERVATION**

**TO THE SUBCOMMITTEE ON NATIONAL PARKS, RECREATION, AND PUBLIC LANDS
THE HONORABLE GEORGE RADANOVICH, CHAIRMAN**

**OVERSIGHT HEARING ON REAUTHORIZATION OF THE
ADVISORY COUNCIL ON HISTORIC PRESERVATION
AND
THE NATIONAL HISTORIC PRESERVATION ACT
JUNE 3, 2003**

SUMMARY STATEMENT

An independent Federal agency, the Advisory Council on Historic Preservation (ACHP) promotes historic preservation nationally by providing a forum for influencing Federal activities, programs, and policies that impact historic properties. In furtherance of this objective, the ACHP seeks reauthorization of its appropriations in accordance with the provisions of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.) (NHPA).

The ACHP offers amendments to its authorities that we believe will strengthen our ability to meet our responsibilities under NHPA, and to provide leadership and coordination in the Federal historic preservation program. As part of that responsibility, and as requested by the Subcommittee, the ACHP also provides its views on the adequacy of protections for private property owners in the process of evaluating properties for inclusion in the National Register of Historic Places.

BACKGROUND

The ACHP was established by Title II of the NHPA. NHPA charges the ACHP with advising the President and the Congress on historic preservation matters and entrusts the ACHP with the unique mission of advancing historic preservation within the Federal Government and the National Historic Preservation Program. In FY 2002, the ACHP adopted the following mission statement:

The Advisory Council on Historic Preservation promotes the preservation, enhancement, and productive use of our Nation's historic resources, and advises the President and Congress on national historic preservation policy.

The ACHP's authority and responsibilities are principally derived from NHPA. General duties of the ACHP are detailed in Section 202 (16 U.S.C. 470j) and include:

- advising the President and Congress on matters relating to historic preservation;
- encouraging public interest and participation in historic preservation;
- recommending policy and tax studies as they affect historic preservation;
- advising State and local governments on historic preservation legislation;
- encouraging training and education in historic preservation;
- reviewing Federal policies and programs and recommending improvements; and
- informing and educating others about the ACHP's activities.

Under Section 106 of NHPA (*16 U.S.C. 470f*), the ACHP reviews Federal actions affecting historic properties to ensure that historic preservation needs are considered and balanced with Federal project requirements. It achieves this balance through the "Section 106 review process," which applies whenever a Federal action has the potential to impact historic properties. As administered by the ACHP, the process guarantees that State and local governments, Indian tribes, businesses and organizations, and private citizens will have an effective opportunity to participate in Federal project planning when historic properties they value may be affected.

Under Section 211 of NHPA (*16 U.S.C. 470s*) the ACHP is granted rulemaking authority for Section 106. The ACHP also has consultative and other responsibilities under Sections 101, 110, 111, 203, and 214 of NHPA, and in accordance with the National Environmental Policy Act (*42 U.S.C. 4321 et seq.*) is considered an agency with "special expertise" to comment on environmental impacts involving historic properties and other cultural resources.

The ACHP plays a pivotal role in the National Historic Preservation Program. Founded as a unique partnership among Federal, State, and local governments, Indian tribes, and the public to advance the preservation of America's heritage while recognizing contemporary needs, the partnership has matured and expanded over time. The Secretary of the Interior and the ACHP have distinct but complementary responsibilities for managing the National Historic Preservation Program. The Secretary, acting through the Director of the National Park Service, maintains the national inventory of historic properties, sets standards for historic preservation, administers financial assistance and programs for tribal, State, and local participation, and provides technical preservation assistance.

The ACHP also plays a key role in shaping historic preservation policy and programs at the highest levels of the Administration. It coordinates the national program, assisting Federal agencies in meeting their preservation responsibilities. Through its administration of Section 106, the ACHP works with Federal agencies, States, tribes, local governments, applicants for Federal assistance, and other affected parties to ensure that their interests are considered in the process. It helps parties reach agreement on measures to avoid or resolve conflicts that may arise between development needs and preservation objectives, including mitigation of harmful impacts.

The ACHP is uniquely suited to its task. As an independent agency, it brings together through its membership Federal agency heads, representatives of State and local governments, historic preservation leaders and experts, Native American representatives, and private citizens to shape national policies and programs dealing with historic preservation. The ACHP's diverse membership is reflected in its efforts to seek sensible, cost-effective ways to mesh preservation goals with other public needs. Unlike other Federal agencies or private preservation organizations, the ACHP incorporates a variety of interests and viewpoints in fulfilling its statutory duties, broadly reflecting the public interest. Recommended solutions are reached that reflect both the impacts on irreplaceable historic properties and the needs of today's society.

New Directions. Since assuming the Chairmanship in November 2002, I have tried to ensure that the ACHP takes the leadership role envisioned for it in NHPA. NHPA established a national policy to “foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations.” Among other things, the statute directed Federal agencies to foster conditions that help attain the national goal of historic preservation; to act as faithful stewards of federally owned, administered, or controlled historic resources for present and future generations; and to offer maximum encouragement and assistance to other public and private preservation efforts through a variety of means.

In creating the ACHP, Congress recognized the value of having an independent entity to provide advice, coordination, and oversight of NHPA’s implementation by Federal agencies. The ACHP remains the only Federal entity created solely to address historic preservation issues, and helps to bridge differences in this area among Federal agencies, and between the Federal Government and States, Indian tribes, local governments, and citizens. While the administration of the historic preservation review process established by Section 106 of NHPA is very important and a significant ACHP responsibility, we believe that the ACHP’s mission is broader than simply managing that process.

With the new direction, the ACHP members are committed to promoting the preservation and appreciation of historic properties across the Nation by undertaking new initiatives that include:

- developing an Executive order (Executive Order 13287, “Preserve America,” signed by the President March 3, 2003) to promote the benefits of preservation, to improve Federal stewardship of historic properties, and to foster recognition of such properties as national assets to be used for economic, educational, and other purposes;
- creating an initiative for the White House (“Preserve America,” announced by First Lady Laura Bush March 3, 2003) to stimulate creative partnerships among all levels of government and the private sector to preserve and actively use historic resources to stimulate a better appreciation of America’s history and diversity;
- using Council meetings to learn from local government and citizens how the Federal Government can effectively participate in local heritage tourism initiatives and promote these strategies to Federal agencies and tourism professionals;
- effectively communicating its mission and activities to its stakeholders as well as the general public;
- pursuing partnerships with Federal agencies to streamline and increase the effectiveness of the Federal historic preservation review process; and
- improving the Native American program, which the ACHP has identified as a critical element in the implementation of an effective Federal historic preservation program and review process.

The ACHP’s 20 statutorily designated members address policy issues, direct program initiatives, and make recommendations regarding historic preservation to the President, Congress, and heads of other Federal agencies. The Council members meet four times per year to conduct business, holding two meetings in Washington, D.C., and two in other communities where relevant preservation issues can be explored.

In 2002 we reorganized the ACHP membership and staff to expand the members’ role and to enhance work efficiencies as well as member-staff interaction. To best use the talents and energy of the 20 Council members and ensure that they fully participate in advancing the ACHP’s goals and programs, three member program committees were created: Federal Agency Programs; Preservation Initiatives; and Communications, Education, and Outreach.

In addition, we created an Executive Committee comprised of myself and the vice chairman of the ACHP and the chairman of each of the other committees to assist in the governance of the ACHP. Several times a year, we appoint panels of members to formulate comments on Section 106 cases. Member task forces and committees are also formed to pursue specific tasks, such as policy development or regulatory reform oversight. On average, three such subgroups are at work at any given time during the year. Each meets about five to six times in the course of its existence, is served by one to three staff members, and produces reports, comments, and policy recommendations.

The staff carries out the day-to-day work of the ACHP and provides all support services for Council members. To reflect and support the work of the committees, the Executive Director reorganized the ACHP staff into three program offices to mirror the committee structure. Staff components are under the supervision of the Executive Director, who is based in the Washington, DC, office; there is also a small field office in Lakewood, Colorado.

PROPOSED AMENDMENTS TO THE NATIONAL HISTORIC PRESERVATION ACT

Background to Reauthorization. The ACHP has traditionally had its appropriations authorized on a multi-year cycle in Title II of NHPA (Section 212, *16 U.S.C. 470i*). The current cycle runs through FY 2005 and authorizes \$4 million annually. These funds are provided to support the programs and operations of the ACHP. Title II of NHPA also sets forth the general authorities and structure of the ACHP.

For FY 2004, the President's budget seeks \$4.1 million for the ACHP. Because this is over the authorization limit, the Executive Office of the President directed the ACHP to propose any legislation required to modify its authorization to be consistent with the President's Budget. The ACHP is therefore seeking amendments to the authorizing legislation at this time. At its February and May 2003 meetings, the ACHP endorsed an approach to the reauthorization issue. The approach addresses the immediate appropriations authority issue and also seeks amendments to the ACHP's composition and authorities to better enable the ACHP to achieve its mission goals. The changes proposed by the ACHP are explained in this overview; specific statutory language will be provided to the Subcommittee at a later date.

Appropriations Authorization. This section would amend the current time-limited authorization and replace it with a permanent appropriations authorization. When the ACHP was created in 1966, its functions were exclusively advisory and limited and the agency was lodged administratively in the Department of the Interior. Since then, the Congress has amended the NHPA to establish the ACHP as an independent Federal agency and give it a range of program authorities crucial to the success of the National Historic Preservation Program.

Not unlike the Commission of Fine Arts (CFA) and the National Capital Planning Commission (NCPC), the ACHP now functions as a small but important Federal agency, carrying out both advisory and substantive program duties. Specific language creating a permanent appropriations authorization would draw upon the similar statutory authorities of the CFA and NCPC. No ceiling to the annual appropriations authorization would be included in the authorizing legislation, but rather the appropriate funding limits would be established through the annual appropriations process.

Expansion of Membership. This section would expand the membership of the ACHP by directing the President to designate the heads of three additional Federal agencies as members of the ACHP. The ACHP has been aggressively pursuing partnerships with Federal agencies in recent years and has found the results to be greatly beneficial to meeting both Federal agency historic preservation responsibilities

and the ACHP's own mission goals. Experience has shown that these partnerships are fostered and enhanced by having the agency participate as a full-fledged member of the ACHP, giving it both a voice and a stake in the ACHP's actions. The amendment would bring the total number of Federal ACHP members to nine and expand the ACHP membership to 23, an administratively manageable number that preserves the current majority of non-Federal members. A technical amendment to adjust quorum requirements would also be included.

Authority and Direction to Improve Coordination with Federal Funding Agencies. This section would give the ACHP the authority and direction to work cooperatively with Federal funding agencies to assist them in determining appropriate uses of their existing grants programs for advancing the purposes of NHPA. For example, it is our experience that programs such as the Historic Preservation Fund (HPF) administered through the States by the Department of the Interior have the flexibility to provide matching seed money to a local non-profit organization to support a heritage tourism program.

The ACHP would work with agencies and grant recipients to examine the effectiveness of existing grant programs, evaluate the adequacy of funding levels, and help the agencies determine whether changes in the programs would better meet preservation and other needs. Any recommendations would be developed in close cooperation with the Federal funding agencies themselves, many of whom sit as ACHP members, and with the States. The proposed amendment would also allow the ACHP to work cooperatively with Federal funding agencies in the administration of their grant programs.

Technical Amendments. This section would provide four technical changes that would improve ACHP operations:

1. Authorize the Governor, who is a presidentially appointed member of the ACHP, to designate a voting representative to participate in the ACHP activities in the Governor's absence. Currently this authority is extended to Federal agencies and other organizational members. The amendment would recognize that the personal participation of a Governor cannot always be assumed, much like that of a Cabinet secretary.
2. Authorize the ACHP to engage administrative support services from sources other than the Department of the Interior. The current law requires the ACHP's administrative services to be provided by the Department of the Interior on a reimbursable basis. The amendment would authorize the ACHP to obtain any or all of those services from other Federal agencies or the private sector. The amendment would further the goals of the FAIR Act and improve ACHP efficiency by allowing the ACHP to obtain necessary services on the most beneficial terms.
3. Clarify that the ACHP's donation authority (16 U.S.C. 470m(g)) includes the ability of the ACHP to actively solicit such donations.
4. Adjust the quorum requirements to accommodate expanded ACHP membership.

VIEWS ON THE ADEQUACY OF PRIVATE PROPERTY PROTECTIONS IN THE NATIONAL REGISTER PROCESS

The Committee has requested our views on the adequacy of protections for private property owners during the process for evaluating and registering properties for inclusion in the National Register of Historic Places.

The National Register is the keystone of the National Historic Preservation Program. Through the professional application of objective criteria, a comprehensive listing of what is truly important in American history has been systematically compiled. The ACHP has direct experience with the National

Register review and evaluation process through its administration of Section 106 of NHPA. As part of planning, unless properties are already listed in the National Register of Historic Places, determinations of eligibility for inclusion in the National Register must be made when such properties may be impacted by Federal or federally assisted actions.

We are unaware of problems with the protection of the rights of private property owners in the Section 106 process, since the determination is made for planning purposes only and for consideration by Federal agencies in taking into account the effects of their actions.

We do believe it is important to distinguish between actual listing in the National Register, which may result in tax and other benefits and legally must include opportunities for property owners to object to such listing, and determinations of eligibility which are used for Federal planning. It is our understanding that in rare instances, some States' legislation and some local ordinances include "eligibility for inclusion in the National Register" to trigger the State or local review process. It is our opinion that determinations of eligibility should not by themselves automatically trigger or link to a State or local review process without due process and additional protections of private property owners' rights. It is also our understanding that State Historic Preservation Offices, such as Texas, are generally discouraging eligibility from being included in State laws and local ordinances to ensure adequate private property protections.

States have varying approaches to dealing with the overall issue of notification and objection. Public notices, hearings, and other mechanisms are used when large historic districts are being considered. In the case of smaller districts or individual properties, written notification is provided. In Texas, notifications are sent out to the property owner, the county judge, the chief elected official, and the local preservation board chair of pending listings in the National Register with an opportunity for making their views known. In New York, if an objection to a nomination is received from an owner, that nomination does not proceed. An official representative from the New York State Historic Preservation Office will speak with the property owner and explain the effects of listing in the National Register. In many instances, owners will withdraw their objections once they understand the implication of such listing.

In summary, we think that as a function of Federal law and Federal administrative practice there are generally adequate protections for the rights of private property owners in the National Register process.

CONCLUSION

The ACHP has reached a level of maturity as an independent Federal agency and as a key partner in the National Historic Preservation Program to warrant continued support from the Congress. We believe that reauthorization, coupled with periodic oversight by this Subcommittee and the annual review provided by the Appropriations Committees, is fully justified by our record of accomplishment. We hope that the Subcommittee will favorably consider this request, including our recommended technical amendments.

We appreciate the Subcommittee's interest in these issues, and thank you for your consideration and the opportunity to present our views.