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Testimony
Before the Committee on Resources
Subcommittee on National Parks, Recreation and Public Lands

Oversight Hearing on the National Historic Preservation Act
April 21, 2005

Thank you Mr. Chairman and members of the Subcommittee for this opportunity to testify on behalf of the National Trust for Historic Preservation concerning the National Historic Preservation Act (NHPA) and the Subcommittee's "discussion draft" proposal to amend the Act. The National Trust's President, Richard Moe, is out of the country this week and it was impossible for him to be here in person, but he has asked me to speak on his behalf and to convey his serious concerns about the importance of the issues raised by this draft.

For more than 50 years, the National Trust has been helping to protect the nation's heritage, as the Congressionally chartered leader of the private historic preservation movement in America. The National Trust, a nonprofit organization with more than a quarter million members throughout the country, is directly involved in saving the best of our past for future generations.

The National Trust and our partners in the historic preservation community support the reauthorization of the Advisory Council on Historic Preservation (ACHP) – as originally proposed by H.R. 3223 from the 108th Congress – and the reauthorization of the Historic Preservation Fund (HPF). We strongly oppose, however, Sections 2, 3, and 4 of the discussion draft that would substantially weaken the Preservation Act's fundamental core. We urge you to move forward in reauthorizing the ACHP and HPF, without including any amendments to the NHPA that would undermine the current safeguards for our nation's historic and archeological patrimony. Let me emphasize that the historic preservation community is absolutely united in our opposition to the amendments proposed in the discussion draft. As you know, the Trust joined six other national organizations in a joint letter to the Subcommittee – collectively representing this opposition on behalf of over 300,000 members and a wide variety of preservation advocates ranging from state and tribal officials to architects and archaeologists.

Historic preservation is the process of identifying places, sites and resources that have survived from our past; evaluating the meaning and value they have for us now; and keeping, using and caring for those significant places, sites and resources so they will survive into the future. The preamble to the NHPA, as passed by Congress in 1966, reminds us that "The spirit and direction of the nation are founded upon and reflected in its historic heritage;" and that "the historical and cultural foundations of the nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." Congress further clarified in 1980 that "the preservation of this irreplaceable heritage is in the public interest."

Virtually every Congress since 1966 has worked to strengthen the NHPA, because there has been a shared, bipartisan consensus that saving America's heritage should be, and has always been, a national goal. These discussion draft amendments, conversely, threaten to shatter that consensus. If enacted, they would represent by far the most serious threat to our heritage in the history of the Congress.

The problems that apparently generated the changes to Section 106 in the discussion draft are anecdotal and rare. Instead of developing strategic solutions to address those concerns, which could be accomplished entirely through the administrative process, this proposal vastly overreaches and would cause irreparable damage to historic properties nationwide by amending a federal law to satisfy a disgruntled minority. If the Subcommittee would like to develop responsible improvements to the Section 106 process, administrative mechanisms are available to accomplish this, such as the recent exemption of the Interstate Highway System and others.

The National Trust is firmly supportive of private property rights and advocates an appropriate balance between those rights and the greater public policy goals that benefit all citizens. In that regard, private property rights have never been allowed to take precedence over our shared national values and the preservation of our country's heritage. The Trust's own Congressional charter reflects the important role of private property ownership in our mission and greatly encourages active public participation in every facet of the historic preservation process.

The Preservation Act protects the rights and values of private property owners, local officials, and citizens across the United States, and gives them a place at the table when the actions of federal agencies threaten to affect their historic properties and their communities. Section 106 provides a process that requires those agencies to "take into account" the

effects of their decisions and their projects on historic properties, and to work with states, tribes, and local communities to seek ways to lessen the effects of those projects. Section 106 requires a process, not an outcome. The goal is not to save every historic site but to make sure that they are considered and that their value is weighed against other public values. Section 106 helps to prevent governmental agencies from running roughshod over the rights of citizens, private property owners, local governments, and tribal governments when it comes to the protection of our American history.

- The Discussion Draft Would Completely Eliminate From Section 106 Consideration Over Three Quarters of Currently Known Historic Properties that Have Already Been Determined Eligible for the National Register.

Section Four of the discussion draft is the most troubling to us, because the vast majority of historic places already known to be significant would be excluded from consideration under Section 106. If this change were enacted, it would limit the scope of Section 106 to the 79,000 historic properties and districts actually listed on the National Register and those “determined by the Secretary to be eligible,” which is about 9,700 additional properties. More than 350,000 historic properties, however, have been determined eligible by the SHPOs and federal agencies in the last 35 years through the Section 106 review process. While these determinations may be undisputed, they have not been reviewed by the Keeper of the National Register directly, and therefore, all of these known historic properties – more than four times the number of those listed on the National Register – would be deprived of existing federal safeguards.

- The Discussion Draft Would Completely Eliminate the Requirement to Evaluate Significant Places that May Qualify for the National Register.

Section Four would also have serious consequences for the elements of our heritage yet unknown or undiscovered. It would give federal agencies a free hand to plan projects that could harm or destroy historic places and archeological sites without even investigating their significance. Whether it is a century-old bridge that is a beloved community landmark, or a nineteenth century neighborhood that is threatened by a proposed highway, many of the places we treasure most in our communities have never even been evaluated for the Register. They would be stripped of any consideration under the discussion draft proposal. In order to protect their property from a federal undertaking, this change would place the burden on property owners themselves to pay for preparing a Register nomination at their own expense. To pursue the process all the way to the Keeper before the commencement of project planning process would be immensely difficult.

Section Four would pose an especially significant threat to tribal historic resources and archeological sites. Only a small fraction of the traditional cultural properties have been listed on the Register or determined eligible by the Keeper. The change in the law would threaten the destruction of the only clues we have into much of this nation’s past – the 10,000 or so years’ worth of artifacts chronicling pre-Columbian human history – a story that can only be discovered through the archeological record. Archaeological sites identified through the Section 106 process represent the historic spectrum ranging from the winter camp of Spanish explorer Coronado, the birthplace of southern patriot Robert Young Hayne, the African Burial Ground in Manhattan, the first Spanish settlement in St. Augustine, the Indian village adjacent to the 1607 Jamestown settlement, and many more. These chapters of our heritage might have been lost and destroyed had it not been for Section 106.

What Americans consider to be historic or culturally significant is not static, but is dynamic and evolving. When the Register was started, we tended to identify architecture or sites that told the stories of only the wealthiest or most famous Americans. The current Section 106 process now offers a process for protection of diverse historic resources. For example, the World Trade Center site in Lower Manhattan, where terrorists attacked the twin towers on September 11, 2001, has been recognized as eligible for the National Register, based on its extraordinary significance in our history. This site, where the lives of thousands of innocent Americans were lost, has become in a sense the Pearl Harbor of the 21st century, a place that affected the lives of every single one of us. As a result of Section 106, the World Trade Center site was evaluated for the Register and the public has had the opportunity to learn about significant elements at that location, some of which never would have been identified at all without the review process under current law. Because of Section 106, federally assisted projects such as the reconstruction of the commuter rail station at the World Trade Center have been significantly modified in response to consultation and will incorporate the preservation of elements within the site that will be visible to the public from the station. As an active participant in the Section 106 review process, the National Trust can assure the Subcommittee that, if the proposed amendments in the discussion draft had been in place, none of this ever would have happened. The World Trade Center is just one of many examples of how the current Section 106 process works on a daily basis to protect the places that have special meaning to us as Americans.

Section 110 of the Historic Preservation Act, and Section 3 of the “Preserve America” Executive Order signed by President Bush in 2003, direct federal agencies to inventory and evaluate their land holdings to determine what archeological or historical resources might be located on them. The discussion draft proposal would eliminate the incentive for federal agencies to evaluate their historic properties because a lack of information about their significance would be rewarded with an exemption from Section 106.

Federal agencies are required to investigate a whole variety of other types of resources prior to making decisions about

their actions including the affects on wetlands, endangered species, groundwater, and soil. The long-standing requirement to investigate historic properties is no different from these other types of studies. By eliminating this requirement from Section 106, the proposal would single out historic places and relegate them to the status of second-class resources.

- Section Two of the Discussion Draft Responds to an Uncommon Problem With a Needless and Draconian Remedy That Would Threaten Private Property Rights.

Section Two of the discussion draft would prohibit eligibility determinations by the Keeper of the National Register if the owner objects to listing the property on the Register. Even historic properties and districts previously determined eligible by SHPOs or federal agencies could be prohibited from an eligibility determination by the Keeper under this provision.

In historic districts, this provision would ban eligibility determinations if more than 50 percent of the owners object within the district – or arguably, if any owners object. As a result, all property owners within the historic district would lose the right to protect their property from federal projects that could harm or destroy their communities. They would also lose incentives for private investment in the district generated by state and federal tax credits.

It is important for the Subcommittee to understand that owner objections to Register listing are very unusual; only 15 such objections have been raised nationwide in the last two years, even though the Subcommittee has been focusing attention on this issue. We strongly oppose amending the NHPA to address a circumstance that is so rare.

- Section Three of the Discussion Draft Responds to an Uncommon Problem by Using Federal Law to Dictate Local Land Use Rules to Local Governments.

Section Three, like Section Two, would respond to a virtually non-existent problem that is backed by nothing more than anecdotal evidence, and in this case, is a matter of state and local law, not federal law. The proposed amendment would create a new requirement for Certified Local Governments receiving funds through the Historic Preservation Fund, and would dictate to these local governments specific requirements about how they regulate their land use, even for projects with no federal assistance or involvement whatsoever. No evidence has been presented that this change is needed or will provide additional due process protections. In our view, it is highly inappropriate for Congress to engage in micromanaging local land use laws. We urge you not to pursue this proposed amendment.

These days more and more Americans are turning to the very heart of our common experience, to the institutions, history, and traditions that define us as a nation. It is our mission to ensure that these vital elements of our American heritage are preserved for generations to come. We appreciate the Subcommittee holding a hearing to examine the proposals outlined in the discussion draft, but urge you not to move forward with the Section 106 provisions in the discussion draft. As exemplified by the President's "Preserve America" Executive Order, it is a civic responsibility and a federal obligation to ensure that vital historic resources can be preserved for generations to come. The discussion draft proposals would take an extreme approach that no other Congress has taken in defining our federal preservation laws. Think of how ironic it would be – in the aftermath of September 11th when so many Americans have been focused on the icons of our national identity – to undermine the process that has preserved the World Trade Center site for posterity. We hope that you will reauthorize the laws that underpin historic preservation without undermining their integrity.