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Will Dawson

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# CASE STUDY: HIGHWAY U.S. 70 AND THE HONDO VALLEY—SAFETY AND COST VERSUS HISTORY

Will Dawson

Contrary to some public misconception, it must be remembered that those of us who wear judicial robes are human beings, and as persons are inspired and motivated by compassion as anyone should be. Consequently we often must remind ourselves that in our official capacities we have authority only to issue rulings within the narrow parameters of the law and the facts before us. The temptation to go about doing good where we see fit, regardless of the law, is sometime strong.<sup>1</sup>

Historic preservation can be defined in many ways, but it is often thought of as a means of stewardship by which people maintain the historically built environment, which includes important cultural and natural places from the past such as buildings, landscapes, and other significant sites.<sup>2</sup> American history may be safeguarded through such historic preservation methods as architectural preservation and record keeping.<sup>3</sup> Historic preservation, however, is not without controversy;

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<sup>1</sup> *Concerned Citizens Coalition v. Fed. Hwy. Administration*, 330 F. Supp. 2d 787, 800 (W.D. La. 2004).

<sup>2</sup> See generally Advisory Council on Historic Preservation (ACHP), *About ACHP: General Information*, <http://www.achp.gov/aboutachp.html> (last updated June 22, 2004). The ACHP's Mission Statement, adopted by its membership on May 31, 2002, states, "The mission of the Advisory Council on Historic Preservation is to promote the preservation, enhancement, and productive use of our Nation's historic resources, and advise the President and Congress on national historic preservation policy." *Id.* The most comprehensive national policy on historic preservation was established by Congress with the passage of the National Historic Preservation Act of 1966 (NHPA), Pub. L. No. 89-655, 80 Stat. 915 (1966); 16 U.S.C. § 470 (2000). Here, historic preservation is defined to include the protection, rehabilitation, restoration, and reconstruction "of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, or culture." 16 U.S.C. § 470a(a). The Act led to the creation of the National Register of Historic Places, a file of cultural resources of national, regional, state, and local significance. *Id.* The act also established the ACHP, an independent federal agency responsible for administering the protective provisions of the act. *Id.* at 470i(a).

<sup>3</sup> Records, like the congressional archives, are kept not only for reference but as a living history of the government at work. Natl. Archives and Recs. Administration, *Records of Congress*, [http://www.archives.gov/records\\_of\\_congress/about\\_the\\_roc/records\\_of\\_congress.html](http://www.archives.gov/records_of_congress/about_the_roc/records_of_congress.html) (accessed May 2, 2005). See generally, ACHP, *supra* n. 2, at

environmental and public interest concerns affect various regulatory efforts that seek to protect America's natural and historical landmarks.<sup>4</sup>

Meanwhile, with an expanding population, travel on the United States' highway system is becoming more prevalent, and it creates the need not only for better highways, but also for more highways.<sup>5</sup> Here, public interest is often served by construction or reconstruction of road systems and highways benefiting the citizenry by providing more efficient travel routes.<sup>6</sup> The expansion of a highway system, however, is sometimes

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<http://www.achp.gov/aboutachp.html>; Megan M. Carpenter, Student Author, *Preserving A Place For The Past In Our Future: A Survey of Historic Preservation In West Virginia*, 100 W. Va. L. Rev. 423, 465-466 (1997).

<sup>4</sup> See, e.g., *Comm. to Preserve Boomer Lake Park v. Dept. of Transp.*, 4 F.3d 1543 (10th Cir. 1993) (challenging FHWA's providing federal funds to build a road through a city park); *Corridor H Alts., Inc. v. Slater*, 166 F.3d 368, 371 (D.C. Cir. 1999) (challenging highway project and alleging violations of various federal statutes); *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686 (3d Cir. 1999) (challenging FHWA's selection of a bridge alignment sending traffic through a historic district); *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999) (challenging FHWA's proposed 12-lane bridge); *Town of Hingham v. Slater*, 98 F. Supp. 2d 131 (D. Mass. 2000) (seeking injunctive relief to stop construction for service line to Old Colony Rehabilitation Project); *S.W. Williamson County Community Assn., Inc. v. Slater*, 243 F.3d 270 (6th Cir. 2001) (lawsuit to block construction of state-funded highway project); *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (lawsuit to block highway construction project based on alleged violations of federal statutes).

<sup>5</sup> The Road Info. Program (TRIP), *Key Facts About America's Road and Bridge Conditions and Federal Funding*, <http://www.tripnet.org/nationalfactsheet.htm> (last updated Feb. 24, 2005) ("A major increase in road and bridge investment is needed to accommodate the growing demands on the nation's surface transportation system. . . . Vehicle travel on America's highways increased by 35 percent from 1990 to 2003" while the "U.S. population grew by 17 percent between 1990 and 2003" and vehicle "travel on America's highways increased by 161 percent from 1970 to 2003" when the "nation's population grew by 43 percent during that period, while new road mileage increased by only six percent." Data from the Federal Highway Administration, the Bureau of Transportation Statistics, the Bureau of Public Debt, the National Highway Traffic Safety Administration, and the Texas Transportation Institute, was compiled and analyzed by TRIP, a nonprofit transportation research group based in Washington, D.C.). *Id.*

<sup>6</sup> See *id.* ("Highway improvements such as removing obstacles, adding or improving medians, wider lanes and shoulders, and upgrading roads from two lanes to four lanes and better road markings and traffic signals can reduce traffic fatalities and accidents and improve traffic flow to help relieve congestion."). There is, however, a substantial scholarly constituency who think that expansion of highways is not necessary. See e.g., James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. Env'tl. L.J. 74, 99 (2003) ("Major highway expansion projects or major new highways can do considerable amounts of direct damage to environmental resources."); Andrea C. Ferster & Elizabeth S. Merritt, *Legal Tools for Fighting Freeways and Saving Historic Roads*, ALI 291 (2002).

achieved at the cost of environmental protection and historic preservation.<sup>7</sup> For this reason, Congress has enacted several statutes requiring federally funded construction to be examined closely for potential environmental and historical impacts.<sup>8</sup> According to the United States Court of Appeals for the Tenth Circuit, “[a]ll federally funded highway projects must comply with a number of federal environmental protection and historic preservation laws, including Section 106 of the National Historic Preservation Act [citation omitted]; Section 4(f) of the Department of Transportation Act of 1966 [citation omitted]; and the National Environmental Policy Act [citation omitted].”<sup>9</sup>

This note, therefore, will discuss the relevant portions of the Department of Transportation Act<sup>10</sup> (DTA), the National Historic Preservation Act<sup>11</sup> (NHPA), and the National Environmental Policy Act<sup>12</sup> (NEPA), each of which the Federal Highway Administration (FHWA) must satisfy prior to constructing a federally funded highway. Additionally, the note will analyze *Valley Community Preservation Commission v. Mineta*,<sup>13</sup> in which preservationists seeking to limit the expansion of federally funded highways sued the FHWA and the United States Department of Transportation (DOT) alleging that a planned highway expansion project violated these federal statutes.<sup>14</sup> The court held that there was enough evidence to support a claim, but that public interest weighed in favor of completion of the project and the FHWA conducted adequate reviews of cultural resources and historic properties along the highway corridor prior to issuing its final decision.<sup>15</sup> This case demonstrates the existence of significant agency deference despite environmental and historical impact analysis.

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<sup>7</sup> *Valley Community Preservation Commn. v. Mineta*, 373 F.3d 1078 (10th Cir. 2004), is a good example of highway expansion at the cost of preservation and environmental concerns. See *infra* nn. 16-51 and accompanying text.

<sup>8</sup> See generally NHPA, 16 U.S.C. § 470; Department of Transportation Act, 49 U.S.C. § 303 (2000); National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (2000). Additionally, depending on the circumstances, many other statutes may apply.

<sup>9</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1084.

<sup>10</sup> Pub. L. No. 89-670, 80 Stat. 931 (1966); 49 U.S.C. § 303.

<sup>11</sup> Pub. L. No. 89-655, 80 Stat. 915 (1966); 16 U.S.C. § 470.

<sup>12</sup> 42 U.S.C. §§ 4321-4370(f).

<sup>13</sup> 373 F.3d 1078

<sup>14</sup> See generally *id.*

<sup>15</sup> *Id.* at 1079.

## I. BACKGROUND

Highway U.S. 70 runs through the Hondo Valley in Lincoln County, New Mexico. In *Valley Community*, the Tenth Circuit considered issues related to a portion of this highway (a 37.5-mile segment between Ruidoso Downs and Riverside that is known as the “Billy the Kid National Scenic Byway”)<sup>16</sup> that came under dispute.<sup>17</sup> This portion of the highway was designated as a National Scenic Byway<sup>18</sup> for its “rich historic associations and its exceptionally striking scenery, including historic homesteads, rural landscapes, roadside fruit stands, and a network of ‘acequias’ (historic irrigation ditches) that are an integral part of the area’s history and culture.”<sup>19</sup> According to a 2002 posting by the Advisory Council on Historic Preservation (ACHP), however, this portion of U.S. 70 is also known for “a rate of accidents and fatalities . . . [that] is about twice that of other rural undivided highways in New Mexico, due to sideswipe, head-on, and rear-end collisions from turning vehicles, failed passing maneuvers, and the inability to see deer crossing the narrow road.”<sup>20</sup>

Based on this high rate of accidents, in 1998 the FHWA offered to fund a New Mexico project that would widen the highway from two lanes to four lanes.<sup>21</sup> However, the highway passes through a rural ranching community in Hondo Valley which features “archeological sites, historic ranches and their associated landscapes, historic districts, and the historic Rio Hondo Acequia System,”<sup>22</sup> all of which would be potentially affected by the U.S. 70 widening.<sup>23</sup> Following procedures set forth by the DTA,<sup>24</sup>

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<sup>16</sup> *Id.* at 1081.

<sup>17</sup> See generally *Valley Community Preservation Commn.*, 373 F.3d 1078.

<sup>18</sup> The National Scenic Byways Program is part of DOT’s Federal Highway Administration. See America’s Byways, *About Byways*, <http://www.byways.org/learn/> (accessed June 2, 2005). Since 1992, the Program has provided funding for almost 1,500 state and nationally designated byway projects in 48 states. Certain roads are recognized by the Secretary of Transportation as All-American Roads or National Scenic Byways based on one or more archeological, cultural, historic, natural, recreational, and scenic qualities. *Id.*

<sup>19</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1081.

<sup>20</sup> ACHP, *New Mexico: Widening of US 70 Highway, Lincoln County*, <http://www.achp.gov/casearchive/casespg02NM.html> (accessed June 8, 2005).

<sup>21</sup> *Id.* (a proposal was offered by the FHWA that would “provide financial assistance to the New Mexico State Highway and Transportation Department to widen U.S. 70 from two to four lanes”).

<sup>22</sup> *Id.*

<sup>23</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1082-83.

<sup>24</sup> DTA § 4(f), 49 U.S.C § 303(c) states,

the NHPA,<sup>25</sup> and NEPA,<sup>26</sup> the New Mexico State Highway and Transportation Department began investigating the effects of and alternatives to widening U.S. 70.<sup>27</sup> The alternatives considered were: (1) a

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The Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance (as determined by Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

- (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 to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

<sup>25</sup> The NHPA provides the process through which affected historic sites are identified. NHPA § 106, 16 U.S.C. § 470f, provides that

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

<sup>26</sup> 42 U.S.C. § 4332(2)(C) requires one to

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

<sup>27</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1081. "Several alternatives to address the stated purpose and need were identified and evaluated as part of a study of the US 70 corridor between Roswell and Ruidoso. These alternatives included improvements to highways other than US 70, the construction of new highways that would bypass the Hondo Valley, and improvements to the existing alignment of US 70. Preliminary analysis of the various alternatives found that improvements to highways other than US

No-Build Alternative; (2) an Enhanced 2-Lane Alternative; and (3) a 4-Lane Alternative.<sup>28</sup> Because Alternative 3 was the only option deemed adequate to address the public safety concerns,<sup>29</sup> it was chosen as the best solution for U.S. 70, rather than the Environmentally Preferred Alternative 2.<sup>30</sup>

Pursuant to § 4(f) of the DTA,<sup>31</sup> § 106 of NHPA,<sup>32</sup> and § 4332 of NEPA,<sup>33</sup> the FHWA conducted extensive research to determine its Environmentally Preferred Alternative.<sup>34</sup> In 1999, the State Highway and Transportation Department issued a report citing the problems with and potential solutions for U.S. 70;<sup>35</sup> in 2001, a Draft Environmental Impact Statement (DEIS) was published.<sup>36</sup> The DEIS recognized the 1999 report

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70 and the construction of new highways to bypass the Hondo Valley were impractical, would not improve safety on US 70 or achieve the State's economic development goals, and would have substantive environmental impacts. . . . Three alternatives were advanced from the corridor study for evaluation in the environmental impact statement. These include[d] Alternative 1 (No-Build Alternative), Alternative 2 (Enhanced 2-Lane Alternative), and Alternative 3 (4-Lane Alternative)." Fed. Hwy. Administration, *Final Environmental Impact Statement, US 70: Ruidoso Downs to Riverside 1-2* (Jan. 29, 2002) (available at [http://www.us70hondovalley.com/pdf\\_docs/finaeis.pdf](http://www.us70hondovalley.com/pdf_docs/finaeis.pdf)) [hereinafter *FEIS*].

<sup>28</sup> *FEIS*, *supra* n. 27, at 1-4.

<sup>29</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1087.

<sup>30</sup> *Id.* at 1082. The FEIS compared all the build alternatives; based on such factors as vegetation loss, threatened and endangered species, loss of wetlands, water quality and damage, noise pollution, and air quality, Alternative 2 was considered the environmentally preferred alternative. See *FEIS*, *supra* n. 27, at 1-8-1-18.

<sup>31</sup> 49 U.S.C. § 303(c). Section 4(f) of the DTA mandates that in the case of highway transportation projects, historic resources must be avoided unless there are no prudent and feasible alternatives. *Id.*

<sup>32</sup> 16 U.S.C. § 470f. Section 106 of NHPA requires federal agencies to review all actions that may affect a property listed on the National Register of Historic Places, or which may affect a property eligible for listing. *Id.* The National Register of Historic Places is the country's official list of cultural resources worthy of preservation, and it is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect the United States' historic and archeological resources. Properties listed in the Register include districts, sites, buildings, structures, and objects that are significant in American history, architecture, archeology, engineering, and culture. The National Register is administered by the National Park Service, which is part of the U.S. Department of the Interior. See National Park Service, *National Register of Historic Places*, <http://www.cr.nps.gov/nr/> (last updated June 6, 2005).

<sup>33</sup> 42 U.S.C. § 4332(2)(C).

<sup>34</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1082.

<sup>35</sup> *Id.* at 1081.

<sup>36</sup> *Id.* The Notice of Availability of the DEIS is available at 66 Fed. Reg. 28903, 28904 (May 25, 2001). An Environmental Impact Statement (EIS) is a detailed written statement required by NEPA § 102(2)(C) whenever an action may have a significant

and proposed three potential solutions.<sup>37</sup> The draft also identified several properties of historic and environmental concern.<sup>38</sup> The FHWA then sought independent consultation from a private archaeology group; the group did not uncover any properties potentially subject to § 4(f) status.<sup>39</sup> By November 15, 2001, a Supplemental Draft Environmental Impact Statement (SDEIS) was released concluding that no historic properties would be affected by the construction.<sup>40</sup>

After consultations with the State Historic Preservation Office, the FHWA released its Final Environmental Impact Statement (FEIS) in 2002 concluding that no § 4(f) properties would be affected by the Hondo Valley construction.<sup>41</sup> The FHWA then published its Record of Decision declaring Alternative 3 the best solution to the growing traffic safety concerns for U.S. 70.<sup>42</sup>

Many local groups disagreed with the FHWA's finding that the project would not adversely affect the historic properties.<sup>43</sup> Valley Community Preservation Commission, a New Mexico non-profit corporation, in conjunction with three individual plaintiffs<sup>44</sup> (hereinafter "Plaintiffs") opposed the selection of Alternative 3, citing historical and environmental concerns, and they sought a preliminary injunction to suspend construction on the Hondo Valley Project.<sup>45</sup> The plaintiffs asserted that widening the highway would result in construction on slopes, which would damage

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effect on the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11 (2005); see generally 40 C.F.R. § 1502.

<sup>37</sup> See generally Fed. Hwy. Administration, *Draft Environmental Impact Statement, US 70: Ruidoso Downs to Riverside* (May 4, 2001) [hereinafter *DEIS*]. See also *Valley Community Preservation Commn.*, 373 F.3d at 1081-1082.

<sup>38</sup> See *DEIS*, *supra* n. 37.

<sup>39</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1082.

<sup>40</sup> *Id.* Fed. Hwy. Administration, *Supplemental Draft Environmental Impact Statement, US 70: Ruidoso Downs to Riverside* (Nov. 15 2001) [hereinafter *SDEIS*]. The Notice of Availability of the SDEIS is available at 66 Fed. Reg. 63532 (Dec. 7, 2001).

<sup>41</sup> See generally *FEIS*, *supra* n. 27. The Notice of Availability of the FEIS is available at 67 Fed. Reg. 6021 (Feb. 8, 2002).

<sup>42</sup> Fed. Hwy. Administration, *Record of Decision, US Highway 70: Milepost 264.5 to Milepost 302.0 Lincoln County, New Mexico 6-7* (available at [http://www.us70hondovalley.com/pdf\\_docs/US70\\_Record\\_Of\\_Decision.pdf](http://www.us70hondovalley.com/pdf_docs/US70_Record_Of_Decision.pdf)) [hereinafter *Record of Decision*]. See also *Valley Community Preservation Commn.*, 373 F.3d at 1082.

<sup>43</sup> See *supra* n. 20, at <http://www.achp.gov/casearchive/casesspg02NM.html>.

<sup>44</sup> Individual parties to the lawsuit included Gerald Joe Ford, Royce Griggs, and Troy Omness. See *Valley Community Preservation Commn.*, 373 F.3d at 1081.

<sup>45</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1083.



retaining walls and in turn have an adverse effect on the surrounding historic properties.<sup>46</sup> The plaintiffs further alleged that the project was commenced without proper investigation by the FHWA as mandated by § 4(f)<sup>47</sup> of the DTA.<sup>48</sup>

The United States District Court for the District of New Mexico, by way of transfer from the D.C. District Court, ruled against the plaintiffs, citing a failure to establish likelihood of success on the merits,<sup>49</sup> a key element in petitioning for injunctive relief.<sup>50</sup> On appeal, the Tenth Circuit considered only Valley Community's § 4(f) challenge, but it still affirmed the district court's decision allowing construction on the Hondo Valley Project to continue.<sup>51</sup>

## II. RELEVANT STATUTES

This section provides analysis of the relevant statutes the FHWA must adhere to in order to secure federal funding for highway projects. The DTA governs the Department of Transportation and establishes the guidelines DOT must follow in order to properly go forward with any transportation project.<sup>52</sup> While this statute addresses environmental and historic concerns, agencies may also be required to conduct analysis under the NHPA and NEPA. The NHPA provides that an agency must take into account the effect of a federal expenditure on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register,<sup>53</sup> while NEPA requires analysis when major federal actions, such as a highway construction project, significantly affect the quality of the human environment.<sup>54</sup> Although *Valley Community* deals only with the DTA, the NHPA and NEPA are significant statutes given their underlying role in the FHWA environmental and historic impact analysis.

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<sup>46</sup> *Id.*

<sup>47</sup> 49 U.S.C. § 303(c). *See supra* n. 24.

<sup>48</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1083.

<sup>49</sup> *See infra* nn. 96-102 and accompanying text.

<sup>50</sup> *Valley Community Preservation Commn. v. Mineta*, 246 F. Supp. 2d 1163 (D.N.M. 2002).

<sup>51</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1078.

<sup>52</sup> *See supra* n. 24.

<sup>53</sup> *See supra* n. 25.

<sup>54</sup> *See supra* n. 26.

*A. Department of Transportation Act—Section 4(f)*

Title 49 U.S.C. § 303(a), or its better known moniker, DTA § 4(f), provides that it is the “policy of the United States Government that special effort be made to preserve the natural beauty of . . . historic sites.”<sup>55</sup> In addition to this policy statement, 49 U.S.C. § 303(c) provides that the Secretary of Transportation

may approve a transportation program or project requiring . . . the use of publicly owned . . . land of an historic site of national, State, or local significance . . . only if: (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 to the . . . historic site resulting from the use.<sup>56</sup>

The Code of Federal Regulations (C.F.R.) further clarifies the language of § 4(f) by providing that “supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption . . . reach extraordinary magnitudes.”<sup>57</sup> Additionally, “any use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.”<sup>58</sup> Furthermore, “[t]he section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of section 4(f) is otherwise appropriate.”<sup>59</sup>

In addition to these requirements, feasible alternatives to the use of historic lands must be studied and presented in the form of an evaluation, allowing time for comments from “officials having jurisdiction over the section 4(f) property and . . . the Department of the Interior.”<sup>60</sup> The DTA and its regulations seem to show an extensive effort by Congress to establish guidelines for the protection of historic and environmentally significant properties: “Section 4(f) sets both procedural and substantive

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<sup>55</sup> 49 U.S.C. § 303(a).

<sup>56</sup> *Id.* at § 303(c).

<sup>57</sup> 23 C.F.R. § 771.135(a)(2) (2005).

<sup>58</sup> *Id.* at § 771.135(b).

<sup>59</sup> *Id.* at § 771.135(e).

<sup>60</sup> *Id.* at § 771.135(i).

limitations upon the Secretary of Transportation's . . . authority to approve a federally funded highway project."<sup>61</sup>

In 1971, the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*<sup>62</sup> acknowledged that historically and environmentally significant landmarks "were not to be lost unless there were truly unusual factors present in a particular case or the cost of community disruption resulting from alternative routes reached extraordinary magnitudes."<sup>63</sup> That Court went on to state in reference to DTA § 4(f): "[i]f the statutes are to have any meaning, the Secretary cannot approve the destruction of [a particular area] unless he finds that alternative routes present unique problems."<sup>64</sup> However, as one scholar has noted, "[u]nfortunately, in court, a showing of 'no feasible and prudent alternative' has not turned out to be a difficult burden . . . to meet."<sup>65</sup> This seems to be the trend in judicial interpretation regarding § 4(f) because as another scholar has concluded, "a growing number of circuits have abandoned the *Overton Park* standard in favor of greater deference to agency determinations about the feasibility and prudence of avoidance alternatives under section 4(f)."<sup>66</sup>

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<sup>61</sup> Barbara Miller, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation*, 36 Am. U. L. Rev. 633, 636 (1987).

<sup>62</sup> 401 U.S. 402 (1971). In *Overton Park*, individuals and conservation groups sued to enjoin the Secretary of Transportation from releasing federal funds to the Tennessee state highway department for construction of a segment of expressway through a city park. *Id.* The court recognized that under the DTA the Secretary should not approve any project requiring use of public land unless there is no feasible and prudent alternative and such program includes all possible planning to minimize harm; although the Secretary should not ignore cost and disruption of the community, the protection of parkland is to be given paramount importance. *Id.* at 412.

<sup>63</sup> *Id.* at 413.

<sup>64</sup> *Id.* The facts in the case were measured against statutory standards authorizing the expenditure of public funds on highways to be constructed through public landmarks only if a "feasible and prudent" alternate route did not exist. *Id.* at 402. The local citizens claimed that in authorizing expenditures for a highway through a park, the Secretary acted in violation of statutory provisions. *Id.*

<sup>65</sup> See Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 Tul. Envtl. L.J. 189, 206 (1998).

<sup>66</sup> Matthew Singer, Student Author, *The Whittier Road Case: The Demise of Section 4(f) Since Overton Park and Its Implications for Alternatives Analysis in Environmental Law*, 28 Envtl. L. 729, 730 (1998).

*B. National Historic Preservation Act—Section 106*

While a NHPA § 106<sup>67</sup> analysis is not at issue in *Valley Community*, the FHWA did conduct the necessary study in conjunction with a DTA § 4(f) analysis to determine whether the federally funded highway project should proceed. “[A]n agency must complete the section 106 identification process before it can satisfy section 4(f)’s requirement that an agency use ‘all possible planning to minimize harm’ to historic sites.”<sup>68</sup> In order to determine whether a site qualifies for § 4(f) protection, the site must be a part of or eligible for the National Register of Historic Places.<sup>69</sup> The United States Court of Appeals for the District of Columbia asserts that, “[b]ecause the historic properties protected by section 106 are similarly defined, it follows that the agency must complete its [NHPA] section 106 determinations before it can comply with [DTA] section 4(f).”<sup>70</sup> The CFR concerning the ACHP sets out requirements and standards to determine compliance with § 106, including identification of the historic properties,<sup>71</sup> assessment of adverse affects to the property,<sup>72</sup> and resolution of potential adverse affects.<sup>73</sup>

NHPA provides that the Secretary of Transportation shall “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”<sup>74</sup> This Act notes the significance of the “spirit and direction of the Nation,”<sup>75</sup> the “historical and cultural foundations of the Nation,”<sup>76</sup> that the “preservation of . . . irreplaceable heritage is [a] public interest,”<sup>77</sup> and that “an increased knowledge [of history] will improve . . . and . . . assist economic growth and development.”<sup>78</sup>

NHPA, however, is considered a simple procedural law that does not provide for substantive enforcement of its policies.<sup>79</sup> According to the

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<sup>67</sup> 16 U.S.C. § 470f.

<sup>68</sup> *City of Alexandria*, 198 F.3d at 866.

<sup>69</sup> 23 C.F.R. § 771.135(e). *See also supra* n. 32.

<sup>70</sup> *Corridor H Alternatives*, 166 F.3d at 371.

<sup>71</sup> 36 C.F.R. § 800.4 (2005).

<sup>72</sup> *Id.* at § 800.5.

<sup>73</sup> *Id.* at § 800.6.

<sup>74</sup> 16 U.S.C. § 470f.

<sup>75</sup> *Id.* at § 470(b)(1).

<sup>76</sup> *Id.* at § 470(b)(2).

<sup>77</sup> *Id.* at § 470(b)(4).

<sup>78</sup> *Id.* at § 470(b)(6).

<sup>79</sup> *See* 36 C.F.R. § 60.2(a) (2005). *See also* Chauncey L. Walker & Marcia A. Israeloff, *Historic Preservation and the Institutional Owner*, 14 J.C. & U.L. 59, 76 (1987).

CFR, “[w]hile the Advisory Council comments must be taken into account and integrated into the decision making process, program decisions rest with the agency implementing the undertaking.”<sup>80</sup> Moreover, in reaction to court decisions regarding ACHP determinations, the ACHP issued a Federal Register notice finalizing amendments to relevant sections of the C.F.R.<sup>81</sup> In pertinent part, the Federal Register notice indicated that “the final amendments make it clear that ACHP opinions on these effect findings are advisory and do not require Federal agencies to reverse their findings.”<sup>82</sup> As one pair of scholars noted, “an Agency Official is only required to give the [ACHP] the opportunity to comment and to take historic preservation factors into account. . . . Section 106 does not, by itself, stop a proposed undertaking unless the review procedures are not satisfied.”<sup>83</sup> The Third Circuit Court of Appeals stated, “a federal agency undertaking a project affecting historic properties is not obligated to give the [ACHP]’s opinion so much weight that it is foreclosed from making its own decision.”<sup>84</sup>

### C. National Environmental Protection Act

NEPA<sup>85</sup> was enacted in 1969 as a measure to preserve and promote national environmental issues important to the United States.<sup>86</sup> In declaring a national environmental policy, Congress recognized the importance in “preserv[ing] important historic, cultural, and natural aspects of our national heritage, and maintain[ing], wherever possible, an environment which supports diversity and variety of individual choice[.]”<sup>87</sup> As one scholar has described it, “NEPA’s protective reach extends to all resources in [‘]man’s environment,[‘] including aesthetic, historic, and cultural resources.”<sup>88</sup> The most important part of NEPA is its requirement for the preparation of an Environmental Impact Statement (EIS) for every major federal action significantly affecting the quality of the human environment, which must include information regarding:

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“Section 106 does not, by itself, stop a proposed undertaking unless the review procedures are not satisfied.” *Id.*

<sup>80</sup> 36 C.F.R. § 60.2(a).

<sup>81</sup> Protection of Historic Properties, Final Rule, 69 Fed. Reg. 40544 (July 6, 2004).

<sup>82</sup> *Id.* at 40545.

<sup>83</sup> Walker & Israeloff, *supra* n. 79, at 75-76.

<sup>84</sup> *Concerned Citizens Alliance*, 176 F.3d at 696.

<sup>85</sup> 42 U.S.C. §§ 4321-4370(f).

<sup>86</sup> *Id.* at § 4331.

<sup>87</sup> Walker & Israeloff, *supra* n. 79, at 80-81 (citing 42 U.S.C. § 4331(b)(4)).

<sup>88</sup> Guill, *supra* n. 65, at 199 (citing 42 U.S.C. § 4332(2)(A); 40 C.F.R. § 1508.9 (1997)).

(i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>89</sup>

Unfortunately, "the EIS process is a 'review and comment' procedure only."<sup>90</sup> As the United States Court of Appeals for the District of Columbia stated, "the statute requires that agencies assess the environmental consequences of federal projects by following certain procedures during the decision making process."<sup>91</sup> Similarly, as the Sixth Circuit Court of Appeals commented, "NEPA is one of [the country's] most important tools for ensuring that all federal agencies take a [']hard look['] at the environmental implications of their actions or non-actions."<sup>92</sup> While a number of scholars and others conclude that the procedures lead to environmentally friendly decisions,<sup>93</sup> one scholar posits "although NEPA sets up myriad requirements and lofty goals, in practice it . . . permits federal agencies to overcome opposition to specific projects by adhering to the procedural niceties without . . . addressing the concerns of opponents to the projects."<sup>94</sup> Therefore, NEPA's requirement of an EIS simply obliges a federal agency to undertake the relevant investigations to make informed decisions regarding environmental impact, but does not

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<sup>89</sup> 42 U.S.C. § 4332(2)(C)(i)-(iv).

<sup>90</sup> Walker & Israeloff, *supra* n. 79, at 82.

<sup>91</sup> *City of Alexandria*, 198 F.3d at 866 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193-94 (D.C. Cir. 1991)).

<sup>92</sup> *S.W. Williamson County Community Assn.*, 243 F.3d at 278 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)).

<sup>93</sup> See e.g., Oliver A. Houck, *Book Review*, 11 Duke Env'tl. L. & Policy Forum 173, 176 (2000) (reviewing *Is That All? A Review Of The National Environmental Policy Act, An Agenda For The Future*, Lynton Keith Caldwell) ("To its supporters, NEPA has worked miracles in changing government behavior, infused agencies with environmental specialists, brought in the views of other agencies and an often-skeptical public, surfaced alternative courses of action, and produced thousands of better decisions--harm-avoiding and harm-mitigating decisions--on the ground."). See also Council on Env'tl. Quality, *The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years* (1997).

<sup>94</sup> Guill, *supra* n. 65, at 203.

stipulate that the agency must actually implement the most environmentally friendly alternative.<sup>95</sup>

#### *D. Preliminary Injunction*

Injunctive relief is a commonly sought remedy in situations involving historic and environmental properties and asserted DTA § 4(f), NHPA § 106, and NEPA violations.<sup>96</sup> “Injunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion.”<sup>97</sup> The criteria for preliminary injunctions are as follows:

In order to receive a preliminary injunction, the plaintiff must establish the following factors: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) [that] the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction, if issued, will not adversely affect the public interest.<sup>98</sup>

Application of the criteria for injunctive relief involves the balance of the factors listed above:

If a plaintiff establishes that the latter three factors “tip strongly” in his or her favor, the likelihood of success inquiry is modified somewhat, and the plaintiff may establish likelihood of success “by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.”<sup>99</sup>

Issuance and denial of preliminary injunctions is often left to the discretion of the court<sup>100</sup> because it requires such “a delicate balancing

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<sup>95</sup> Singer, *supra* n. 66, at 750.

<sup>96</sup> See e.g., *Concerned Citizens Alliance*, 176 F.3d 686; *Town of Hingham*, 98 F. Supp. 2d 131; *S.W. Williamson County Community Assn.*, 243 F.3d 270; *Davis v. Mineta*, 302 F.3d 1104; *Concerned Citizens Coalition*, 330 F. Supp. 2d 787. Summaries of these cases can be found at *supra* n. 4.

<sup>97</sup> *Concerned Citizens Coalition*, 330 F. Supp. 2d at 799-800 (citing *Holland Am. Ins. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

<sup>98</sup> *Davis v. Mineta*, 302 F.3d at 1111 (citing *Fed. Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999)).

<sup>99</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1083-1084 (citing *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003)).

<sup>100</sup> 42 Am. Jur. 2d *Injunctions* § 14 (2005).

of . . . factors.”<sup>101</sup> While each factor is important to the final court decision, likelihood of success on the merits has been cited as the most important factor.<sup>102</sup>

In summary, the relevant statutes and requirements for preliminary injunctions discussed in this section provide guidance to both agencies and courts as they make decisions with respect to issues such as those involved in the *Valley Community Preservation Commission v. Mineta* decision at issue in this note.

### III. CASE ANALYSIS: *VALLEY COMMUNITY PRESERVATION COMMISSION V. MINETA*

The circumstances surrounding the widening of the Billy the Kid National Scenic Byway evidence the administrative procedures the FHWA must satisfy prior to commencing a federally funded highway project. The *Valley Community* court analyzes challenges to this project; while the court only deals with the DTA<sup>103</sup> and injunctive relief, it is also helpful to examine here the NHPA<sup>104</sup> and NEPA<sup>105</sup> in order to show the complications involved in historic preservation. Specifically, this section of the note seeks to demonstrate the difficulties that the FHWA and environmentally and historically active groups face in order to accomplish their goals.

#### A. Injunctive Relief

In its motion for preliminary injunction, Valley Community's main contention was that “the FHWA violated Section 4(f) of the [DTA] . . . by failing to conduct the necessary reviews and investigations to determine whether the project will entail [‘]use[’] of historic properties protected under Section 4(f) prior to approving the project for construction.”<sup>106</sup> The plaintiffs further argued: “1) the FHWA failed to undertake the requisite studies needed . . . prior to issuing its [Record on Decision]; and 2) the

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<sup>101</sup> *Id.* (citing *Maier-Schule GMC, Inc. v. General Motors Corp.*, 850 F. Supp. 1095 (W.D.N.Y. 1994), *aff'd*, 62 F.3d 1412 (2d Cir. 1995); *Olmeda v. Schneider*, 889 F. Supp. 228 (D.V.I. 1995); *Sheppard v. Township of Frankford*, 617 A.2d 666 (App. Div. 1992)).

<sup>102</sup> 42 Am. Jur. 2d *Injunctions* § 16 (2005) (citing *AVR, Inc. v. Churchill Truck Lines, Inc.*, 915 F. Supp. 1025 (D. Minn. 1996)).

<sup>103</sup> 49 U.S.C. § 303.

<sup>104</sup> 16 U.S.C. § 470.

<sup>105</sup> 42 U.S.C. §§ 4321-4370(f).

<sup>106</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1081.



FHWA employed an inadequate area of potential effects.”<sup>107</sup> In order to determine whether injunctive relief was improperly denied, the Tenth Circuit reviewed the basis for injunctive relief under the DTA,<sup>108</sup> NHPA,<sup>109</sup> and NEPA.<sup>110</sup>

As discussed in the previous section, injunctive relief required Valley Community to demonstrate four things: a substantial likelihood of success on the merits; irreparable injury if the injunction is not granted; threatened injury outweighing the injury to the opposing party if the injunction is granted; and, an injunction that does not violate a public interest.<sup>111</sup> After reviewing these factors, the Tenth Circuit held that “while the Plaintiffs may suffer some harm as a result of the denial of the injunction, the district court correctly concluded that the balance of harms and the public interest weigh in favor of the FHWA.”<sup>112</sup> The court ruled that the plaintiffs would experience some harm due to the “adequate proximity to and use of the land in question.”<sup>113</sup> However, the economic harm to the defendants would be substantial if the injunction was granted<sup>114</sup> and the Hondo Valley Project was not allowed to continue.<sup>115</sup> The court did acknowledge that financial harm typically does not outweigh environmental harms,<sup>116</sup> but indicated injunctive relief is based on the merits of the case and whether the FHWA was in compliance with the applicable environmental and historic preservation statutes and regulations.<sup>117</sup>

### B. DTA Section 4(f) Analysis

“Although Plaintiffs originally alleged violations of both the National Environmental Policy Act and Section 4(f) of the Department of

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<sup>107</sup> *Id.* at 1087.

<sup>108</sup> § 4(f); 49 U.S.C. § 303(c).

<sup>109</sup> § 106; 16 U.S.C. § 470f.

<sup>110</sup> 42 U.S.C. § 4332(2)(C).

<sup>111</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1083.

<sup>112</sup> *Id.* at 1086.

<sup>113</sup> *Id.* (citing *Davis v. Mineta*, 302 F.3d at 1115).

<sup>114</sup> The FHWA had already invested over \$52 million in the project and would lose roughly \$4,320,000 per month in the event of an injunction. *Valley Community Preservation Commn.*, 373 F.3d at 1083.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1086 (citing *Citizens to Preserve Overton Park*, 401 U.S. 402, 412-413).

<sup>117</sup> *Id.* at 1087 (“If the FHWA complied with all relevant environmental laws and correctly determined . . . the project will not use Section 4(f)-protected property, then the balancing of harms weighs in favor of the defendants.”).

Transportation Act, [the] appeal challenge[d] only FHWA's compliance with Section 4(f)."<sup>118</sup> Two aspects of § 4(f) evaluations are often analyzed when historic and environmental preservation groups contest FHWA findings—the use of historic properties and agency deference.<sup>119</sup> In *Valley Community*, the court's conclusions arguably turned on the FHWA's determination of the use of historic properties and the deference allowed in making that determination.<sup>120</sup> The plaintiffs argued that the FHWA did not adequately determine whether the Hondo Valley Project would “use” protected lands.<sup>121</sup>

A DTA § 4(f) analysis typically begins with a determination of properties that qualify for protection under NHPA.<sup>122</sup> According to regulations implementing NHPA, a historic property is one defined by its presence on or eligibility for the National Register of Historic Places.<sup>123</sup> A property is eligible for the Register if it is authorized by executive order or by Congress, is a national historic landmark,<sup>124</sup> or is nominated by the State Historic Preservation Office.<sup>125</sup> A historic significance determination, however, does not preclude that property's use by a federally funded highway project.<sup>126</sup>

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<sup>118</sup> *Id.* at 1084.

<sup>119</sup> See generally D.J. Gerken, *Loopholes You Could Drive a Truck Through: Systematic Circumvention of Section 4(f) Protection of Parklands and Historic Resources*, 32 Urb. Law. 121, 142 (2000); Singer, *supra* n. 66, at 731. Each article discusses the amount of agency deference provided to the FHWA in its determination of whether historic and environmental properties are affected by federal projects and whether the effects of the projects can be overcome by the stated purposes of the federal project. *Id.*

<sup>120</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1087-1092.

<sup>121</sup> *Id.* at 1081. Restrictions imposed by statute governing the Secretary of Transportation's decision to fund highways across land with historic significance apply any time a proposed highway construction project entails a “use” of a property protected by that statute. 49 U.S.C. § 303(c); 23 C.F.R. § 771.135(p)(1)(i), (p)(2).

<sup>122</sup> Guill, *supra* n. 65, at 205-206 (citing 49 U.S.C § 303(c)).

<sup>123</sup> 36 C.F.R. § 800.16(l)(1).

<sup>124</sup> § 470a (a)(1)(A)-(B) of the NHPA establishes the designation of a national historic landmark. § 470a (a)(2) of the NHPA establishes the criteria for establishing a property as a national historic landmark. National historic landmarks are nationally significant historic places designated by the Secretary of the Interior because they possess exceptional value or quality in illustrating or interpreting the heritage of the United States. *Id.* Fewer than 2,500 historic places bear this distinction. See National Park Service, *National Historic Landmarks Program*, <http://www.cr.nps.gov/nhl/> (last updated May 31, 2005).

<sup>125</sup> 36 C.F.R. § 60.1(b).

<sup>126</sup> See Bradford J. White, *Recent Developments in Historic Preservation and Architectural Control Law*, 26 Urb. Law. 777, 779-781 (1994).

In *Valley Community*, the FWHa issued a SDEIS which determined that properties in the surrounding area eligible or potentially eligible for the National Register would not be affected by the project.<sup>127</sup> Based on subsequent consultations, the FHWA released its FEIS, which concluded that neither of the Hondo Valley Project "build alternatives [would] involve use of Section 4(f) properties."<sup>128</sup> Valley Community argued that this determination was flawed based on the FHWA's determination of the area of potential effects.<sup>129</sup>

To determine whether historic and environmental properties are affected by a federal project, an area of potential effects must be evaluated.<sup>130</sup> In the Hondo Valley Project, the FHWA determined that the construction area of potential effects extended 150 to 500 feet from the edge of U.S. 70.<sup>131</sup> However, "[f]or much, if not most of the roadway, it appears that an area of potential effects of 150 feet was used."<sup>132</sup> The plaintiffs argued that the area of potential effects was determined inadequately and proposed a 200-foot boundary.<sup>133</sup> The court, however, deferred judgment on the area to the FHWA stating that the "agency's determination is due a substantial amount of discretion."<sup>134</sup>

The FHWA cleared the most significant hurdle in the application of § 4(f) by establishing, through internal evaluations and outside consultations, that the highway project would not use any historic properties<sup>135</sup> or disturb any properties within the area of potential effects.<sup>136</sup> Upon making this determination, the FHWA selected Alternative 3, the four-lane expansion, as its preferred alternative.<sup>137</sup> This determination was made "despite acknowledging that the enhanced two-lane alternative was the environmentally-preferred option."<sup>138</sup> The

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<sup>127</sup> SDEIS, *supra* n. 40. See also *Valley Community Preservation Commn.*, 373 F.3d at 1082.

<sup>128</sup> FEIS, *supra* n. 27, at 5-2.

<sup>129</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1091.

<sup>130</sup> 36 C.F.R. § 800.16(d). This regulation defines areas of potential effects as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." *Id.*

<sup>131</sup> *Record of Decision*, *supra* n. 42, at 6-7.

<sup>132</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1091.

<sup>133</sup> *Id.* (a 200-foot area of potential effects would have included over 100 buildings).

<sup>134</sup> *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. at 412).

<sup>135</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1082.

<sup>136</sup> *Id.* at 1091.

<sup>137</sup> FEIS, *supra* n. 27, at 5-2.

<sup>138</sup> *Id.* See also *Valley Community Preservation Commn.*, 373 F.3d at 1083.

FHWA's determination of "use," the area of potential effects, and its selection of Alternative 3 over the environmentally preferred Alternative 2 arguably indicates a level of deference provided to agency decisions in federal highway projects involving public safety, historic, and environmental concerns.<sup>139</sup>

As discussed in the previous section of this note, § 4(f) specifically allows the use of historic properties if: "(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 to the . . . historic site resulting from the use."<sup>140</sup> The determination of a "prudent and feasible alternative"<sup>141</sup> has been a source of trouble for environmental and historic preservation groups. One scholar has noted that "[m]any courts have held that agencies [do] not need to demonstrate an avoidance alternative . . . if the alternative fail[s] to meet the agency's stated purpose."<sup>142</sup> Realizing this as a method for successful project approval, this scholar concludes that "agencies craft narrow purposes for their projects."<sup>143</sup> In *Valley Community*, the FHWA was able to establish that the alternative construction projects were not prudent and feasible because the alternatives did not adequately address the safety purposes of the Hondo Valley Project.<sup>144</sup> The agency's selection of Alternative 3 rather than Alternative 2, and the Tenth Circuit's approval of this choice, seems to demonstrate the court's level of deference to the agency.

### C. NHPA and NEPA Analysis

The FHWA evades a decision based solely on historic and environmental preservation concerns by deferring to the project purpose—addressing highway safety concerns. NHPA § 106<sup>145</sup> and NEPA § 4332<sup>146</sup> each require an evaluation of the property to be used by a federal agency. In accordance with the regulations relating to the NHPA, any federal agency is required to consult the State Historic Preservation Office.<sup>147</sup> This consultation, however, is not the definitive analysis of whether use of

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<sup>139</sup> See e.g. Guill, *supra* n. 65, at 204; Singer, *supra* n. 66, at 730, 748-49; Gerken, *supra* n. 119, at 142.

<sup>140</sup> 49 U.S.C. § 303(c).

<sup>141</sup> *Id.*

<sup>142</sup> Singer, *supra* n. 66, at 731.

<sup>143</sup> *Id.* at 729.

<sup>144</sup> See generally *Valley Community Preservation Commn.*, 373 F.3d 1078.

<sup>145</sup> 16 U.S.C. § 470f.

<sup>146</sup> 42 U.S.C. § 4332(2)(C).

<sup>147</sup> 36 C.F.R. § 800.3(c).

the historic properties should be forbidden<sup>148</sup>—in *Valley Community*, the FHWA consulted with the Preservation Office and the ACHP, but use of the historic properties was permitted.<sup>149</sup> Likewise, the CFR only requires that the ACHP have “a reasonable opportunity to comment.”<sup>150</sup> Though the agency must consult with the ACHP, it does not have to abide by the Council’s recommendation.<sup>151</sup> In *Valley Community*, the plaintiffs introduced evidence showing the ACHP “question[ed] the validity of the earlier no effect and no adverse effect determinations of the [FHWA].”<sup>152</sup> The court, however, determined that the FHWA addressed the ACHP concerns.<sup>153</sup> Additionally, the Tenth Circuit held the district court properly concluded that “the [FHWA] was [‘]not mandated to adhere to the findings of the [ACHP] as they had determined that there would not be any use of historic properties.[’]”<sup>154</sup>

Pursuant to § 4332 of NEPA,<sup>155</sup> the FHWA conducted extensive research to determine its Preferred Alternative.<sup>156</sup> In 2001, a DEIS was published in accordance with NEPA requirements<sup>157</sup> and later that year, a SDEIS was released concluding that no historic properties would be affected by the construction.<sup>158</sup> The FHWA released its FEIS in 2002 finding that the project would not adversely affect the environment.<sup>159</sup> As noted in the above sections, “the EIS process is a ‘review and comment’ procedure only,”<sup>160</sup> and no further NEPA analysis was required. The

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<sup>148</sup> *Id.* at § 60.2(a).

<sup>149</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1082-1083 (“The FHWA sought comments from the New Mexico State Historic Preservation Office . . . regarding the determinations in the Cultural Resources Survey. Based on the survey and consultations with the [State Historic Preservation Office], the FHWA issued a [SDEIS] on November 15, 2001. The [SDEIS] evaluated seventeen buildings, structures, and landscapes that either are or may be eligible for the National Register and concluded that none would be affected by the project.”).

<sup>150</sup> 36 C.F.R. § 60.2(a).

<sup>151</sup> *Id.*

<sup>152</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1089.

<sup>153</sup> *Id.* at 1090.

<sup>154</sup> *Id.* (citing *Valley Community Preservation Commn.*, 231 F. Supp. 2d at 36 (quoting 36 C.F.R. § 800.3(a)(1))).

<sup>155</sup> 42 U.S.C. § 4332(2)(C).

<sup>156</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1082.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* See SDEIS, *supra* n. 40.

<sup>159</sup> See generally FEIS, *supra* n. 27.

<sup>160</sup> See Walker & Israeloff, *supra* n. 79, at 82. Transportation projects often run into snags in the NEPA process. See *Eagle Found., Inc. v. Dole*, 813 F.2d 798, 804 (7th Cir. 1987) (“America’s highways present examples of delay [and] cost overruns . . .”).

FHWA performed the requirements of NEPA § 4332, overcoming opposition to its highway expansion project “by adhering to the procedural niceties,”<sup>161</sup> and the Hondo Valley project was allowed to continue. Furthermore, the Tenth Circuit was satisfied with the outcome of the NEPA analysis in the lower courts and did not allow the Valley Community claims to reach the appeals court.<sup>162</sup> This seems to be is yet another example of the deference courts pay to federal agencies.

#### IV. CONCLUSION

The FHWA has two hurdles to overcome in order to proceed with projects affecting historic and environmental assets. The first hurdle is determining whether historic and environmentally protected properties will be used or affected in the highway project.<sup>163</sup> If such use or effect is determined, the FHWA must then determine whether the use or effect is justified.<sup>164</sup> In each determination, the level of agency deference is remarkably high. If the FHWA properly follows the evaluation criteria established by DTA § 4(f), NHPA § 106, and NEPA, the likelihood of agency success in proceeding with its highway project is great.<sup>165</sup>

In the case of U.S. 70, the FHWA followed the procedures set out in these statutes.<sup>166</sup> By determining affected historic lands, evaluating alternative-build proposals, issuing EISs, and allowing appropriate time for community input, the FHWA was able to establish that its choice of Alternative 3, widening U.S. 70 to four lanes, was reasonable. In *Valley Community*, the harm and potential affects to historic property were arguably outweighed by the safety concerns precipitated by the current status of U.S. 70.<sup>167</sup> Buttrressing the FHWA’s argument was its abidance to

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Unfortunately, transportation officials often see environmental review as a painful process and frequently look for ways to make the process easier. See e.g., Fed. Highway Admin., *Successful Efforts in Environmental Streamlining: Eight Case Studies in Project Development* (2003), <http://environment.fhwa.dot.gov/stmrng/casestudies> (noting the “perception that NEPA is the culprit for the majority of project development delays and associated cost increases that have occurred since its creation.”).

<sup>161</sup> Guill, *supra* n. 65, at 203. See also *supra* nn. 90-95 and accompanying text.

<sup>162</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1078.

<sup>163</sup> 23 C.F.R. § 771.135(a).

<sup>164</sup> *Id.*

<sup>165</sup> See e.g., Singer, *supra* n. 66, at 731 n. 15. Singer noted that as of 1998 “only one plaintiff has prevailed in a section 4(f) case since 1985.” *Id.* (citing *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803 (11th Cir. 1988)).

<sup>166</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1087.

<sup>167</sup> *Record of Decision*, *supra* n. 42, at 1.

the regulations<sup>168</sup> and the extremely high cost of issuing a preliminary injunction.<sup>169</sup>

The Tenth Circuit Court established that great financial interests and public safety issues often outweigh environmental and historic interests in preliminary injunction hearings where the FHWA has complied with all relevant preservation laws.<sup>170</sup> Public safety is an extremely important concern,<sup>171</sup> and the FHWA deemed the harm imposed by not widening U.S. 70 greater than the potential harm imposed by construction affecting properties along the highway.<sup>172</sup> Therefore, it is perhaps reasonable to conclude that historic preservation and environmental protection matters can be outweighed by safety and financial concerns in completing and continuing a project that will satisfy other public interests.

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<sup>168</sup> *Valley Community Preservation Commn.*, 373 F.3d at 1090.

<sup>169</sup> *Id.* at 1086.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1087. The well recognized "important public interest in safety on the roads and highways therefore weighs in favor of completing the construction project." *Id.* (citing *Dixon v. Love*, 431 U.S. 105, 114 (1977)).

<sup>172</sup> *Record of Decision*, *supra* n. 42, at 1.