

Corridor EIS Archives

EM008

From: Sullivan, Robert G.
Sent: Monday, July 10, 2006 7:22 PM
To: Corridor EIS Archives
Subject: FW: National Trust Comments on Preliminary Maps for Energy Corridor
Attachments: NTHP.Energy Corridor Ltr.07-10-06.pdf

Bob S.
630-252-6182

From: Mike Smith [mailto:Mike_Smith@nthp.org]
Sent: Monday, July 10, 2006 7:15 PM
To: corridoreiswebmaster
Subject: National Trust Comments on Preliminary Maps for Energy Corridor

<<NTHP.Energy Corridor Ltr.07-10-06.pdf>>

To whom it May Concern:

Please accept the attached comment letter on the West-wide Energy Corridor's preliminary maps on behalf of the National Trust for Historic Preservation. If you have trouble opening the attachment, please contact me directly. Thank you.

Michael Smith
Assistant General Counsel
National Trust for Historic Preservation
1785 Massachusetts Ave. NW
Washington, DC 20036
(202)588-6031
(202)588-6272 (Fax)

7/11/2006



NATIONAL TRUST
for HISTORIC PRESERVATION®

July 10, 2006

VIA E-MAIL (corridoreiswebmaster@anl.gov) AND FAX (202) 586-1472

Ms. Julia Souder
DOE Project Manager, West-wide Corridor Study
Office of Electricity Delivery and Energy Reliability
Room 8H-033
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

**Re: Comments on the Preliminary Maps for the West-wide Energy Corridor
Programmatic Environmental Impact Statement**

Dear Ms. Souder:

On behalf of the National Trust for Historic Preservation (National Trust), we appreciate the opportunity to comment on the preliminary maps for the West-wide Energy Corridor Programmatic Environmental Impact Statement (PEIS). Given the magnitude of the proposed Energy Corridor, and the intense use of federal lands, we are concerned about the potential adverse effects to significant cultural and historic resources. Our comments focus on several issues we have with the preliminary Energy Corridor maps and the current process, including a failure to provide adequate information about the location of the corridors in accordance with the National Environmental Policy Act (NEPA) and a failure to initiate Section 106 of the National Historic Preservation Act (NHPA).

Interests of the National Trust. Congress chartered the National Trust in 1949 as a private nonprofit organization to “facilitate public participation” in historic preservation, and to further the purposes of federal historic preservation laws. 16 U.S.C. §§ 461, 468. With the strong support of our 265,000 members around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition to our headquarters in Washington, D.C., we have eight regional and field offices throughout the country, including a Western Office in San Francisco, a Mountain/Plains Office in Denver, and a Southwest Office in Fort Worth, Texas, which are responsive to concerns in the areas affected by the corridor designations. The National Trust also operates 26 historic sites open to the public.

Protecting the Irreplaceable



Congress enacted Section 368 of the Energy Policy Act of 2005 to advance a West-wide corridor through a coordinated effort by the Secretaries of Agriculture, Commerce, Defense, Energy and Interior, in consultation with the Federal Energy Regulatory Commission (FERC), (referred to as “the agencies”). Energy Policy Act of 2005, Pub. L. No. 109-58, 2005. The National Trust does not oppose the concept of the West-wide Energy Corridor – to provide reasonable, reliable, and efficient transmission of energy. However, Congress did not exempt the need to comply with NEPA and the NHPA, and thus, compliance with these statutes is critical.

Thus far, especially given Congress’ unrealistic deadlines placed on designating the corridors, it is unclear whether the agencies are or will satisfy the statutory requirements of NEPA and the NHPA prior to approving the corridor. We understand that the agencies have made an effort to designate corridors adjacent to major roads and highways, which we commend. Also, the National Trust appreciates the additional step in the NEPA process to evaluate the preliminary location of the proposed Energy Corridor. However, we remain concerned about the insufficient detail regarding the exact location of the Energy Corridor. In short, our comments below are aimed at helping to ensure that cultural and historic resources are adequately identified, considered, and evaluated, and that the public and appropriate consulting parties are given an adequate opportunity to participate in the NEPA and NHPA processes.

1. The Preliminary Maps for the Energy Corridor do not satisfy the National Environmental Policy Act Requirements.

The preliminary maps for the Energy Corridor provide insufficient detail to adequately comment on the location of the proposed corridor or more importantly the cultural and historic resources potentially at risk. There is a presumption that more, not less detail would accompany the preliminary maps because the NEPA process requires the authorizing agency to prepare a “coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989)). Indeed, NEPA’s purpose is to protect against uninformed decision-making by requiring agencies to “the fullest extent possible . . . [to] use all practicable means . . . to avoid or minimize any possible adverse effects [] upon the quality of the human environment.” 40 C.F.R. § 1500.2(f). Participation is a critical component of the NEPA process, and the agency must ensure that “environmental information is available to public officials and citizens before decisions are made and before actions are taken . . . public scrutiny [is] essential to implementing NEPA.” Id. § 1500.1(a)(b). Further, NEPA requires the agency to take a “hard look” at the potential environmental consequences of the proposed action by assessing impacts and effects that include: “ecological, aesthetic, historic, cultural, economic, social, or health,

whether direct, indirect, or cumulative,” something that can only be satisfied by the disclosure of information. Id. § 1508.8.

The preliminary maps’ lack of detail makes it difficult for the interested public, as well as State and local government entities and Native American tribes, to discern whether the corridors are within or adjacent to significant cultural and historic resources. In fact, it is difficult to comprehend whether the proposed sites for the corridors are within specially designated areas, such as National Monuments, National Conservation Areas, Wilderness Areas, National Parks, and National Historic Trails. For example, it is unclear whether a corridor would run through the southwest side of the Grand Staircase-Escalante National Monument in Utah, along Johnson Canyon Road and US Highway 89. Grand Staircase-Escalante was designated as a national monument in part to protect and preserve significant cultural resources. Over 4,000 cultural sites have been recorded within the Monument, even though only 3 percent of the 1.7 million acres has been surveyed. It also is unclear whether a corridor would run through the middle of the Sonoran Desert National Monument in Arizona, which has nationally significant landscapes with cultural resources, including the Juan Bautista de Anza National Historic Trail. These are just two notable examples of where deficient detail and insufficient disclosure of information disrupts the commenting process.

In short, allowing the public this additional opportunity to comment on the preliminary location of the Energy Corridors accomplishes nothing because of the insufficient details about the proposed corridor designations. Instead, it creates further confusion and concern about the agencies’ ability or intention to disclose specific, concrete information about the proposed locations, alternative locations, existing resource conditions within these areas, and the potential environmental consequences to significant natural and cultural resources. Whether the vagueness of the information is intentional or not, the ambiguity about the location of the proposed corridor hinders the public’s ability to meaningfully participate in the decisionmaking process. The agencies should seek to disclose specific information about the location of the Energy Corridors either by publishing a more detailed map with exact locations, or at a minimum providing exact information within the Draft PEIS.

2. NEPA Requires that the Agencies Incorporate Greater Detail Into the Draft PEIS.

The deficient preliminary maps raise concern about the level of detail that the agencies intend to provide in the Draft PEIS. Although the process of designating the Energy Corridor has been termed “programmatic,” the agencies are not excused from providing specific details about the Energy Corridor. The fact is that the decisions made in the PEIS will irretrievably commit the identified corridors to one use – a 3,500-foot right-of-way for all future energy transmission activities. In other words, future site-specific decisions about energy transmissions will not examine whether the location should occur within the designated corridor. Therefore, it is inappropriate for the agencies to defer the disclosure of details about the proposed corridors or an analysis of impacts until they review site-specific actions proposed within those corridors.

To ensure that the Draft PEIS satisfies NEPA's requirements, the agencies should incorporate the following information:

- **The PEIS Should Offer a Reasonable Range of Alternatives.**

NEPA requires the agencies to analyze a reasonable range of alternatives. 40 C.F.R. § 1502.14. The CEQ regulations describe the alternative requirement as the “heart of the environmental impact statement.” Id. The purpose of the alternative requirement is to prevent the impact statement from becoming a “foreordained formality.” City of New York v. Department of Transp., 715 F.2d 732, 743 (2nd Cir. 1983). Whether an alternative is “reasonable” or not turns on whether it will accomplish the stated purpose for the project. Custer County Action Ass’n v. Garvey, 256 F.3d 1024, 1041 (10th Cir. 2001).

With respect to the proposed Energy Corridor, the Draft PEIS should evaluate a broad range of alternative locations for the corridors. The Draft PEIS should provide alternatives that are not within specially designated public lands, and should examine alternative locations that use existing right-of-ways and/or locate the corridors near interstate highways and other transportation corridors. These alternatives should include an evaluation of potentially allowable uses within the corridors. Also, the Draft PEIS must include enough information to allow the agencies to “rigorously explore and objectively evaluate” each alternative. 40 § C.F.R. 1502.14(a). Dubois v. U.S. Dep’t of Agric., 102 F.3d 1273, 1278 (1st Cir. 1996) (an alternative that has a reasonable probability to avoid “serious adverse consequences” must be explored).

Finally, the agencies should provide additional information about the dimensions and eventual layout of the corridors for each alternative. The Energy Policy Act states that “a corridor designated under this section shall, at a minimum, specify the centerline, width, and compatible uses of the corridor.” Energy Policy Act of 2005, Pub. L. No. 109-58, 2005. The corridors are currently designated at 3,500-foot wide, but questions remain as to why most of the corridors are 3,500-foot wide, whether they will be uniformly the same size, and what is the likelihood they will expand after designation? The answers to these questions will help the public determine whether cultural and historic resources will be immediately impacted and how they might be impacted in the future. Such information should be explained clearly in the alternatives section of the Draft PEIS.

- **The PEIS Must Provide Sufficient Baseline Information about the Affected Environment.**

The PEIS must provide adequate baseline data and information, including a description of cultural and historic resources and their condition within the area of the proposed Energy Corridors. NEPA's regulations require the agency to “describe the environment of the area(s) to be affected or created by the alternative under consideration.” 40 C.F.R § 1502.15. Establishing

baseline conditions of the affected environment is an essential requirement of the NEPA process. See Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988) ("without establishing . . . baseline conditions . . . , there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA"). Only with adequate disclosure of information can the public comprehend, with sufficient particularity, the cultural and historic resources affected by the corridor designations.

Moreover, a lack of specificity about the location of the Energy Corridors makes it difficult for the public and other governmental entities' to provide information about known cultural and historic resource within the proposed corridors. This also is important because of the number of undiscovered cultural properties on federal lands. For example, only 6 percent of BLM lands have been inventoried, which has led to the discovery of over 263,000 cultural properties. BLM, "Preserve America" Report, (Sept. 2004). BLM lands have an estimated 4 to 4.5 million cultural properties. Id.

- **The PEIS Should Adequately Evaluate the Environmental Consequences of the Energy Corridor Designations on Cultural and Historic Resources.**
 - The PEIS Should Provide Sufficient Analysis of Direct and Indirect Effects on Cultural and Historic Resources.

NEPA requires the agency to describe and evaluate the direct and indirect environmental consequences of the proposed action. 40 C.F.R. § 1502.16(a-b); see also Custer County Action Assoc. v. Garvey, 256 F.3d 1024, 1035 (10th Cir. 2001). The NEPA regulations define indirect impacts as those that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. . . ." 40 C.F.R. § 1508.8(b). If the agencies are uncertain of relevant environmental information, or the information is unavailable, the agencies' ability to prepare an adequate impact statement may be jeopardized. "Reasonable forecasting" is an implicit agency duty under NEPA. Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973). According to the court, federal agencies are responsible for predicting environmental effects of proposals, even if those effects are not fully known. Id.; see also Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984) ("Reasonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'").

Since it is not only "reasonably possible" to analyze the environmental impacts of the proposed energy corridors on cultural resources, but also likely that such impacts will occur, the agencies should analyze those potential impacts in the PEIS and also provide such information to the public. See Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002). The agencies cannot defer an evaluation of the direct and indirect impacts of the Energy Corridor because the corridor designation in this PEIS represents an irretrievable commitment of the

3,500-foot right-of-way to energy transmission. Specifically, the agencies should evaluate the indirect impacts of ancillary activities connected with energy development projects that could increase access to cultural resources, and as a consequence negatively impact those resources. Additionally, the agencies should look to the overall effect on the landscapes of the 11 Western states and the many resources it contains, especially when the integrity of cultural resources is closely tied to the landscape setting, such as historic trails and traditional cultural properties (TCPs) significant to Native American tribes.

- The PEIS Should Provide Sufficient Analysis of Cumulative Effects on Cultural and Historic Resources.

According to NEPA, the agencies have an obligation to take a “hard look” at the potential environmental consequences of cumulative impacts. 40 C.F.R. § 1508.25(c)(3); see also Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.2d 1372, 1379 (Forest Service must “consider cumulative impacts”). Cumulative impacts are the compounding of an action on “other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.” 40 C.F.R. § 1508.7 (emphasis added). These impacts “can result from individually minor but collectively significant actions taking place over a period of time.” Id. As summarized in Muckleshoot Indian Tribe v. U.S. Forest Service:

[A]n EIS must ‘catalogue adequately the relevant past projects in the area.’ It must also include a ‘useful analysis of the cumulative impacts of past, present and future projects.’ This requires ‘discussion of how [future] projects together with the proposed . . . project will affect [the environment].’ The EIS must analyze the combined effects of the actions in sufficient detail to be ‘useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts.’ Detail is therefore required in describing the cumulative effects of a proposed action with other proposed actions.

177 F.3d 800, 809-10 (9th Cir. 1999) (quoting City of Carmel-By-The-Sea v. U.S. Dept. of Transp., 123 F.3d 1142, 1160 (9th Cir. 1997) (citations omitted)).

The PEIS should include an analysis of the cumulative impacts of both the proposed energy corridors and other foreseeable connected activities within the same general areas. For example, many foreseeable energy developments will occur in connection to the designation of the corridors. These projects will increase the level of impact on the surrounding areas. It is important for the agencies to provide adequate information in order to assess the potential impacts on historic and cultural resources.

- **Provide Reasonable, Programmatic Mitigation Measures.**

Finally, the Draft PEIS must examine ways to mitigate impacts to cultural and historic resources. NEPA requires BLM to “[i]nclude [in the EIS] appropriate mitigation measures not already included in the proposed action or alternatives.” 40 C.F.R. § 1502.14(f). The analysis should include “a discussion of possible mitigation measures to avoid adverse environmental impacts . . . and must be reasonably complete in order to properly evaluate the severity of the adverse effects of a proposed project prior to making a final decision.” Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1173 (10th Cir. 1999) (internal citations omitted). “It is not enough to merely list possible mitigation measures.” Id. Rather, mitigation measures should be supported by analytical data. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). BLM must analyze mitigation measures in detail and explain how effective the measures would be. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.20.

3. The Agencies Must Satisfy the Requirements of Section 106 of the National Historic Preservation Act Prior to Approving the Energy Corridor.

The agencies’ designation of the Energy Corridor requires compliance with Section 106 of the NHPA prior to approval to ensure that effects on cultural and historic properties are “taken into account.” Congress enacted the NHPA because “the preservation of [the Nation’s] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, esthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.” 16 U.S.C. § 470(b)(4). The NHPA provides that it shall be the policy of the federal government to “administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations.” Id. § 470-1(3). Importantly, Congress did not exempt the NHPA requirements from the Energy Corridor designation with the Energy Policy Act of 2005. See Energy Policy Act of 2005, Pub. L. No. 109-58, 2005.

Section 106 of the NHPA prohibits federal agencies from approving or engaging in any federal undertaking unless the agency first: (1) considers the potential effects of the project on any historic properties that are listed or eligible for listing in the National Register, and (2) allows the Advisory Council on Historic Preservation an opportunity to comment on the undertaking. Id. § 470f. The Advisory Council’s regulations, as required by the NHPA, establish the mandatory procedural requirements for compliance with Section 106, which are binding on all federal agencies. Id. § 470s; see 36 C.F.R. Part 800 (as amended 2000). The agencies are required to complete the Section 106 review and consultation process “prior to”

approving the expenditure of any federal funds on an “undertaking.” 16 U.S.C. § 470f; 36 C.F.R. § 800.1(c).¹

The agencies must “ensure” that Section 106 review is initiated early in the planning process so that a broad range of alternatives can be considered. 36 C.F.R. § 800.1(c). The regulations do allow agencies to engage in “nondestructive project planning activities” before completing the Section 106 review. *Id.* However, if those planning activities “restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties,” as is the case here, then prior compliance with Section 106 is required. *Id.*; see also *Yerger v. Robertson*, 981 F.2d 460 (9th Cir. 1992). The Energy Corridor designation cannot be construed as a “nondestructive project planning activity” because the programmatic decisions made within the PEIS will foreclose the agencies’ ability to consider a sufficient range of alternatives associated with future energy transmission decisions within the corridors. That is, the authorizing agency’s opportunity to alter subsequent energy transmission proposals will be limited, as the general location of the energy transmission will be bound by the 3,500-foot corridor.

The National Trust is concerned about the agencies’ failure to initiate the Section 106 process; there simply is no indication that the agencies have initiated the Section 106 process for the Energy Corridor designations. The proposed Energy Corridors will commit large corridors of federal public land, as well as non-federal land, to uses that could destroy the integrity of countless significant cultural and historic resources. Deferring the identification and examination of cultural resources until later energy transmission decisions is not an option. Therefore, until the agencies complete the Section 106 process, the reach of destruction will be unknown, making it difficult if not impossible to address the effects in the future, and leaving the agencies’ approval of the corridors susceptible to a legal challenge.

Importantly, the agencies’ failure to initiate the Section 106 process effectively excludes an important element of the decisionmaking process, i.e., the ability of consulting parties and the

¹ The application of Section 106 involves an initial two-step inquiry to determine whether the action is an undertaking, and if so, whether it has the potential to adversely affect historic properties. 36 C.F.R. §§ 800.3(a), 800.16(y); see *Montana Wilderness Association v. Fry*, 310 F. Supp.2d 1127, 1152 (D. Mont. 2004). “Undertaking” is defined broadly to include any “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.” 16 U.S.C. § 470w(7). Undertakings may have adverse effects if they have the potential to “alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, . . . setting, . . . feeling, or association.” 36 C.F.R. § 800.5(a). The Energy Corridor designation is an “undertaking,” as defined by the NHPA, likely to have adverse effects on significant cultural and historic properties.

public to participate.² Tribal consultation is especially critical because the identification of traditional cultural properties (TCPs) and sacred sites must occur through a consultation process between the agency and affected tribal officials.³ 16 U.S.C. § 470a(d)(6)(B). Unlike other historic properties, which are tangible, TCPs may involve large and amorphous boundaries, and their significant attributes can often be ascribed to “extensive views of natural landscape without modern intrusions.”⁴ Within the West, there are many sensitive tribal resources on federal and tribal property that could be adversely affected by the Energy Corridor. The preliminary maps seem to underscore the need to initiate Section 106 consultation with tribes and other consulting parties as early as possible. If tribes and consulting parties had better, more clearly defined maps, these participants in the process could provide the agencies with details of cultural and historic properties potentially at risk, and propose solutions for resolving any potential conflicts.

The National Trust strongly recommends that the agencies initiate the Section 106 process in accordance with the Section 106 regulations. In particular, the agencies must seek to: (1) “make a reasonable and good faith effort” to identify historic properties, 36 C.F.R. § 800.4(b)(1); (2) determine the eligibility of historic properties for the National Register of Historic Places, *id.* § 800.4(c); (3) assess any effects the undertaking may have on historic properties, *id.* 800.5; and (4) if the effects are adverse, develop and evaluate alternatives or modifications to the project in order to avoid, minimize, or mitigate the adverse effects, based on consultation with the SHPO, Indian tribes, the ACHP, and other consulting parties, *id.* § 800.6(a).

In the alternative, the agencies may initiate a programmatic agreement in accordance with 36 C.F.R. § 800.14. The programmatic agreement would need to be negotiated between the Advisory Council and the agency official, and involve other consulting parties such as appropriate SHPO/THPOs, the National Conference of State Historic Preservation Officers, Indian tribes, other Federal agencies, and members of the public. The programmatic agreement

² The Section 106 process “seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning.” 36 C.F.R. § 800.1(a).

³ The Section 106 regulations clarify that the agency must make a “reasonable and good faith effort” to provide Indian tribes with a “reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” 36 C.F.R. § 800.2(c)(2)(ii)(A); see Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

⁴ Patricia Parker and Thomas F. King, National Register Bulletin No. 38 – Guidelines for Evaluating and Documenting Traditional Cultural Properties, at <http://www.cr.nps.gov/nr/publications/bulletins/nrb38/>.

Ms. Julia Souder
Office of Electricity Delivery and Energy Reliability
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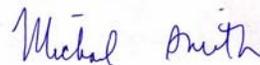
would help to establish a method for resolving the Energy Corridor's potential adverse effects to cultural and historic resources.

For either scenario, given the magnitude of the Energy Corridor designation and the fact that the designation involves many different federal, State, and private lands, we strongly suggest that the agencies engage the Advisory Council and the 11 SHPOs to determine the best way to proceed and satisfy their Section 106 responsibilities.

In conclusion, the National Trust appreciates the opportunity to raise some initial concerns with the preliminary maps and the decisionmaking process for the proposed West-wide Energy Corridor. The lack of sufficient detail regarding the preliminary maps, and the lack of an opportunity for the public to provide substantive comments regarding the placement of the corridors, especially as it relates to information about potentially affected cultural and historic resources, raises serious questions about the agencies' ability to comply with NEPA. In addition, we are concerned with the agencies failure to initiate Section 106 of the NHPA. We hope the agencies will seek to resolve our concerns as the NEPA process moves forward and the Section 106 process is initiated.

The National Trust looks forward to reviewing the Draft PEIS and participating in the Section 106 process. If you have any questions regarding our comments, please feel free to contact me directly at (202)588-6035.

Respectfully submitted,



Michael Smith
Assistant General Counsel

Cc: Reid Nelson, ACHP, Washington, DC
Michael Kaczor, Federal Preservation Officer, U.S. Forest Service
Kate Winthrop, Acting Historic Preservation Officer, BLM
Barb Pahl, Mountains/Plains Regional Director, NTHP
Daniel Carey, Southwest Regional Director, NTHP
Anthea Hartig, Western Regional Director, NTHP