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National Environmental Policy Act - Destruction of Buildings on the National Register

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NATIONAL ENVIRONMENTAL POLICY ACT—DESTRUCTION OF BUILDINGS ON THE NATIONAL REGISTER

The Ninth Circuit holds that a change in federal funding for a downtown redevelopment project requires environmental review, but rejects a *per se* rule requiring the preparation of an environmental impact statement where the destruction of buildings on the National Register is within the scope of the refinanced project. *Preservation Coalition, Inc. v. Pierce,* 667 F.2d 851 (9th Cir. 1982).

INTRODUCTION

As early as the turn of the century Congress saw the need to legislate to protect historic properties. Prior to 1966, the types of historic properties protected by federal legislation were limited primarily to those of "national significance,"[1] and those located on federal lands.[2] In the 1960s, however, public interest in historic preservation gained momentum[3] and Congress passed two acts which greatly expanded the federal role in the protection of historic properties.[4] Both are important in this discussion.

The National Historic Preservation Act of 1966 (NHPA) has as its primary goal the protection and preservation of historic properties,[5] and provides for the creation and maintenance of a National Register of Historic Places.[6] Further, the Act provides for the creation of an Advisory Council on Historic Preservation[7] and specifies the duties and obligations of the Council.[8] Federal agencies must consult with the Advisory Council before taking any action that would affect buildings included on or eligible for listing on the National Register.[9] The consultation process may result in a Memorandum of Agreement which binds the signatories to protective measures regarding the historic properties.[10] If a signatory fails to carry out the terms of the Memorandum of Agreement, the federal agency must

1. Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461–67 (1976).
2. Antiquities Act of 1906, 16 U.S.C. §§ 431–33 (1976).
3. *See generally,* Stipe, *Why Preserve?* 11 N.C. CENT. L.J. 211 (1980); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation,* 33 STAN. L. REV. 473 (1981); Fowler, *Historic Preservation and the Law Today,* 12 URB. LAW. 3 (1980).
4. National Historic Preservation Act of 1966, 16 U.S.C. §§ 470–70n (1976); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–47 (1976).
5. *See* H.R. Rep. No. 1916, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3307.
6. 16 U.S.C. § 470a(a)(1) (1976).
7. *Id.* at § 470i(a).
8. *Id.* at §§ 470j–70k.
9. *Id.* at § 470f and 36 C.F.R. § 800.6(b) (1982).
10. 36 C.F.R. § 800.6(c) (1982).

again request the Advisory Council's comments.[11] In those cases, the federal agency may not take any action that could result in an adverse effect on property included on or eligible for listing on the National Register until the Advisory Council has had opportunity to comment.[12]

Congress enacted the National Environmental Policy Act of 1969 (NEPA) to insure that federal agencies adequately consider environmental factors before taking action which affects the quality of the human environment,[13] and to insure that the public has opportunity to study and comment upon proposed agency action.[14] The Act has as one of its goals the preservation of "important historic, cultural and natural aspects of our national heritage. . . ."[15] Groups seeking to preserve historic properties have often sought, pursuant to NEPA, judicial review of agency action affecting those properties.[16]

The environmental review provisions of NEPA require the preparation of an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."[17] Generally, the federal agency, in order to determine whether the proposed agency actions will signficantly affect the quality of the human environment, prepares an Environmental Assessment (EA) of the proposed action.[18] Additionally, in many instances the federal agency may share responsibility for the preparation of the EA with a state or local agency.[19] If the agency preparing the EA makes a finding of no signficant impact (FONSI), then no EIS is required.[20] If, on the other hand, the agency determines that the proposed action will have a significant impact, NEPA requires an EIS.[21] Challenges to FONSI's are the subject of much NEPA litigation and the circuits are split on the standard to apply in reviewing a FONSI.[22]

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11. *Id.* at § 800.6(c)(3).
12. *Id.*
13. 42 U.S.C. § 4331 (1976).
14. *Id.* at § 4331(c).
15. *Id.* at § 4331(b)(4).
16. *See e.g.*, Wisconsin Heritage, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis.), *modified* 490 F. Supp. 1334 (E.D. Wis. 1980); National Center for Preservation Law v. Landrieu, 496 F. Supp. 716 (D.S.C.); *aff'd per curiam* 635 F.2d 324 (4th Cir. 1980); WATCH v. Harris, 603 F.2d 310 (2nd Cir.), *cert. denied sub nom.*, Waterbury Urban Renewal Agency v. WATCH, 444 U.S. 995 (1979); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).
17. 42 U.S.C. § 4332(2)(C) (1976).
18. 40 C.F.R. §§ 1501.4(c), 1508.9 (1982).
19. *Id.* at § 1501.5(b).
20. *Id.* at §§ 1501.4(e), 1508.13.
21. *Id.* at § 1501.4(c).
22. *Compare* Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976); Hanley v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); and First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1381 (7th Cir. 1973) (arbitrary and capricious standard of review) *with* Portela v. Pierce, 650 F.2d 210, 213 (9th Cir. 1981); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973); Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974); and Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973) (reasonableness standard of review).

The historic preservation goals of NHPA and NEPA frequently affect projects and programs administered by the Department of Housing and Urban Development (HUD). Since HUD is often responsible for administering financial assistance to urban renewal programs, HUD's actions often affect buildings in downtown urban areas which are included on or are eligible for listing on the National Register. Whenever HUD's actions affect such buildings, the review provisions of NEPA and NHPA apply.

A recent Ninth Circuit opinion, *Preservation Coalition, Inc. v. Pierce*,[23] concluded that an agreement between a Boise, Idaho, municipal redevelopment agency and HUD which converted funding for a downtown redevelopment project from urban renewal loan and grant funds to Community Development Block Grant (CDBG) funds required environmental review pursuant to HUD regulations. The court, however, refused to apply a *per se* rule requiring the preparation of an Environmental Impact Statement (EIS) whenever agency action results in the destruction of National Register buildings.

FACTUAL BACKGROUND

In 1969 and 1971, HUD and the Boise Redevelopment Agency (BRA) entered into loan and grant contracts to fund an urban renewal project covering several blocks in downtown Boise. In 1971 the BRA prepared an environmental assessment covering both contracts which concluded that the project would have no significant environmental impact, and that therefore no EIS was required for the project. HUD approved the BRA's finding of no significant impact.

Contractors cleared portions of the project site between 1972 and 1978, but did not undertake any construction during that time. Meanwhile, a 1973 historic preservation survey of downtown Boise, and the project area, resulted in the listing of seven buildings on the National Register in 1974. The BRA signed Memoranda of Agreement regarding the buildings in 1974. In 1975 the BRA prepared an updated environmental assessment of the project which, like the 1971 environmental assessment, concluded that the project would have no significant impact. In 1978 the Eastman Building was added to the National Register, and in 1979 the BRA signed a Memorandum of Agreement regarding that building.[24]

In 1979, the BRA converted funding for the redevelopment project from urban renewal loan and grant funds to Community Development Block Grant (CDBG) funds by entering into a "financial settlement" with HUD.[25] The financial settlement allowed the BRA to pay off existing

23. 667 F.2d 851 (9th Cir. 1982).

24. The court did not decide whether the defendants had violated NHPA, and did not discuss the terms of the Memorandum of Agreement.

25. The CDBG program was an effort by the federal governmnet to consolidate "complex and overlapping programs of financial assistance to communities of varying sizes and needs into a consistent system of federal aid . . ." 24 C.F.R. 570.2(b) (1980).

project loans, and to apply the remainder of the CDBG funds to the completion of the project. Further, and more importantly, the funding conversion allowed the BRA to apply CDBG funds toward construction of a 3000 space parking garage. The BRA could not have used urban renewal loan and grant funds for that purpose.

The BRA, pursuant to HUD regulations governing financial settlements, prepared and submitted to HUD an environmental assessment (EA) of the entire project, including the parking garage. The EA addressed the effects the redevelopment project would have on the historic environment, the air quality, the noise level, and traffic congestion in Boise and concluded that the project would have no significant impacts. HUD approved the EA and Preservation Coalition, Inc. (Coalition) brought suit challenging HUD's approval. The Coalition's central contention was that the destruction of buildings on the National Register *per se* significantly affects the quality of the human environment and that therefore the BRA was required to prepare an EIS.

The district court found that the doctrine of laches barred the Coalition's claims against the BRA. Alternatively, the court concluded that the BRA's clearance finding or FONSI was reasonable, and that, therefore, the BRA was not required to prepare an EIS of the redevelopment project. Further, the district court concluded that the BRA's decision to demolish or substantially alter buildings on the National Register did not violate NHPA. The Coalition appealed the NEPA findings only. The National Trust for Historic Preservation (National Trust) filed an amicus brief which challenged the NHPA findings.

THE DECISION

The Ninth Circuit Court of Appeals first held that the doctrine of laches did not bar the Coalition's claims against the BRA.[26] The court then concluded that the conversion of funding for the project from urban renewal loan and grant funds to CDBG funds required environmental review pursuant to HUD regulations.[27] The court, although it concluded that the funding conversion required environmental review, held that the BRA's EA and FONSI were reasonable and that therefore the BRA was not required to prepare an EIS.[28] Further, the court held that the NHPA claims were not properly before the court, and did not address those claims.[29]

26. 667 F.2d at 855.
27. *Id.* at 856.
28. *Id.* at 858–61.
29. *Id.* at 862.

Doctrine of Laches

The court of appeals held that the application of the doctrine of laches is discretionary, but that the district court had not properly applied the doctrine. The court of appeals stated the district court could not apply the doctrine unless it "properly found (a) lack of diligence by the party against whom the defense is asserted, and (b) prejudice to the party asserting the defense."[30] The district court determined that June 28, 1971, the date the BRA and HUD entered into the second loan and grant contract, was the relevant date for determining whether the Coalition had been diligent. Since the Coalition did not file suit until 1979, the district court reasoned that the Coalition had not been diligent. The court of appeals rejected that analysis.

The court of appeals concluded that May 1979, the date the BRA decided to destroy National Register buildings, was the relevant date. The court concluded that since the Coalition, upon learning of the BRA's decision, had promptly complained to HUD that an EIS was required, and had filed suit immediately after HUD announced that no EIS was required, the Coalition had been diligent. Further, the court determined that the BRA would not be prejudiced by the maintenance of the suit since no project construction had taken place. The court of appeals held that the Coalition's claims were not barred by the doctrine of laches.

Environmental Review of the Funding Conversion

The Coalition argued that HUD's approval of the funding conversion was tantamount to HUD's authorizing the construction of a 3000 car parking facility. It argued that since CDBG funds would be used to construct the facility, whereas urban renewal funds could not have been used for that purpose, the funding conversion itself caused all the environmental impacts associated with the construction of a major parking facility. The Coalition argued that HUD's "authorization" of the parking structure was a "major federal action significantly affecting the human environment" and that the BRA was therefore required to prepare an EIS.

The court of appeals rejected the Coalition's contentions. The court determined that the parking structure, although not funded by the previous loan and grant contract, was a part of the original redevelopment plan. Under that plan the BRA committed itself to raise funds for the parking structure to satisfy state matching requirements. The court reasoned that the funding conversion did no more than finance that which the BRA considered necessary for the completion of the project. The court therefore determined that the BRA's 1971 and 1975 EA findings of no significant impact were still valid. The court did not, however, discuss whether the

30. *Id.* at 854.

previous EA's had addressed the impact that the parking structure would have on downtown Boise.

The court compared the facts in this case to those in *San Francisco Tomorrow v. Romney*.[31] There the Ninth Circuit held that a grant of additional funds to cover increased land acquisition and relocation costs was not "further major federal action" within the meaning of NEPA and that, therefore, no further environmental review was required. The *Preservation* court likened the funding conversion to the grant of additional funds in *San Francisco Tomorrow*. The court stated ". . .the shift from urban renewal funds to CDBG funds does not affect the fundamental nature of the project, nor inject into it a new aspect *which has never been considered*"[32] [emphasis supplied]. As noted *supra*, however, the court did not discuss whether the EA's prepared in 1971 and 1975 had addressed the parking structure.

The *Preservation* court, although it determined that the funding conversion was not tantamount to HUD's authorizing construction of a previously unconsidered parking garage, and hence did not require environmental review for that reason, concluded that the funding conversion did require environmental review under then-applicable HUD regulations. The then-applicable HUD regulations provided that where "previously conducted environmental reviews are insufficient due to changed circumstances, including the availability of additional data or advances in technology, [the project] must be subjected to an original or updated environmental review. . . ."[33] Further, the regulations provided that where an applicant proposed a financial settlement of an urban renewal project prior to substantial completion, the proposal was deemed a "project" subject to environmental review.[34]

The court found that because the Eastman Building had been added to the National Register subsequent to the preparation of the 1971 and 1975 environmental assessments, conditions had changed and an updated environmental review was required. The court also found that BRA was required to prepare an environmental assessment of the financial settlement. The BRA did in fact prepare an environmental assessment in 1979 which took into account changed circumstances, including the addition of buildings in the project area to the National Register, and the impact of the financial settlement. The BRA made a "clearance finding" of no significant impacts, and HUD approved the finding.

31. 472 F.2d 1021 (9th Cir. 1973).
32. 667 F.2d at 856.
33. 24 C.F.R. § 58.19(a) (1979).
34. *Id.* at § 58.20.

Standard of Review—Rejection of a Per Se Rule

The court of appeals reviewed the BRA's clearance finding and, applying a "reasonableness" standard of review, upheld the BRA's determination of no significant impact. The Coalition's principal contention was that the BRA's finding of no significant impact was *per se* unreasonable since the BRA contemplated, as part of the project, the destruction of a National Register building. The court of appeals recognized that the Second Circuit has apparently adopted a *per se* rule requiring the preparation of an EIS whenever National Register buildings are affected by a project,[35] but refused to apply such a rule. The court stated that such a rule is "inconsistent with at least the spirit of *San Francisco Tomorrow v. Romney.*"[36]

The court further reasoned that a *per se* rule was unreasonable because it would place too much of a burden on agencies. The court determined that the environmental assessment is a necessary and desirable screening device which relieves agencies of the responsibility of preparing unnecessary and expensive environmental impact statements. The court concluded that a *per se* rule would unnecessarily remove the environmental assessment screen since it would *require* the preparation of an EIS.

The court, although it rejected a *per se* rule, required that the BRA's finding of no significant impact be "reasonable." At the outset of its analysis the court stated that ". . . judgments of historical significance made by the Advisory Council on Historic Preservation . . . deserve great weight."[37] The court further stated, however, that ". . . compliance with NHPA, even when it exists, does not assure compliance with NEPA."[38] The court did not discuss whether the BRA had complied with NHPA, nor did it discuss whether the BRA had complied with the terms of the Memorada of Agreement regarding the protected buildings.

The BRA concluded that the project would not significantly affect the historic environment in downtown Boise. The BRA relied primarily upon a report prepared by an architect which concluded that other buildings in the downtown area better represent the architecturally significant features of the building scheduled for demolition. The court stated, "[o]n balance, the careful manner in which the BRA considered historic information and the thoroughness of its statement explaining its decision not to require

35. WATCH v. Harris, 603 F.2d 310 (2nd Cir.), *cert. denied sub nom,* Waterbury Urban Renewal Agency v. WATCH, 444 U.S. 995 (1979).

36. 667 F.2d at 857; *see supra,* text accompanying notes 28 and 29.

37. 667 F.2d at 858.

38. *Id.* at 859.

an EIS convinces us that the BRA's finding of no significant impact on the historic environment was reasonable."[39]

The court criticized BRA's methodology in determining that the project would have no significant impacts on air quality but nevertheless upheld the determination. The BRA proposed mitigation measures to reduce the impact of the project on the air quality and produce an overall result of no significant impact. The court found that BRA's reliance on mitigation measures proposed to be taken by public and private bodies not controlled by the BRA or City of Boise was "improper." The court, however, found that the record adequately described mitigation measures which *were* under the control of the BRA and the City of Boise, and hence concluded that the finding of no significant impact on the air quality was reasonable.

The court also upheld the BRA's determination that the project would not have significant impacts on noise level or traffic congestion. The court noted that where a federal project conforms to local zoning ordinances and land use plans, such conformity is evidence supporting a finding of no significant impact. The court determined that the urban renewal project did not change land use patterns. The primary effect of the project was to "reverse and mitigate existing adverse environmental trends and conditions by replacing an obsolete and deteriorating retail commercial area with a new one."[40] The court concluded that the finding of no significant impacts on noise level and traffic congestion was reasonable.

NHPA Claims

The court refused to consider the NHPA claims asserted by the amicus National Trust. The Coalition, although it did assert NHPA claims in district court, chose not to do so on appeal. The court held that the amicus could not, itself, place the issue before the court on appeal since the amicus was not a party below. The court suggested that the amicus should have intervened instead of appearing as amicus.

ANALYSIS

The *Preservation* court asserted that the funding conversion, although it allowed the BRA to spend federal money on a parking garage, did not "affect the fundamental nature of the project, nor inject into it a new aspect which ha[d] never been considered."[41] Therefore, the court concluded, the funding conversion was not the equivalent of HUD's authorizing construction of a previously unconsidered parking garage. The

39. *Id.* at 859–60.

40. *Id.* at 861 (*citing,* Central Oklahoma Preservation Alliance v. Oklahoma City, 471 F.Supp. 68, 78 (W.D. Okl. 1979)).

41. 667 F.2d at 856.

court conspicuously, however, made no mention of whether the impacts of the parking garage had, in the 1971 and 1975 EA's, been considered and discussed.

In this case, the BRA addressed the environmental impacts of the parking garage in the 1979 EA, because then-applicable HUD regulations required it to do so. Under 24 C.F.R. §58.19 the BRA was required to prepare updated environmental review of the entire project because the EA's which it prepared in 1971 and 1975 were "insufficient due to changed circumstances."[42] Those "changed circumstances" were the addition of the Eastman Building to the National Register in 1979. Further, 24 C.F.R. §58.20 required the BRA to prepare an "assessment of the environmental consequences of the financial settlement" itself.[43]

Current 24 C.F.R. §58.20, like its predecessor, requires an applicant for a financial settlement to prepare an assessment of the environmental consequences of the *financial settlement*.[44] Current 24 C.F.R. §58.19, however, has been substantially revised. Now the regulation does not require updated environmental review of ongoing projects unless *no* environmental review has previously been completed, or a prior *EIS* is insufficient under regulations governing the use of prior EIS's.[45] The regulation does not specifically require updated environmental review if a clearance finding of no signficant impacts has been approved, even if there are changed circumstances (e.g., addition of buildings in the project area to the National Register).[46]

The *Preservation* court determined that the financial settlement, although it allowed the BRA to spend federal money on a parking garage, did not for that reason trigger NEPA environmental review requirements. The court reasoned that only 24 C.F.R. §58.19 required the BRA to prepare an EA of the entire project. If, however, current 24 C.F.R. §58.19 had been in effect, the BRA would not have been required, because of the addition of buildings in the project area to the National Register, to prepare updated environmental review of the entire project.[47] Hence, the

42. 24 C.F.R. §58.19(a) (1979).

43. *Id.* at §58.20(a)(2).

44. 24 C.F.R. §58.20(a)(2) (1982).

45. *Id.* at §58.19(c)(2).

46. The *Preservation* court concluded, without discussing the language of current §58.19, that "it appears that under the new regulations supplementary review would still be required [where circumstances have changes significantly]." The court further concluded, "[i]f the regulations do not demand such supplementation, the statute itself [NEPA] probably requires it." The court noted, however, "[s]upplementation of an environmental assessment after designation of historic buildings in the project area to the National Register would not, of course, be required where applicable environmental review has been previously carried out in a timely and proper manner." [citation obmitted] 667 F.2d at 851 n.1. The court did not, however, discuss whether in this case the EA's prepared in 1971 and 1975 had adequately addressed the impacts of the parking garage. *See supra,* text accompanying notes 28 and 29.

47. *See supra,* note 45.

impacts of the parking garage would not have been spcifically considered and addressed in 1979.

The reasoning in *Preservation* suggests a loophole through which local agencies might avoid NEPA obligations. Where a change in funding allows a local agency to spend money for purposes not originally authorized, the agency could claim that the later purposes are within the original "planned scope of the project," that an EA was previously approved for the project, and that therefore, it is not required to prepare updated environmental review. Under current 24 C.F.R. §58.19 the agency would not specifically be required to prepare an updated environmental review if an EA clearance finding (FONSI) had previously been approved. Under current 24 C.F.R. §58.20 the agency would have to assess the environmental consequences of the financial settlement, but not of any aspects of the project within the original "planned scope of the project."

The *Preservation* court rejected a *per se* rule requiring the preparation of an environmental impact statement where the destruction of buildings on the National Register is contemplated. The court instead held that an environmental assessment must consider the effects of a project on the historic environment, and that if through the assessment process the agency concludes that the project has no significant affects, the court must determine whether the finding is "reasonable." The court, after reviewing all of the evidence before the lower court, concluded that the BRA's finding was "reasonable" and upheld the BRA's decision not to prepare an EIS.[48]

In jurisdictions where a court applies a "reasonableness" standard in reviewing an agency's decision not to prepare an EIS, a *per se* rule requiring the preparation of an EIS is unnecessarily burdensome. The court, in applying the reasonableness standard, must have a fully developed administrative record before it, and may consider "supplemental affidavits, depositions, and other proof considering the environmental impact of the project . . . if an inadequate evidentiary development before the agency can be shown."[49] A reasonableness standard of review should insure that an agency FONSI which does not adequately address the impact on the historic environment of the destruction of a building on the National Register will be overturned by the reviewing court.

If, on the other hand, a reviewing court applies an "arbitrary and capricious" standard in reviewing agency decisions, as does the Second Circuit, a *per se* rule may be justifiable. An agency decision not to prepare an EIS where the destruction of buildings listed on the National Register is contemplated may be unreasonable under a reasonableness standard of

48. 667 F.2d at 857–61.

49. Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973).

review but acceptable under an arbitrary and capricious standard. A court applying an arbitrary and capricious standard would be compelled to uphold an agency FONSI unless that finding was clearly arbitrary. "Absent a showing of arbitrary action, [a court] must assume that the agenc[y] [has] exercised [its] discretion appropriately."[50] If a court can overturn a FONSI only if it is arbitrary and capricious, a *per se* rule may be the only way to insure that effects on the historic environment be given adequate consideration.

CONCLUSION

The reasoning in *Preservation* leaves open a loophole through which local agencies might try to "bootstrap" projects onto previously funded projects without having to comply with NEPA. Courts reviewing federal action involving funding changes for NEPA compliance should carefully scrutinize claims by local agencies that proposed construction is within the scope of a previously developed plan. Where proposed construction has not been specifically considered in a previous environmental assessment or EIS, the reviewing court should require that an assessment be performed which does address the proposed construction. Careful review by the courts will insure that agencies comply with the environmental review provisions of NEPA.

Where the destruction of buildings listed on the National Register will result from proposed federal agency action, environmental review is always required by NEPA. Whether the agency should *per se* be required to prepare an EIS in those cases may logically depend on which standard of review the court applies in reviewing a FONSI. If the court applies an arbitrary and capricious standard of review, a *per se* rule requiring the preparation of an EIS may be justifiable since the court will only reverse a FONSI if the agency which prepared the EA was clearly acting arbitrarily in reaching the FONSI. If, on the otherhand, the court applies a reasonableness standard of review, as in *Preservation*, a *per se* rule is probably not justifiable. In those cases, the court should reverse any unreasonable FONSI. Whichever standard of review a court applies, it should bear in mind that the purpose of environmental review of federal agency action affecting National Register properties is to insure that any proposed destruction of architecturally, culturally, or historically significant buildings be carefully considered.

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50. Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976).