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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
13

14 CITY OF BERKELEY; MAYOR AND
15 MEMBERS OF THE CITY COUNCIL
16 OF THE CITY OF BERKELEY,
17 Plaintiffs

NO: _____

18 vs.

**MEMORANDUM IN SUPPORT OF
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

20 UNITED STATES POSTAL SERVICE;
21 PATRICK R. DONAHOE AS POSTMASTER
GENERAL OF THE UNITED STATES
22 POSTAL SERVICE; TOM A. SAMRA,
VICE PRESIDENT-FACILITIES
23 OF THE UNITED STATES POSTAL
24 SERVICE; DIANA ALVARADO, DIRECTOR,
REAL ESTATE, USPS PACIFIC REGION;
25 Defendants.
26
27
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1 **SUMMARY OF ARGUMENT**

2
3 The United States Postal Service (USPS) proposed no later than 19 April 2013 to sell the
4 Berkeley Post Office, and is now on the verge of completing a sale without conducting review
5 required under the National Historic Preservation Act (NHPA) or the National Environmental
6 Policy Act (NEPA). Both NHPA and NEPA require USPS, before disposing of the Berkeley Post
7 Office, a property listed in the National Register of Historic Places in the United States, to publicly
8 evaluate the historic impacts of the proposed sale, which include loss of the property's historic use
9 and public access to the property. These laws also require USPS to evaluate alternatives, proposed
10 either by USPS or the public, which will eliminate or minimize adverse effects of the proposed sale.
11 The USPS failed to conduct historic (NHPA) and environmental (NEPA) review prior to the sale of
12 the property, and has failed even to initiate (let alone complete) environmental review. The USPS
13 decision to sell the property without long-term enforceable protections, and without acknowledging
14 the adverse effects, contrary to the stated position of the federal Advisory Council on Historic
15 Preservation (ACHP), is a clear violation of the NHPA.

16
17 On or about 24 October 2014 USPS disclosed on an official web site that it has entered into
18 an escrow agreement for sale of the Berkeley Post Office. USPS has subsequently refused to
19 disclose the terms of its proposed sale or the proposed future use or owner of the property. On 31
20 October 2014, at approximately 5:45 P.M. Eastern time, USPS announced its conclusion that it had
21 completed its review under NHPA. Because USPS has consistently denied its obligation to conduct
22 public assessment under NEPA, and has refused the City of Berkeley's request for 30 days' notice of
23 the sale and close of escrow, the City believes that USPS will attempt to convey the Post Office
24 property at any moment. To preserve the status quo and enable this Court to review Berkeley's
25 substantial and worthy claims, the Court is asked to enter an immediate restraining order, and on
26 hearing of an order to show cause, a preliminary injunction.

1 The facts and proceedings to date are set forth in the verified complaint, and in the
2 concurrently-filed exhibits (“Ex.”) in support of this memorandum, attached to the verification of
3 Antonio Rossmann at the head of those exhibits.
4

5 **I. THIS COURT’S INJUNCTIVE RELIEF IS NECESSARY TO PREVENT**
6 **IMMEDIATE AND IRREPARABLE HARM FROM SALE OF THE BERKELEY**
7 **MAIN POST OFFICE.**

8 **A. Entering Into a Sale Agreement Creates Reviewable Final Agency Action.**

9 When an agency has issued a definitive statement of its position, determining the rights and
10 obligations of the parties, that action is final for purposes of judicial review, despite the "possibility
11 of further proceedings in the agency" to resolve additional issues. *Bell v. New Jersey*, 461 U.S. 773,
12 779-80 (1983); *Committee for Preservation of the Seattle Federal Reserve Bank Bldg. v. Federal*
13 *Reserve Bank*, 2010 U.S. Dist. LEXIS 26084, *8 (W.D. Wash. 2010) (citing *Bell*). In *Committee for*
14 *Preservation*, which found that the Federal Reserve Bank failed comply with NHPA and NEPA
15 when it agreed to sell a National Register-eligible building to an undisclosed buyer, the district
16 court found that the bank’s entering into a purchase and sale agreement constituted “final agency
17 action” subject to the court’s review. *Id.*

18
19 Similarly here, USPS established reviewable final agency action representing that it is now
20 “in contract” to sell the Berkeley Post Office to an undisclosed purchaser. USPS has not even
21 attempted any NEPA review, and has prematurely concluded the NHPA section 106 consultation
22 process in defiance of ACHP’s warnings—and those of the California State Historic Preservation
23 Officer (SHPO), the City, and the National Trust for Historic Preservation (National Trust)—that
24 USPS has failed to comply with the NHPA. Complaint, §§32-36; Ex. 24 (post office listed as “in
25 contract”); Ex.25 (ACHP letter disputing USPS’s finding of no adverse effects); Ex. 28:3 (USPS
26 letter to ACHP, SHPO and consulting parties “concludes the Section 106 process”); see also Ex. 15,
27 22 (SHPO), Ex. 8, 11, 26 (City); Ex. 5, 9 (National Trust). USPS has also refused the City’s
28

1 requests that it identify the buyer and provide the City 30 days' advance notice prior to sale.
2 Complaint, ¶¶34-35; see also Ex. 26 (city letter); Ex. 27 (USPS response).

3
4 **B. Without this Court's Injunction, Imminent Completion of the Berkeley Post**
5 **Office Sale Will Irreparably Harm Plaintiffs and the Public and Prejudice the**
6 **Court's Review of the Merits.**

7 The standards in the Ninth Circuit for obtaining a temporary restraining order are the same
8 as those for obtaining a preliminary injunction. *State of Alaska v. Native Village of Venetie*, 856
9 F.2d 1384, 1389 (9th Cir. 1988). To obtain a preliminary injunction, plaintiffs must establish that
10 they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence
11 of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the
12 public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Following *Winter*,
13 the Ninth Circuit continues to analyze these four elements using a "sliding scale" approach, in
14 which "the elements of the preliminary injunction test are balanced, so that a stronger showing of
15 one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632
16 F.3d 1127, 1131 (9th Cir. 2011). Where as here, the moving party can demonstrate a very high
17 likelihood of injury, an injunction may be granted when serious questions going to the merits are
18 raised and the balance of hardships tips sharply in the plaintiff's favor. *Id.* at 1135.

19
20 Here, no guesswork is required to identify the immediate threats stemming from USPS's
21 representation that after a century of public ownership, it is now "in contract" to sell the National
22 Register-listed Berkeley Post Office to a seller it has not disclosed. (Complaint, ¶32; Ex. 24-28.)
23 USPS has declined to conduct any NEPA review prior to the imminent sale, and has ended section
24 106 consultation, despite ACHP's disagreement with USPS' refusal to recognize the preservation
25 value of the post office's century of public use. *Id.*, ¶¶33-36; Ex. 25 (ACHP); Ex. 27 (USPS
26 response to ACHP). As ACHP determined, the imminent post office sale is highly likely to change
27 use of the facility, and fails to protect alteration or even demolition of the property if approved by
28 USPS, as both the seller and the proposed "covenant" holder. Complaint, ¶33; Ex.25.)

1 In the case most closely resembling the present one, *National Post Office Collaborate v.*
2 *Donahoe*, 2013 U.S. Dist. LEXIS 154679 (D. Conn. 2013), the court granted plaintiffs' request for
3 a temporary restraining order and preliminary injunction enjoining USPS's sale of its National
4 Register-listed post office in Stamford, Connecticut, until defendants complied with their
5 obligations under NEPA. On the issue of irreparable injury, the court observed that USPS there, as
6 here, had made it clear that it intended to "imminently pass title" to a new owner, making the harm
7 that plaintiffs faced regarding their NEPA claim as immediate as it will ever get. The issuance of a
8 preliminary injunction was appropriate to preserve the relative position of the parties and the court's
9 ability to adjudicate the merits of plaintiffs' NEPA claim. *Id.* at •46; see also *Louis Vuitton*
10 *Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006) ("A preliminary injunction ...
11 seeks generally only to maintain the status quo pending a trial on the merits"). The *Collaborate*
12 court also rejected USPS' claim that its proposed preservation covenant would sufficiently
13 minimize the risk of harm, concluding that this argument "assumes what can only be demonstrated
14 by reasoned analysis" in an EIS or EA, as NEPA requires. *Op. cit.* at •51.

15
16 In at least three specific respects, the imminent sale of the post office threatens irreparable
17 injury to the plaintiff City of Berkeley and its governing board members.¹ First, because the relief
18 plaintiffs seek is USPS's full compliance with NHPA and NEPA before the property sale becomes a
19 *fait accompli*, relief cannot be provided at all through a monetary award or some non-injunctive
20 relief. The Supreme Court has recognized, "Environmental injury, by its nature, can seldom be
21 adequately remedied by money damages and is often permanent or at least of long duration, i.e.,
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¹Berkeley's and its governing board's standing to assert NHPA and NEPA claims is beyond question. See, e.g., *People ex rel. Imperial County Air Pollution Control Dist. v. Department of Interior*, 751 F.3d 1113, 1121(9th Cir. 2014); *Churchill County v. Babbitt*, 150 F.3d 1072, 1077-1091 (9th Cir. 1998); *Douglas County v. Babbitt*, 448 F.3d 1495, 1500-1501 (9th Cir. 1995); *City of Davis v. Coleman*, 521 F.2d 661, 670-673 (9th Cir. 1975); Complaint, ¶52; Ex. 1-3,5,8-9,11,21,26.

1 irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the
2 issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480
3 U.S. 531, 545 (1987).

4
5 Although an injunction does not issue automatically whenever the court identifies a NEPA
6 violation, "an injunction is the appropriate remedy absent unusual circumstances. *City of South*
7 *Pasadena v. Slater*, 56 F.Supp.2d 1106, 1143 (C.D.Cal. 1999) (citing *Village of Gambell*, 480 U.S.
8 at 545); *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir.
9 1995)). The Ninth Circuit has often recognized the need to grant injunctive relief to enforce
10 compliance with the procedural requirements of NEPA. See, e.g., *Alaska v. Lubchenco*, 723 F.3d
11 1043, 1051 (9th Cir. 2013) (affirmed lower court's injunction to halt and prepare EIS because
12 agency should not have summarily concluded the action would cause no significant impact);
13 *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1191, 1207 (9th Cir. 2010) (affirmed
14 lower court's injunction preventing implementation of BLM regulations due to violations of NEPA
15 procedural requirements).

16
17
18 Second, by transferring title of the Berkeley Post Office out of federal ownership, allowing
19 completion of the property sale would prejudice plaintiffs' ability to ensure that the federal-agency
20 disposition complies with NHPA and NEPA. Compare *Environmental Rights Coalition, Inc. v.*
21 *Austin*, 780 F.Supp. 584, 598 (S.D. Ind. 1991) (injunction unavailable for federal law violation
22 because property had passed out of federal ownership.) As illustrated in NEPA cases addressing
23 remedial issues in property exchanges and transfers, completion of a property transfer can make it
24 daunting or even impossible for courts to grant effective relief. See *Kettle Range Conservation*
25 *Group v. BLM*, 150 F.3d 1083, 1087 (9th Cir. 1998). In *Kettle Range*, the district court chose not to
26 preliminarily enjoin a land transfer between the BLM and several private parties. 150 F.3d 1083.
27 Despite later ruling for the plaintiffs on the merits, the court found itself unable to "unscramble the
28 eggs" because most of the transfers were completed and plaintiffs did not attempt to join the new

1 owners *Id.* at 1087. The concurrence warned against failing to enjoin land transfers pending final
2 rulings:

3 The result in this case is ... unfortunate indeed. Although the district court held that
4 the government violated NEPA and that it transferred public lands in violation of our
5 environmental laws, those lands will now be clear-cut by the private purchasers. That
6 is not how our legal system is supposed to work.

6 *Id.* at 1088 (Reinhardt, J., concurring).

7 Third, because completion of sale would immediately deprive the USPS of ownership,
8 proceeding with the sale of the post office could irreparably foreclose future options that USPS and
9 the public have not yet analyzed as alternatives. See Complaint, ¶¶32, 46-48; *City of South*
10 *Pasadena*, 56 F.Supp.2d at 1121 ("Evaluation of alternatives to the proposed project is the 'heart of
11 the environmental impact statement.' 40 C.F.R. §1502.14"). Pages 10-11, identifying the examples
12 of Dallas and Phoenix post offices, describe one such attractive alternative.

13 **C. The Balance of Equities and Public Interest Strongly Favor the Plaintiffs.**

14
15 The balance of equities in this case strongly resembles *National Post Office Collaborate*,
16 which found that the balance of equities and public interest favored the issuance of injunctive relief
17 to plaintiffs preventing USPS from completing its proposed sale of the historically significant
18 Stamford Post Office. The court found the following:

19 • "[T]here is a strong public interest in ensuring that USPS complies with its NEPA
20 obligations here and in any future sales of its other properties." 2013 U.S. Dist. LEXIS 154679, •54.

21 • Although the USPS claimed substantial financial risks from not proceeding with the sale it
22 had arranged, the court concluded that "any purported harms that it will suffer as a result of
23 preliminary injunctive relief are of its own making in failing to comply with NEPA." *Id.*, •54.

24 • Notwithstanding USPS' asserted need to sell off national patrimony for momentary
25 budgetary advantage, NEPA's obligations "cannot be evaded because compliance may be
26 inconvenient or time-consuming." *Id.* at •55 (citing *RESTORE: The N. Woods v. U.S. Dep't of*
27 *Agric.*, 968 F. Supp. 168, 178 (D. Vt. 1997)).
28

1 • Since failure to enjoin the sale would have interfered directly with the court's review of the
2 NEPA merits, no "less drastic" remedy short of an injunction was available 2013 U.S. Dist. LEXIS
3 154679, *55; cf. *Monsanto v. Geerston Seed Farms*, 561 U.S. 139 (2010).

4
5 All of these factors also strongly tip the balance of equities in plaintiffs' favor here. First, the
6 public interest strongly favors USPS's compliance with NEPA and NHPA before the post office
7 sale becomes a *fait accompli*. The 1914 Berkeley Post Office is not simply listed on the National
8 Register, but described in its nominating description as a source of civic pride that embodies the
9 city's sense of mission for public buildings, with a lobby that is a civic treasure. Complaint, ¶10;
10 Ex. 1. The well-patronized post office is crucial to the life of downtown Berkeley, and is historically
11 significant both as an independent structure and in its contribution to the National Register-listed
12 Civic Center Historic District, which serves as an ensemble of harmoniously planned buildings and
13 as a collective body of civic architecture. Complaint, ¶¶10-11; Ex. 1-2. The post office is related to
14 the Civic Center by its location, function, date and style, and serves as an expression of the aesthetic
15 ideals of government to "educate and develop the public taste and eventually elevate it to a higher
16 plane." Complaint, ¶ 1; Ex. 2.

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18
19 In light of the Post Office's central role in Berkeley's history and present, taking the post
20 office function out of this crucial downtown location and completing the Post Office's sale to a still-
21 unknown bidder would produce major adverse impacts for the city and its constituents, including
22 loss of public access to and use of an historic resource, and degradation of the historic civic center
23 district's integrity, and conflict with the City's land use authority. Complaint ¶¶48, 52; Ex. 1-5, 8-9,
24 15, 21-22, 25-26. The Berkeley City Council carefully reviewed the evidence of these significant
25 effects and described them in unanimous city council resolutions. Ex. 3, 8. Yet what type of NEPA
26 review did USPS conduct *before* irretrievably committing to sell this iconic structure and linchpin
27 of Berkeley's downtown? The answer: *none at all*. See Complaint, ¶20; Ex. 12:2-3.

1 With respect to the Berkeley Post Office, USPS has not even documented alleged costs of
2 preventing the sale, because it has refused to identify for plaintiffs and the public the ostensible
3 buyer "in contract" with USPS. Complaint, ¶¶32-36; Ex. 24-27. But even if it had done do, or
4 attempts to do so later, any such harm would likewise here be of USPS' own making in light of the
5 NHPA and NEPA violations identified. Moreover, with the property "in contract" and completion
6 of sale likely imminent, nothing short of this Court's injunction provides a viable "less drastic"
7 remedy. As the record shows, Berkeley and the National Trust repeatedly urged USPS in the past
8 two years to pause long enough to initiate and complete NHPA and NEPA compliance. See, e.g.,
9 Ex. 3, 5, 8, 9, 26. ACHP and SHPO made similar requests. Ex. 17, 23, 25. The court in *National*
10 *Post Office Collaborate* also reminded USPS, that notwithstanding some respects in which USPS
11 has become more like a private business, the service "does furnish an essential public service and
12 has public functions and responsibilities." 2013 U.S. Dist. LEXIS 154679, *54 (citing *Chelsea*
13 *Neighborhood Associations v. United States Postal Service*, 516 F.2d 378, 385 (2d. Cir. 1975)).

14 15 **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.**

16 **A. Defendants Failed to Comply with NEPA.**

17
18
19 NEPA clearly applies to the USPS. *City of Rochester v. United States Postal Service*, 541
20 F.2d 967 (2d. Cir. 1976); 39 C.F.R. part 775 (USPS NEPA regulations). With equal clarity, NEPA
21 applies to the *proposed action* of USPS. The proposed relocation and sale of the Berkeley Post
22 Office represents a major federal action affecting the human environment. See, e.g., Ex. 3, 8, 9, 11,
23 16-18, 22-28. Before taking any official decision on relocation or sale, or both, of the historic Post
24 Office, an environmental impact statement (EIS) must be prepared and circulated for public review.
25 Although the City believes neither a categorical exclusion nor environmental assessment would
26 fully address impacts for this action, USPS did not even attempt these preliminary steps, failing to
27 prepare any environmental document whatsoever.

1 Defendants' end-run around NEPA in the present case resembles
2 *National Post Office Collaborate*, where the Court had little difficulty establishing that plaintiffs
3 amply showed a likelihood of success on the merits. In that case, USPS invoked a categorical
4 exclusion from NEPA, in contravention of the plain language of the regulations cited and existing
5 case law. 2013 U.S. Dist. LEXIS 154679, *41; see 39 C.F.R. § 775.6(e)(8). Here, USPS refused
6 requests to comply with NEPA before taking the final action now challenged. Complaint, ¶¶36-50;
7 Ex. 12:2-3, 24-28. Yet substantial, indeed overwhelming, evidence supports the conclusion that
8 relocation and sale of the Berkeley Main Post Office will adversely impact the cultural
9 environment, which includes the loss of access to and use of an historic resource, and community
10 disruption. See *City of Rochester*, 541 F.3d at 973-974 (NEPA requires analysis of post office
11 closing and relocation); 40 C.F.R. § 1508.14 ("human environment shall be interpreted
12 comprehensively" to include "physical environment and the relationship of people with that
13 environment"); 39 C.F.R. §775.6(a); 40 C.F.R. §§ 1508.27 (changes in context and intensity);
14 1508.27(b)("may cause destruction of...significant historic resources"). This evidence was
15 presented at the USPS public hearing in Berkeley on 26 February 2013; and major impacts on
16 Berkeley and its constituents are summarized in the City's unanimous resolutions. Complaint, ¶¶48;
17 52; see Ex.3, 8 and section I.C, *supra*.

18
19 USPS cannot rationalize this evasion of NEPA by pretending that its proposed sale can
20 proceed separately from environmental review of relocation. The "major federal action" -- the
21 "whole of the action" -- defined by the USPS notice is that of relocation *and sale*. USPS at the
22 outset anticipated selling the current Berkeley Main Post Office building in connection with the
23 relocation. Ex. 7. The action cannot be segmented into relocation only when the driving force for
24 that action is the intended sale. 40 C.F.R. § 1508.25 ("connected actions ... should be discussed in
25 the same impact statement"); see also *National Post Office Collaborate*, 2013 U.S. Dist. LEXIS
26 154679, at *40-44. (rejecting similar argument); *City of Rochester*, 541 F.3d at 973-974.

1 Moreover, to comply with NEPA, assessment of the relocation and sale must take place at
2 the earliest possible moment to ensure that impacts are acknowledged, alternatives identified, and
3 both the proposal and impacts are assessed *before* decision, and in time to allow meaningful public
4 participation to influence that decision. 40 C.F.R. § 1502.5 (EIS "shall be prepared early enough"
5 to contribute to decision-making and "not be used to rationalize or justify decisions already made").
6 Assessment after sale will prove meaningless, because at that time the remaining alternatives will
7 only ask how to deal with an empty, publicly-inaccessible building. See, e.g., Ex. 17:41 (harm from
8 changing use of post offices constitutes an adverse effect under NEPA); Complaint, ¶29; Ex. 21:7.

9
10 Finally, even if USPS attempts after the fact to rely on a "categorical exclusion," it cannot
11 escape the duty to prepare an EIS in connection with its Berkeley Post Office action. The
12 regulations of both the Council on Environmental Quality and USPS itself do not allow categorical
13 exclusions in cases such as this, representing "extraordinary circumstances in which a normally
14 excluded action may have a significant adverse effect." 40 C.F.R. § 1508.4; 39 C.F.R. § 775.6; see
15 also 39 U.S.C. § 404 (no Congressional NEPA exemption for closure or consolidation of post
16 offices). As the ACHP recognizes, blending NEPA with NHPA, "Potential impacts to historic
17 properties may constitute an extraordinary circumstance that renders the use of a CATEX
18 inappropriate for NEPA purposes." ACHP, *Preserving Historic Post Offices: A Report to Congress*
19 37. Ex. 17:37.

20
21 Here an effective NEPA review would prove to be far more than an academic exercise. In
22 rejecting the ACHP's claim that USPS treat loss of historic use as an adverse impact, the USPS vice
23 president complained that "sales would be prohibited" since "there would be little opportunity to
24 mitigate or minimize the adverse effects of lost postal use." Complaint ¶ 28; Ex. 18. NEPA
25 examination of alternatives would have forcefully refuted this false premise. In Dallas, the notable
26 historic post office was sold for residential development, but only by reserving on long-term
27 leaseback to USPS the continued operation of the post office on the full main floor. Ex. 19. In
28 Phoenix, an historic post office was sold to the city, with a long-term (50-year) leaseback to USPS

1 to maintain the Arizona State University postal station. Ex. 20. In sum, as ACHP has concluded,
2 faithful NEPA compliance would also enable USPS to meet its separate but related duties under
3 NHPA. Report to Congress, 36-37; Ex. 17:36-37.

4
5 **B. Defendants Failed to Comply with NHPA**

6
7 USPS regulations specify that the service must comply with section 106 of NHPA.
8 Executive Order 12072, and Executive Order 13006. 39 C.F.R. § 241.1(d)(1). Here, USPS violated
9 key requirements of NHPA.

10 • **The Section 106 Process Was Not Completed “Prior to” USPS Entering
11 Into a Contract for Sale of the Berkeley Post Office**

12 The plain language of the NHPA requires that the ACHP have an opportunity to comment
13 “prior to” agency action, such as the sale of historic property. 16 U.S.C. § 470f. The record is clear
14 that the section 106 process had not been completed prior to the time the USPS website indicated
15 that the building was under contract. The section 106 regulations specifically require that, “[I]f the
16 final decision of the agency is to affirm the initial finding of no adverse effect,” as was the case
17 here, the agency’s responsibilities under section 106 are not “fulfilled” until after the head of the
18 agency or a “senior policy official” has “prepare[d] a summary of the decision that contains the
19 rationale for the decision and evidence of consideration of the [Advisory Council on Historic
20 Preservation’s] opinion,” and “the summary of the decision has been sent to the Council, the
21 SHPO/THPO, and the consulting parties.” 36 C.F.R. § 800.5(c)(3)(ii)(B). In direct violation of this
22 regulation, the USPS response to the ACHP’s letter disagreeing with its no adverse effect finding
23 came one week after its website indicated the building was in contract. (Ex. 28.)

24
25 NHPA’s section 106 requires that the agency initiate consultation at the earliest possible
26 stage of the decision-making process – in this case, at the time when a *proposed sale of historic*
27 *property* is announced, not when the property is formally offered for sale. 36 C.F.R. § 800.3(e)-(f).
28 NHPA’s “early planning” requirement is intended to assure the public that agencies of the federal

1 government will consider “a broad range of alternatives” in order avoid harm to historic properties.
2 36 C.F.R. § 800.1(c). USPS must complete its section 106 consultation before offering to sell the
3 historic post office building. Taking such a consequential decision without that consultation
4 precludes consideration of viable preservation alternatives and stifles public input. See 16 U.S.C. §
5 470f.

6 • **USPS Improperly Segmented Its Decisions on the Relocation of Services
7 and the Sale of an Historic Building.**

8 The USPS failed to initiate section 106 consultation prior to its decision to relocate
9 operations from the Berkeley Post Office in April 2013, a decision that has consequences for the
10 historic building and had the effect of foreclosing alternatives in the consultation that followed that
11 decision. As early as July 2012, the City expressed concerns that the USPS had not properly
12 coordinated its review process for the relocation of post offices with the agency’s duties relating to
13 protection of historic resources. Ex. 3. NHPA section 106 requires agency officials to seek the
14 views of the public and interested parties prior to making any consequential decision that could
15 adversely affect a historic property. 36 C.F.R. § 800.3(e)-(f). However, the USPS made the decision
16 to relocate its services without section 106 consultation.

17
18 The section 106 regulations clearly state that a “[c]hange of the character of the property’s
19 use . . . that contribute[s] to its historic significance” is an adverse effect. 36 C.F.R. §
20 800.5(a)(2)(iv). As a result, the NHPA requires compliance with section 106, “prior to” the
21 agency’s action. 16 U.S.C. § 470f. The USPS failed to take such action in advance of its relocation
22 decision in violation of this provision. In *National Trust for Historic Preservation v. Blanck*, 938 F.
23 Supp. 908 (D.D.C. 1996), *aff’d mem.*, 203 F.3d 53 (D.C. Cir. 1999), the court found that the Army
24 violated NHPA by not considering its decision to release excess property to be an “undertaking.” It
25 reasoned that the Army had made an “affirmative decision” which “had the sort of serious and long-
26 term consequences for the Historic District that the NHPA requires be undertaken in consultation
27 with the ACHP.” Similarly, here the USPS curtailed consultation prior to an undertaking that will
28 have consequences for the future of the Berkeley Post Office. Ex. 28.

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- **USPS Erroneously Determined that Sale of the Post Office Would Have "No Adverse Effect" on the Historic Property**

The section 106 regulations clearly establish that the “[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance” constitutes an adverse effect on a historic property under section 106. 36 C.F.R. § 800.5(a)(2)(vii). However, the USPS has refused to acknowledge an adverse effect, despite the explicit objections by the ACHP that the terms of the preservation covenant proposed by the USPS were inadequate to ensure “long-term preservation” within the meaning of the regulations. The ACHP comment on this point was clear: “the current covenant allows for alterations (including demolition) so long as the covenant holder, USPS, approves them. Such an appraisal is left to the sole discretion of the covenant holder, without any restrictions.” Ex. 25:1. The ACHP also found long-term protection inadequate because USPS lacked “demonstrated experience in protecting historic properties,” and advised finding another covenant holder and continued consultation.” *Id.* at 2. Rejecting ACHP’s advice (Ex. 27), USPS missed a clear opportunity to avoid this NHPA violation by acknowledging potential adverse effects of the sale and using the consultation process to help resolve those adverse effects.

- **USPS Erroneously Determined that Sale of the Post Office Would Have "No Adverse Effect" on the Historic Use of the Property**

USPS also violated section 106 regulations by deciding to remove the post office function from the National Register-listed Berkeley Main Post Office building, based on the untenable assumption that this federal action has no potential to affect the historic property. Section 106 regulations clearly state that a “[c]hange of the character of the property’s use . . . that contribute[s] to its historic significance” is an adverse effect. 36 C.F.R. § 800.5(a)(2)(iv) (emphasis added).

In summarily concluding that its action would have no significant effects and concluding the section 106 process, USPS went around numerous indications in and outside government at every level that the action would have major negative consequences and stand in violation of the NHPA. See, e.g., Ex.25 (ACHP letter disputing USPS’s finding of no adverse effects); Ex. 26 (USPS letter

1 to ACHP, SHPO and consulting parties "concludes the Section 106 process"); Ex. 15, 22 (SHPO),
2 Ex. 8, 11, 26 (City); Ex. 5, 9 (National Trust). In addition, USPS evaded discussing the cumulative
3 consequences of its decision in a nationwide context in which it is proposing numerous closures.

4
5 The U.S. House of Representatives Appropriations Committee in its report on the Financial
6 Services and General Government Appropriation Bill, 2014, at 75, stated that it is "concerned by
7 reports that the Postal Service is attempting to sell off many of its historic properties without regard
8 for the preservation of these buildings. The Committee is particularly concerned that the Postal
9 Service may not be following Section 106 of the National Historic Preservation Act in the
10 relocation and sales process of these historic buildings." Ex. 16:75. In a separate report on the
11 Department of Interior, Environment, and Related Agencies Appropriation Bill, 2014, at 89, the
12 House committee observed:

13
14 Last year the National Trust on [sic.] Historic Preservation placed historic post office
15 buildings on its list of most endangered historic places. The Committee is concerned
16 that although the Advisory Council on Historic Preservation has been working with
17 the United States Postal Service for almost two years to develop a consistent,
18 transparent, consultative process to preserve these historic properties, no such
comprehensive process has been forthcoming. The Committee directs the Council to
provide, within 90 days of enactment of this Act, a report on the action plan for
ensuring USPS compliance with Section 106 responsibilities during the divestment of
historically significant properties.

19 Ex. 16:89.

20 In response, the ACHP on 17 April 2014 issued its 50-page *Preserving Historic Post*
21 *Offices: A Report to Congress*. Ex. 17. The ACHP report noted that in contrast to the vast majority
22 of federal-agency cases in which the line agency accepted an SHPO or ACHP finding of adverse
23 effect, USPS has consistently resolved its conflicts by simply declaring no adverse effect. Ex. 17:
24 31-32. The ACHP continued, "The finding of no adverse effect is appropriate only when the
25 [preservation] covenant adequately provides for long-term preservation of the property's
26 significance (which may include characteristics beyond its architectural features." Ex. 17:42. And
27 under the heading "Sale of historic postal facilities to non-federal owners may result in an adverse
28 effect under Section 106," the council wrote, at page 41 with emphasis added:

1 Many post offices were constructed and have operated for decades as the civic core of
2 the community, serving as community meeting places and providing the federal
3 presence in the community. The effect of this loss of traditional use on the
4 significance of the historic property should be determined through evaluation of the
5 property's significance in accordance with the National Register criteria. That is, if a
6 post office is listed or eligible for the NRHP based solely on its architecture or design
7 (National Register Criterion C), then a change of use would not constitute an adverse
8 effect. However, *if the significance is also tied to historical events (National Register
9 Criterion A), such as the traditional function of providing retail mail service to the
10 community, then changing the use of the property may constitute an adverse effect.*
11 *(36 CFR § 800.5(a)(2)(iv))*

12 It bears emphasis that ACHP's interpretation of its regulations trumps USPS' evasion. As
13 this Court held more than two decades ago,

14 Section 201 of the NHPA created the Advisory Council on Historic Preservation
15 ('Advisory Council'), an independent federal agency with an advisory role on historic
16 preservation matters. 16 U.S.C. § 470i. The Advisory Council has authority to
17 promulgate regulations to govern the implementation of Section 106, 16 U.S.C. 470f.
18 16 U.S.C. § 470s. Although not an administrative agency, the Advisory Council
19 regulations command substantial deference. *McMillan Park Committee v. National
20 Capital Planning Commission*, 968 F.2d 1283, 1288 (D.C. Cir. 1992) (citing *Andrus
21 v. Sierra Club*, 442 U.S. 347 (1979)).

22 *North Oakland Voters Alliance v. Oakland*, 1992 U.S. Dist. LEXIS 19033, •8-9 (N.D. Cal.1992).

23 In contrast to ACHP's expectations, when the council directly challenged USPS's faulty
24 determination of no significance, and disputed USPS' ability to ignore the impact of terminating
25 historic use, USPS instead abruptly ended section 106 consultation. Complaint, ¶¶33-42; Ex. 25-28.
26 As ACHP and others including the City explained, but USPS evaded, the conditions proposed for a
27 "covenant" that USPS would control, and failure to recognize historic use, vitiated the USPS
28 finding of no adverse effect. Ex. 25, 26.

29 • **USPS Violated Section 111 By Failing to Consider Alternatives to Sale
30 Such as Leasing**

31 Prior to making a formal decision on the sale of a historic property, federal agencies are
32 required to consider options to lease facilities rather than sell them outright. Section 111 of the

1 National Historic Preservation Act explicitly requires that "any Federal agency ... shall, to the
2 extent practicable, establish and implement alternatives for historic properties, including adaptive
3 use, that are not needed for current or projected agency purposes, and may lease an historic property
4 owned by the agency to any person or organization, or exchange any property owned by the agency
5 with comparable historic property, if the agency head determines that the lease or exchange will
6 adequately insure the preservation of the historic property." 16 U.S.C. § 470h-3(a).

7
8 In 2010 a federal district court in Washington State concluded that the Federal Reserve Bank
9 of San Francisco failed to comply with section 111 of the NHPA by authorizing the sale of a
10 historic federal building without considering adaptive use, lease, or exchange. The court stated that
11 "[t]he congressional directive to at least consider, if not implement, adaptive use or lease strategies
12 to protect historic properties is clear ... and the failure to do so would constitute a violation of
13 NHPA." *Comm. for Preservation*, 2010 U.S. Dist. LEXIS 26084 at 19.

14
15 **III. IN GRANTING THE INJUNCTION, THE COURT SHOULD NOT REQUIRE THE**
16 **CITY TO POST A BOND.**

17 The Federal Rules of Civil Procedure grant the courts discretion to require an appropriate
18 bond before a preliminary injunction may issue. Fed. R. Civ. P. 65(c). In *City of South Pasadena v.*
19 *Slater*, which like the present action involved a plaintiff city seeking a preliminary injunction in a
20 challenge to federal action testing compliance with NHPA and NEPA, the court required no bond of
21 the city. *City of South Pasadena* found no reason to depart from the "general" rule, in which courts
22 "routinely impose either no bond or a minimal bond in public interest environmental law cases,
23 such as the present action seeking compliance with NHPA and NEPA." 56 F.Supp.2d at 1148; see
24 also *People ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325, modified
25 on other grounds, 775 F.2d 998 (9th Cir. 1985). "The court has discretion to dispense with the
26 security requirement, or to request mere nominal security, where requiring security would
27 effectively deny access to judicial review." *City of South Pasadena*, 56 F.Supp.2d at 1148 (citing
28 *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975); *Natural Resources Defense*

1 *Council v. Morton*, 337 F. Supp. 167 (D.D.C. 1971).) Courts in NEPA enforcement actions which,
2 like the present one, were brought to preserve public values rather than to achieve economic gain,
3 have routinely rejected a large bond for an injunction in circumstances where other criteria for
4 securing an injunction have been met. See, e.g., *Scherr v. Volpe*, 466 F.2d 1027, 1036 (7th Cir.
5 1972); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 236 (4th Cir.
6 1971); *Natural Resources Defense Council v. Morton*, 337 F. Supp. 167 (D.D.C. 1971); *Powelton*
7 *Civic Home Owners Association v. Department of HUD*, 284 F. Supp. 809 (E.D. Pa. 1963.)

8
9 **CONCLUSION**

10
11 For the foregoing reasons, plaintiffs request that this Court issue an immediate restraining
12 order, and on return of the order to show cause issue a preliminary injunction, preventing
13 defendants from proceeding with USPS's sale of the Berkeley Main Post Office, pending final
14 determination of this action.

15
16 Dated: 4 November 2014

Respectfully submitted,

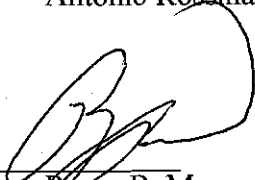
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19 ZACH COWAN, City Attorney (SBN 96372)
20 CITY OF BERKELEY

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22 By: _____
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