

**MEMORANDUM**

Subject: Section 106 Policy Guidance  
Interpretation of Setting

From: Director, Office of Environmental Policy  
Washington, D.C. 20590

To: Mr. Edwin M. Wood  
Regional Federal Highway Administrator  
San Francisco, California

Date: August 30, 1989

Reply to  
Attn. of: HEV-20  
HEV-11

This will acknowledge receipt of your memorandum dated August 10 on this subject. We have scheduled a meeting with the Advisory Council for Historic Preservation staff on Tuesday, September 5, to initiate a discussion as requested by the Division regarding the effect determination when issues of setting arise.

Your August 10 and 11 memorandums and the California Division Office's August 3 memorandum also requested policy guidance on the applicability of Section 4(f) to historic sites because of proximity impacts. The Federal Highway Administration has determined the following:

1. A constructive use does not occur when a project's proximity impacts on a site listed on or eligible for the National Register of Historic Places, result in a determination of "no effect" or "no adverse effect" (when applying the requirements of Section 106 of the National Historic Preservation Act and 36 CFR Part 800).
2. Since "adverse effects" under Part 800 are not separated as to magnitude, the range of adverse effects can be wide. When proximity impacts result in an "adverse effect" determination under the requirements of Section 106 of the National Historic Preservation Act and 36 CFR Part 800, a constructive use occurs only when the project's proximity impacts are so severe that the activities, features, or attributes that qualify the historic site for eligibility or listing on the National Register are substantially impaired.
3. A constructive use does not arise merely because a proposed transportation improvement can be seen from the protected resource or because the setting has changed. Unless the activities, features, or attributes that

qualify a resource for protection under Section 4(f) possess sensitive visual qualities which are substantially impaired by the project, constructive use would not occur. For historic sites, constructive uses would not occur unless the setting is a major contributing element of a historic site's eligibility or inclusion on the National Register and the setting is substantially impaired.

We are presently examining the final Environmental Impact Statement and other supporting materials to determine whether there is sufficient basis for concluding that there is no constructive use on this project. We will provide our findings when our examination is complete.

We will continue to keep you informed of our progress in this matter.

/Original Signed By/

Ali F. Sevin