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Subject: FW: PIRATE Project (FD 36501) Board Decision
Date: Wednesday, June 4, 2025 4:45:00 PM
Attachments: [52609.pdf](#)

Dear Consulting Parties:

The Surface Transportation Board (Board) issued a decision yesterday regarding Union Pacific Railroad Company's (UP) proposed construction and operation of an approximately 6-mile rail line (known as PIRATE) in Maricopa County and Pinal County, Arizona (Docket No. FD 36501). The decision states that the Board is unable to reach a majority on whether UP violated Section 110(k) of the National Historic Preservation Act. The decision further states that no determination that Section 110(k) is applicable will be issued under 36 CFR § 800.9(c) and that the Board will continue with the Section 106 process and its consideration of UP's petition.

Accordingly, the Board's Office of Environmental Analysis (OEA) will resume the Section 106 process and will contact all of the consulting parties in a separate email to discuss next steps shortly. The Board's decision is attached to this email.

If you have any questions, please contact:

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Subject: PIRATE Project (FD 36501) Board Decision

Dear Consulting Parties:

The Surface Transportation Board (Board) issued a decision yesterday regarding Union Pacific Railroad Company's (UP) proposed construction and operation of an approximately 6-mile rail line (known as PIRATE) in Maricopa County and Pinal County, Arizona (Docket No. FD 36501). The decision states that the Board is unable to reach a majority on whether UP violated Section 110(k) of the National Historic Preservation Act. The decision further states that no determination that Section 110(k) is applicable will be issued under 36 CFR § 800.9(c) and that the Board will continue with the Section 106 process and its consideration of UP's petition.

Accordingly, the Board's Office of Environmental Analysis (OEA) will resume the Section 106 process and will contact all of the consulting parties in a separate email to discuss next steps shortly. The Board's decision is attached to this email.

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SERVICE DATE – JUNE 3, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36501

UNION PACIFIC RAILROAD COMPANY—CONSTRUCTION AND OPERATION
EXEMPTION—IN MARICOPA COUNTY, ARIZ.

Digest:¹ The Board is unable to reach a majority on whether Union Pacific Railroad Company (UP) violated Section 110(k) of the National Historic Preservation Act. Accordingly, no determination that Section 110(k) is applicable will be issued under 36 C.F.R. § 800.9(c), and the Board will continue with the Section 106 process and its consideration of UP's petition.

Decided: June 3, 2025

Union Pacific Railroad Company (UP) has petitioned for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate a 6-mile rail line (known as the PIRATE project, or the project) to connect the Pecos Advanced Manufacturing Zone to UP's mainline at the border between Maricopa County and Pinal County, Ariz. (Pet. 2.)²

On July 28, 2023, while preparing the Final Environmental Assessment (Final EA) for the project, the Board's Office of Environmental Analysis (OEA) discovered that there had been significant ground disturbance and damage to National Register of Historic Places-eligible archaeological resources within the proposed right-of-way and within the Area of Potential Effects (APE).³

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and reference such information in decisions when necessary. See Canadian Nat'l Ry.—Control—Iowa N. Ry., FD 36744, slip op. at 1 n.3 (STB served Jan. 14, 2025). In this case, the Board determined that it could not adequately discuss this matter in the majority decision and separate member statements without making limited reference to information in some documents designated as confidential by UP.

³ The APE is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” 36 C.F.R. § 800.16(d).

Specifically, on July 28, 2023, OEA discovered, through an examination of aerial photography, extensive ground disturbance within the APE. Construction activities by third parties occurred in five locations, including excavation of two retention basins and the removal of 40,500 cubic yards of soil on 14.5 acres of land within National Register Eligible (NRE) archaeological sites, grading within NRE archaeological sites impacting approximately 6.6 acres, and excavation for a pipeline, also located within a NRE archaeological site. The ground disturbance within the APE, on UP's property, included a total of almost 18 acres of land and the excavation and removal of approximately 40,500 cubic yards of culturally sensitive soil from within NRE archaeological sites.

Following meetings with and requests by the Tribal Historic Preservation Officer of the Tohono O'odham Nation and other affected Tribes, OEA issued a notice delaying issuance of the Final EA until further notice. OEA Notice, FD 36501 (STB served Aug. 31, 2023). Among the issues raised by the Tribes were concerns as to whether a violation of Section 110(k) of the National Historic Preservation Act (NHPA) had occurred. By decision served December 11, 2023, the Board formally commenced consideration of the applicability of Section 110(k) and took steps to obtain additional information about the circumstances surrounding the damage, which occurred in five different areas.⁴ The Board directed UP to respond to eight information requests (each with multiple subparts) and to produce relevant documents; it also set a schedule for submissions on whether UP engaged in "anticipatory demolition" of historic properties in violation of Section 110(k). See Union Pac. R.R.—Constr. & Operation Exemption—in Maricopa Cnty., Ariz., FD 36501, slip op. at 5-6 (STB served Dec. 11, 2023).

UP made rolling submissions, ending on February 15, 2024, which included written responses to the information requests and the production of just over 1,000 documents totaling more than 10,000 pages.⁵ Due to the volume and complexity of the material in question, the Board placed the briefing schedule for Section 110(k) in abeyance to allow for additional time to review the record and assess the substance and sufficiency of UP's responses. Union Pac. R.R.—Constr. & Operation Exemption—in Maricopa Cnty., Ariz., FD 36501, slip op. at 2 (STB served Mar. 26, 2024). By decision served November 14, 2024, the Board directed UP to cure certain deficiencies in its responses to Board-ordered document requests and set new deadlines for submissions on whether a Section 110(k) violation had occurred. Union Pac. R.R.—Constr.

⁴ Shortly after discovering the ground disturbances, OEA initiated a damage assessment process. OEA prepared a Noninvasive Cultural Resources Damage Assessment Report, which was finalized in May 2024, followed by an additional invasive damage assessment to fully document the extent of subsurface damage to the archaeological sites and support the Board's Section 110(k) inquiry. (See email transmitting letter from D. Gosselin (Director, OEA) to E. Choi (Advisory Council on Historic Preservation) at 1-2 (June 7, 2024) (Env't Comment EO-3955).) The Invasive Cultural Resources Damage Assessment Technical Report was finalized, following opportunity for review and comment, in January 2025. (See Env't Comment EO-3990.)

⁵ On April 1, 2024, UP filed a Supplemental Response to the Board's Information Request 5. The response disclosed a training session on federal requirements of the NHPA (among other laws) that UP organized and held on March 22, 2024, attended by senior leadership and employees from multiple departments.

& Operation Exemption—in Maricopa Cnty., Ariz. (November 2024 Decision), FD 36501, slip op. at 2 (STB served Nov. 14, 2024). UP made a corrective filing and supplemented its production on November 26, 2024. Opening submissions were due on December 16, 2024, and replies were due on January 13, 2025.

The Board’s November 2024 Decision invited submissions from UP and interested persons, including all Section 106 consulting parties in this proceeding, on whether UP engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of the NHPA. Id. at 5. Opening submissions were filed by UP and by Commercial Metals Company (CMC), which anticipates shipping on the proposed line, on December 16, 2024. No replies were received.

UP’s submission states that the ground-disturbing activities occurred because of communication failures within UP, and lack of awareness of the historic review process among members of its Real Estate Department and Commercial Telecom group who dealt with the third parties that engaged in the unauthorized activities. (UP Submission 5-6.)⁶ UP states that poor communication resulted in confusion on a number of topics, including “the nature of the environmental and historic review process and how the Board’s ongoing review limited third parties’ ability to conduct activities on property related to the future rail line.” (Id.; see also id. at 7-12 (describing how these failures impacted what transpired with drainage facilities and the protection-in-place or relocation of utilities, the two primary types of ground-disturbing activity that occurred within UP’s right-of-way).)

UP acknowledges that these failures are “unacceptable” and “in need of correction.” (Id. at 18, 24; see also id. at 10 (stating that UP’s utility protection and relocation projects associated with its PIRATE initiative demonstrate “communication breakdowns and insufficient education on the environmental and historical review process”).) Information produced in discovery indicates that UP had no prior policies or procedures in place to promote awareness of and compliance with NHPA requirements. Specifically, the record reflects that UP had no mechanisms to train UP personnel working on acquisitions, contracting, and telecom related to rail line construction projects, or to monitor or coordinate activities being undertaken by those personnel internally or with third parties. Nor did UP take affirmative steps to help ensure that property within the APE was not disturbed unless and until the proposed rail line construction and operation was authorized by the Board, even when UP was aware early on that there were several significant tribal archaeological sites within the APE. (UP-Pirate-0000961-Confidential.)⁷ UP asserts that it “is *committed* to making improvements to its internal processes

⁶ UP asserts that the PIRATE project was unique for UP because most of its construction activities involve smaller projects involving excepted track that is not subject to the Board’s authorization process. (Id. at 5.)

⁷ Emails relating to the cultural resource surveys being undertaken during the spring of 2022 seem to reflect an expectation that UP would share the APE information with adjacent landowners. (UP-Pirate 0000220-Confidential, at -0221.) However, it is not apparent from UP’s documents or responses to information requests that this was done at that time. There is no evidence that UP notified adjacent landowners of the historic review process and the need to

to ensure historic and cultural resources are protected” going forward. (UP Submission 14-15.) As described in its submission, these improvements include more comprehensive internal training; adding provisions to third-party contracts requiring notice and written consent before any ground disturbing activity can occur on UP property during federal review of future rail construction projects; adding language to agreements with outside consultants hired by UP to manage construction projects requiring Board approval to cover historic and cultural review; and enhanced internal project management and oversight to supervise outside consultants and contractors and ensure that all known historic and cultural resources information is communicated immediately to relevant UP personnel. (Id. at 15-17.)

UP states that it deeply regrets what occurred, but asserts that the lapses in communication and awareness that led to third parties engaging in ground-disturbing activities on UP property “do[] not constitute ‘anticipatory demolition’ within the meaning of Section 110(k).” (Id. at 18.) Specifically, UP asserts that a Section 110(k) violation requires two findings of intent: that the applicant both “intended to significantly adversely affect a historic property” and did so with “the intent to avoid the requirements of Section 106.” (Id. at 18.) UP maintains that it did not have the requisite intent for a finding of anticipatory demolition under Section 110(k), focusing much of its argument on the “intent to avoid” prong. (Id. at 22-24.) UP states that, even before it filed its petition for exemption, it had been consulting with OEA during the ongoing environmental and historic review process, and that it was appropriately involved in that process when third parties conducted the ground-disturbing activities on UP property. (Id. at 22.) UP also asserts that its efforts to quickly secure the APE, cooperate with OEA, and implement OEA’s recommendations after the ground disturbances were discovered “belie any deliberate attempt to try to circumvent the Section 106 review process.” (Id. at 23; see also id. at 12-14 (describing the actions taken by UP).) Additionally, UP argues that the record shows that the mistakes made “were ones of insufficient knowledge and inadequate communication and coordination among Union Pacific employees.” (Id. at 23-24 (describing examples).) UP maintains, in conclusion, that “[t]he missteps in the present project, while unacceptable and in need of correction, do not rise to the level of a Section 110(k) violation.” (Id. at 24.) Accordingly, UP asks the Board to resume its consideration of the PIRATE project and grant the petition for exemption, subject to appropriate environmental and historic mitigation measures, in view of the significant public benefits UP envisions from the project. (Id. at 24-26 (describing benefits).)

CMC asserts that “anticipatory demolition” generally is established only if there is evidence of intentional destruction of historic or cultural resources designed to circumvent the historic review process, and that based on its review of the publicly available documents, CMC is not aware of any evidence that UP intentionally destroyed historic resources or allowed such activities for the purposes of avoiding the historic review process. (CMC Submission 1.) CMC also contends that, if the Board were to find that UP engaged in anticipatory demolition, it should nevertheless allow the project to proceed in view of the “pressing need for rail service” and the

refrain from ground-disturbing work during the pendency of that process until August 2023, after OEA discovered that ground-disturbing activities had occurred. (See, e.g., UP-Pirate-0001071; UP-Pirate-0000287; UP-Pirate-0000911; UP-Pirate-0000919; UP-Pirate-0000931; UP-Pirate 0000980; UP-Pirate-0000985; UP-Pirate-0001059.)

economic and environmental benefits the project would bring to the surrounding community. (Id. at 1-2.)

* * *

The Board is unable to reach a majority on whether UP violated Section 110(k) of the NHPA. Accordingly, no determination that Section 110(k) is applicable will be issued under 36 C.F.R. § 800.9(c). The Board will continue with the Section 106 process and its consideration of the merits of the petition.

It is ordered:

1. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz. Board Member Hedlund concurred with a separate expression. Board Member Schultz, joined by Board Member Fuchs, concurred with a separate expression. Board Member Primus dissented with a separate expression.

BOARD MEMBER HEDLUND, concurring:

I. The Section 106 Historic Review Process Should Continue Despite the Absence of a Consensus on Whether UP Violated Section 110(k)

As explained below, I conclude that the undisputed facts of this tragic incident demonstrate that Union Pacific Railroad Company (UP) engaged in “anticipatory demolition” of historic properties in violation of Section 110(k) of the National Historic Preservation Act (NHPA). Despite the fact that the Board has been unable to reach a consensus on whether UP violated Section 110(k), I concur in today’s decision moving the historic review process forward.

It is only under the next step of this process, as described in 36 C.F.R. 800.6, that resolution of the adverse effects on historic properties in this case may begin to be addressed. The regulations call for discussions among the “Consulting Parties” (including UP, the affected Tribes, the State Historic Preservation Office, and others) “to develop and evaluate alternatives or modifications to the [project] that could avoid, minimize, or mitigate adverse effects on historic properties” with an eye towards the execution of a Memorandum of Agreement (MOA) to memorialize the resolution of adverse effects.

Although the Board has not decided whether to approve or deny the project, I note that any approval could include the imposition of conditions to assure the Board, the public, and—most importantly—the Tribes that UP takes seriously the impact of its actions, and will take binding steps (including the commitments set out in its December 16, 2024 Submission) to ensure that nothing like this ever happens again in connection with any UP project.

UP has, in recent times, displayed a sensitivity to Tribal issues. For example, in honor of Native American Heritage Month in 2022, UP sought to reckon with the company's role in construction of the transcontinental railroad and its effect on indigenous cultures:

“Union Pacific is fortunate enough to have [a] rich legacy with many of the Western U.S. First Nations, from the Pawnee, whose Scouts helped protect the transcontinental railroad, to our current Navajo, or Dine, employees on track gangs...It is a complicated history, and Union Pacific owns that with the connecting of the nation by rail, the Native American way of life was tragically altered forever.”¹

Additionally, UP has entered into cooperative arrangements with various other Tribes in recent years, including one with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) to allow Tribal members access to historic hunting and fishing grounds through Oregon's Meacham Canyon.² Such agreements could provide guidance on how to address the harm in this case. It is my sincere hope, and my concrete expectation, that UP will consult with and listen to the Tribes—whose heritage was carelessly desecrated by the company's actions—and in so doing find some way to appropriately acknowledge its behavior and remediate the significant harms caused thereby.

UP's destruction of ancestral grounds and sacred cultural resources has of course caused great pain to the affected Tribes. In the words of the Gila River Indian Community and Salt River Pima-Maricopa Indian Community Tribal Historic Preservation Officers:

“We are intensely saddened to know that our religious and culturally significant *O'Odham* heritage has been desecrated and destroyed by modern human ground disturbing activity. Destruction actions with heavy earth-moving machinery is unconscionable to the *O'Odham* spiritual connections with our Huhugam ancestors. We are dismayed that there are people who believe that the destruction of this nature is considered a causal mishap and do not have any idea what spiritual harms have occurred due to the desecration of our ancestor's eternal resting places.”³

Indeed, the importance of protecting another Tribal sacred ground in Arizona (Oak Flat) was called out last week by Justice Gorsuch in his dissent from the denial of certiorari in Apache Stronghold v. United States, 2025 WL 1496472 at *7 (mem.):

¹ <https://www.up.com/customers/track-record/tr110122-native-american-heritage-month-leader-spotlight.htm>.

² <https://eastoregonian.com/2013/08/28/tribes-reach-agreement-with-railroad>. The agreement also provides that UP would work with CTUIR when building additional rail line.

³ Invasive Cultural Resources Damage Assessment Technical Report for AZ U:10:2(ASM), Mesa, Maricopa County, Arizona at 54 (Revised and Finalized Jan. 2025).

“Faced with the government’s plan to destroy an ancient site of tribal worship, we owe the Apaches no less. They may live far from Washington, D. C., and their history and religious practices may be unfamiliar to many. But that should make no difference. ‘Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country’s commitment to...religious freedom.’ Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 584 U. S. 617, 649 (2018) (Gorsuch, J., concurring).”

While concurring in the decision to advance the project to the next stage of the historic review process, I explain my views on the Section 110(k) issue below.

II. The Undisputed Facts Support a Finding that UP Engaged in “Anticipatory Demolition” of Historic Properties in Violation of Section 110(k)

Based on the evidence of record, I conclude that UP engaged in “anticipatory demolition” of historic properties in violation of Section 110(k). UP’s failure to protect highly significant and sensitive archaeological sites during the environmental and historic review process allowed over 19 acres of significant and sacred lands to be heavily disturbed, and over 40,000 cubic yards of soil containing important cultural material—likely including burial remains and thousands of artifacts—to be removed and trucked away for disposal at unknown locations. No innocent bystander, UP employees actively facilitated these ground-disturbing activities through formal agreements with third parties—sub-projects that were necessary components of the overall project and thus ultimately for UP’s benefit—while simultaneously working with Board staff and its contractor within the historic review process. Although UP has argued that Section 110(k) requires a “specific intent” to avoid the Section 106 historic review process and to significantly adversely affect a historic property, I believe that NHPA is best interpreted to require at most a “general intent” to do so. Because UP’s behavior in this case meets that standard, I conclude that its actions constitute a violation of Section 110(k).

UP’s first consultation with the Board’s Office of Environmental Analysis (OEA) regarding the project’s environmental and historic review process occurred in February 2021. As early as February 18, 2022, OEA’s third-party consultant (Jacobs), in response to inquiries from UP’s Real Estate Department, informed UP’s Engineering Department of the types of field work Jacobs wished to conduct during the site visits, *including a cultural resources survey*. The Real Estate Department was also informed that Jacobs wanted to be on site as early as March 2022 and actively worked toward executing right-of-entry agreements to facilitate the Jacobs field work. OEA formally began the Section 106 historic review process on April 6, 2022. At a meeting on August 8, 2022, OEA first notified UP that a number of significant archaeological sites located within the project’s Area of Potential Effects were eligible for listing in the National Register of Historic Places and that the proposed project would have an adverse effect on historic properties. On November 3, 2022, UP actively participated in meetings with the consulting parties about the project’s adverse effect on cultural resources and the need to develop an MOA setting out a process to mitigate those effects. On May 31, 2023, OEA issued its draft Environmental Assessment addressing the project’s potential environmental and historic impacts for public review and comment.

During this very same period, UP was negotiating various time-sensitive land purchase and utility relocation agreements which expressly provided for the construction of two retention basins and various utility relocation activities on UP's property. For example, the owners of the Unbound Gateway project—the property located where the lead track would turn to head straight east—conditioned the sale of the right of way to UP on the right to construct a retention basin on the property by a date certain.⁴ UP 110(k) Submission at 7. Similarly, the owners of the Power Industrial project—immediately west of the planned wye track—bargained with UP to construct a retention basin on property sold to UP for the right of way.⁵ Id. Both agreements specifically dictated that UP would become the eventual owner of the retention basins, and UP concedes that it “planned...to reconfigure and utilize these...basins for drainage from the tracks and roadbed once the line was constructed.” Id. at 8. Indeed, UP agreed to pay Unbound to construct its retention basin, presumably in consideration for avoided basin-related construction costs UP would have necessarily incurred later. Parts of UP's team apparently saw no impediment to these activities at the time they occurred out of a mistaken belief that “any pre-approval prohibition on construction was limited to Union Pacific and the rail line itself,” assuming that “the restrictions placed on Union Pacific” did not prevent it from directly and specifically allowing third parties access to its property to engage in conduct that would inevitably result in ground-disturbing activities—in an area that UP knew contained a number of significant archaeological sites and sensitive cultural resources. Id. at 6.⁶

⁴ UP was aware of Unbound's plan to construct the basin as early as early as November 3, 2021. The easement specifically allowing construction of Unbound's retention basin, as well as the right of entry agreement regarding the construction, were executed in early May 2023. Ground-disturbing activities—largely within a known, significant archaeological site and involving the removal of almost 16,000 cubic yards of culturally sensitive soil and heavy disturbance of approximately 6 acres of land—commenced almost immediately.

⁵ The easement specifically allowing construction of Power Industrial's retention basin, as well as the right of entry agreement regarding the construction, were executed in early December 2022. Again, ground-disturbing activities—all within the core of a known, significant archaeological site and involving the removal of approximately 25,000 cubic yards of culturally sensitive soil and heavy disturbance of approximately 8.5 acres of land—commenced almost immediately.

⁶ Likewise, because construction of the PIRATE line would impact Kinder Morgan's existing natural gas pipeline, UP negotiated with Kinder Morgan to excavate the surrounding area—within the known, significant archaeological site—and lower the pipeline further below ground, with Kinder Morgan agreeing to conduct the work and UP agreeing to pay all of the project expenses. The reimbursement agreement was executed on November 28, 2022, and the temporary access agreement was executed on May 18, 2023. And still again, ground-disturbing activities commenced almost immediately. UP, through the Real Estate Department, actively facilitated these ground-disturbing activities despite knowing that “no ground disturbance related to construction may take place until the STB has approved the preliminary findings report” because “the area...is hot for cultural resources” and that Kinder Morgan was not permitted to “excavate until the STB authorizes construction” of the PIRATE line. UP 110(k) Submission at 11 (and documents cited therein).

The deadlines for completion provided in these agreements were clearly and obviously inconsistent with what UP knew to be the timeline for the Section 106 historic review process, and yet UP actively facilitated third-party efforts to begin construction with all due haste. Again, all of the various sub-projects were necessary components of the overall project and thus ultimately for UP's benefit. At no time did UP direct any of the third parties to cease ground-disturbing activities until compelled to do so by the Board.

UP seeks to obscure these facts through a veil of corporate ignorance, claiming that its Real Estate Department—the sub-unit responsible for negotiating and executing the various third-party agreements at issue (and thus imbued with sufficient corporate authority to legally bind the company)—somehow “lacked visibility into the timeline of the authorization process before the Board” and had “insufficient awareness of Board Processes” based on a “lack of communication.” *Id.* at 6, 9. And yet even the Real Estate Department, presumably staffed at least in part by attorneys, knew enough about these processes to possess an affirmative awareness that pre-approval construction and demolition activities undertaken directly by UP itself were prohibited. *Id.* at 6.

Regardless, whatever inter-departmental communication failures may or may not have occurred is immaterial to determining whether UP as a whole⁷ possessed sufficient knowledge of the relevant facts and circumstances in this case to support finding a Section 110(k) violation, which it clearly did. UP is a sophisticated corporate entity with a presumed awareness of its legal responsibilities, having first entered the railroad business in 1862. The breakdown of UP's internal processes in this case—including the Law Department's apparent failure to conduct appropriate oversight—neither excuses the company's behavior nor absolves it of responsibility for the significant ground-disturbing activities that indisputably occurred on its property and that UP actively facilitated for its own benefit.

III. Section 110(k) Does Not Require a “Specific Intent” to Avoid the Provisions of Section 106

Section 110(k) requires that:

“Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of [Section 106 of NHPA], has intentionally significantly affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the [Advisory Council on Historic Preservation (AChP)], determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.”

⁷ The Board may pursue civil penalties on rail carriers “knowingly authorizing, consenting to, or permitting” unauthorized construction activities, 49 U.S.C. 11901(c), and when acting within the scope of their employment, the actions or omissions of rail carrier employees are considered the actions or omissions of the rail carrier itself. 49 U.S.C. 11907.

Therefore, where an applicant may have engaged in “anticipatory demolition”—i.e., violated Section 110(k)—the Board is required to make a determination on that issue before granting a permit or license or providing any other assistance to an applicant. Consol. Rail Corp.—Abandonment Exemption—In Hudson Cnty., N.J., Docket No. AB-167 (Sub-No. 1189X), et al., at 4 (STB served Aug. 22, 2022) (emphasis added) (Conrail Abandonment).⁸

In Conrail Abandonment, the Board acknowledged that “there is no clear caselaw on whether actual subjective intent is required [to find a 110(k) violation], nor has the Board previously addressed Section 110(k)’s requirements,” but explained that “[i]n other civil contexts, courts have interpreted ‘intent’ to include either an actual subjective intent to violate the statute or a reckless disregard for the fact that certain actions would violate the statute.” Id. at 10 (footnotes omitted). In that case, the Board ultimately declined to render a final determination on the issue as it concluded that there had been no Section 110(k) violation under either interpretation of intent. Id.

As the Supreme Court has noted, intent is an inherently “ambiguous” concept that can take on a variety of different meanings depending on the statutory context. See Farmer v. Brennan, 511 U.S. 825, 838 (1994). The four basic levels of intent are (in descending order of culpability): purpose, knowledge, recklessness, and negligence. See Borden v. United States, 593 U.S. 420, 426 (2021); United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978). Actors act purposefully when they “consciously desire” a particular result. Borden, 511 U.S. at 426. They act knowingly when they are aware that a result is practically certain to result from their conduct; even if not affirmatively wanting a specific result, they still make a deliberate choice with awareness of consequent harm. Id. They act recklessly when they consciously disregard a substantial and unjustifiable risk attached to their conduct, in gross deviation from accepted standards. Id. at 427. They act negligently if they should be (but in fact are not) aware of such substantial and unjustifiable risk. Id. The concept of “general intent” roughly corresponds to the two middle levels (knowledge and recklessness).

UP argues here that Section 110(k) requires the very highest level of culpability: an actual subjective intent to (a) avoid the Section 106 process and (b) significantly adversely affect a historic property, thereby suggesting that a violation can be found only if its sole “purpose” or “motive” was to violate the statute. But UP’s proffered interpretation is certainly not dictated by NHPA’s text. The plain language of the statute specifies only some form of intent; it quite clearly does not require either purpose or motive (more specific terms Congress could have chosen to use had it wished to do so). In point of fact, it would be exceedingly odd for the statute to anticipate the possibility of a violation in circumstances where the applicant simply allowed the adverse event to occur (having the legal power to prevent it) but simultaneously require that the applicant have the specific purpose to avoid the Section 106 review process. It is eminently more reasonable to interpret the intent requirement manifested in each prong coextensively; to do otherwise would effectively render a portion of Section 110(k)’s text a

⁸ The Board’s most recent decision in this case likewise specified that the question of whether UP violated Section 110(k) “will be resolved” before the environmental and historic review process in this docket is allowed to proceed. Union Pac. R.R.—Constr. & Operation Exemption—in Maricopa Cnty., Ariz., FD 36501, slip op. at 3 (STB served Nov. 14, 2024).

virtual nullity. See Hibbs v. Winn, 542 U.S. 88, 101 (2004) (explaining that statutes should be construed to give effect to every provision so that no part is inoperative, superfluous, void, or insignificant).

Moreover, considering Section 110(k) in context supports a conclusion that actual subjective intent is not required. While NHPA is admittedly primarily a procedural statute, the fact that its procedures are specifically designed to encourage both the identification and protection of historic resources is of course relevant to the question at hand.⁹ If a specific motive to violate the statute were required, applicants would functionally be allowed to engage in destructive conduct even when consciously aware that a significant adverse effect to historic resources is substantially certain to result from that conduct. This concern is far from academic; indeed, one can easily envision a variety of rail construction scenarios where an applicant first discovers the presence of historic properties in the course of the Section 106 review process, and subsequently decides to destroy them (or allows them to be destroyed) for some “business purpose” ostensibly unrelated to that process. Embracing an interpretation of Section 110(k) that requires actual subjective intent to avoid the provisions of Section 106 would nonsensically undermine NHPA’s goal of encouraging the protection of historic properties.

UP largely rests its specific intent argument on NHPA’s legislative history and the guidance issued by the Secretary of the Interior (Secretary) regarding NHPA implementation. See also Conrail Abandonment, slip op. at 9-10 (discussing both). While at first blush these sources would seem to bolster UP’s position, closer examination suggests a more nuanced interpretation is appropriate.

With regard to the legislative history,¹⁰ UP is correct insofar as one portion of the Senate Report from the Committee on Energy and Natural Resources suggests that Section 110(k) directs Federal agencies to withhold federal assistance when an applicant “demolishes an historic structure before making the application for assistance, in order to avoid historic preservation review provisions.” S. Rep. No. 102-336 at 13 (1992). Equally relevant to the proper

⁹ Likewise, the goal of the NHPA Amendments of 1992 (which added Section 110(k)) was “to strengthen the preservation of [the nation’s] historic heritage and resources.” S. Rep. No. 102-336 at 1 (1992).

¹⁰ As a general matter, while the Board sometimes looks to legislative history as an interpretive guide, its usefulness for purposes of statutory construction has been increasingly questioned over the last few decades. See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568-69 (2005) (explaining that “judicial reliance on legislative materials like committee reports...may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text”); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620–21 (1991) (Scalia, J., concurring) (explaining that even committee reports do not necessarily represent the understanding of the full Congress, given that they are created by a minority of Members, making it dangerous to draw assumptions about the whole body’s understanding of the statute from such documents). At the very least, such precedents caution against over-reliance on legislative history as a tool for statutory interpretation.

interpretation of the statutory text, however, are the circumstances leading to Section 110(k)'s final language. As originally introduced in 1991, the portion of Senate Bill 684 establishing Section 110(k)'s prohibition on anticipatory demolition did not include a requirement that an applicant have engaged in conduct "with intent to avoid the requirements of" Section 106. This provision seems to have been added during the Committee amendment process in response to a concern raised by the Department of the Interior (DOI) that Senate Bill 684 as originally drafted "could have the unintended effect of penalizing property owners who make good faith changes to their property that they do not know are not in conformance with [NHPA], and then sometime in the distant future they are denied assistance." *Id.* at 34. To insulate such "good faith" situations from potentially running afoul of NHPA, DOI suggested a change to the Senate Bill's original language to include some sort of "intent to avoid" Section 106, concluding that in the absence of such a requirement "it would be unjust to deny a landowner the assistance that would otherwise be due." *Id.* It is therefore reasonable to conclude, based solely on the legislative history, that the addition of the "intent to avoid" language was simply an attempt to exempt from Section 110(k) liability circumstances where an applicant might be said to have engaged in (at most) negligent conduct prior to submitting its application. Viewed in this light, the statutory text was never intended to insulate applicants who knowingly or recklessly engage in destructive activities, either before or after the Section 106 process has been initiated.

With regard to the Secretary's NHPA implementation guidance, UP is again correct insofar as the document expresses DOI's interpretation that Section 110(k) is implicated when historic properties are "destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of" Section 106 review. 63 Fed. Reg. 20,496, 20,503 (Apr. 24, 1998). However, this point is not particularly persuasive, given that the document's statements regarding Section 110(k)'s "intent to avoid" requirement are fairly conclusory, and fail to provide any analysis of the statutory text, purpose, or legislative history¹¹—all of which, as explained above, on balance support a finding that Section 110(k) does not require a specific purpose to avoid the Section 106 process.

Pointing to many of the same sources, UP likewise argues that Section 110(k) violations are limited "to instances where the adverse effect on the historic property occurred *prior* to the applicant's submission of its application for federal assistance or authority." UP 110(k) Submission at 23 n.29 (emphasis in original). But again, the plain language of the statute does not limit its reach to such circumstances; an "intent to avoid" any of the various components of an agency's Section 106 review process can easily occur either before or after that process has begun. It doesn't take much imagination to envision circumstances where an applicant is first made aware of the existence of historic resources on its property during the Section 106 process and subsequently engages in destructive conduct "to avoid" the agency's ability to consider potential project alternatives or impose mitigation/remediation. To conclude that an applicant commits a Section 110(k) violation if it engages in destructive conduct the day before submitting its application, but does not commit a violation if it engages in such conduct the day after, would

¹¹ It seems plausible to presume that, much like UP's subjective intent argument, the Secretary's guidance was driven by a singular focus on one piece of NHPA's legislative history—which (as noted above) presents a somewhat more complicated story when examined in toto.

be both arbitrary and capricious. And again, had Congress specifically envisioned limiting Section 110(k) liability to only situations where an applicant intends to avoid the historic review process *altogether*—through the destruction of historic properties prior to the submission of its application—it easily could have included language to that effect.

Several decisions from the Federal Energy Regulatory Commission are particularly instructive in this regard. In Duncan’s Point Lot Owner’s Ass’n v. Union Electric Co., 112 FERC P 61,289, 62,314 (FERC issued Sept. 15, 2005), the Commission specifically explained that Section 110(k) “applies, by its express terms, to actions of an applicant prior to the agency’s grant of a federal license.” This principle was later applied in Rover Pipeline, LLC, 158 FERC P 61,109 (FERC issued Feb. 2, 2017) (Rover Certificate). In that case the Commission concluded that a 110(k) violation had occurred when the applicant for a pipeline construction project destroyed a historic structure almost two years after the construction certificate application and Section 106 consultation processes had begun. Tellingly, the Commission did not require a showing that the applicant possessed a specific subjective intent to avoid the requirements of Section 106, but stressed that the applicant seemed to have destroyed the structure at least in part to facilitate the underlying construction project (despite having committed to the Commission that the project would have no adverse effects on historic resources). See, e.g., Rover Pipeline, LLC, 174 FERC P 61,208, 61,875 & 61,893 (FERC issued Mar. 18, 2021) (Rover Show Cause) (noting that the applicant anticipated tearing down the structure if it could not be used for office space given that the land could most efficiently be used to site a pipeline compressor station); *id.* at 61,878-79 (noting that the applicant informed the State Historic Preservation Office of its decision to demolish the historic structure prior to completion of the Section 106 consultation process because the house was an impediment to the company’s use of the property and did not “suit [the company’s] needs”).

Given the above, I conclude that Section 110(k) does not require a showing of “specific intent” to avoid the historic review process; either knowledge or reckless disregard with respect to the likelihood that an applicant’s conduct will result in the avoidance of some part of Section 106 (i.e., “general intent”) is sufficient. The question then becomes whether (a) UP’s behavior in this case meets that standard and (b) UP “allowed the significant adverse effect to occur” (having legal power to prevent it). Answering that question is not difficult, as the evidence of record discussed above amply demonstrates that UP clearly acted with knowledge of or in reckless disregard to information and Board direction that ground disturbing activities could not take place during the Section 106 historic review process and yet “allowed”—in fact, actively facilitated—various third parties to engage in such activities—ultimately to UP’s benefit—while the Section 106 process was ongoing.

BOARD MEMBER SCHULTZ, with whom BOARD MEMBER FUCHS joins, concurring:

In the terms supplied by the statute itself, UP’s actions must be such that the Board can find that UP “intentionally significantly adversely affected a historic property” or allowed such effects to occur, and that UP did so with the “intent to avoid the requirements of [Section 106 of the NHPA].” 54 U.S.C. § 306113. If UP did not act, or fail to act, with the intent to avoid the requirements of Section 106, then Section 110(k) has not been satisfied.

The record does not support a finding that UP acted with intent to avoid the requirements of Section 106. Rather, the record shows that UP was appropriately participating in the Section 106 historic review process with OEA and the other consulting parties. The documents and written responses UP produced in response to the Board's request for information regarding the ground disturbances and damage to cultural resources, as well as OEA's own damage assessment, indicate that these incidents occurred *after* the Section 106 historic review process was well underway. These facts support the conclusion that the disturbances that occurred were not undertaken with the intent to avoid the requirements of Section 106. The sworn information and documents produced by UP also do not support a finding that the ground-disturbing activities were undertaken with any intent to avoid Section 106's requirements. No commenter argues otherwise or alleges that UP acted in bad faith to avoid Section 106 review. Given the stage of the Section 106 process, the damage almost certainly would have been discovered and delayed a final decision on a rail construction project that UP was eager to complete—which is precisely what came to pass.

I recognize the significant spiritual and emotional loss of the affected Tribes resulting from the destruction of their ancestral grounds and sacred cultural resources. I do not dismiss this as a minor mishap. UP has correctly recognized that its prior handling of the historic review process in this proceeding was “unacceptable” and “in need of correction.” I remain deeply troubled by UP's failure to have any mechanisms in place to protect sensitive cultural resources and help ensure that property within the APE was not disturbed unless and until the proposed construction project was authorized by the Board. As noted in the Decision, UP states that it is committed to making improvements to its internal processes and sets forth several actions it has taken or will take to ensure historic and cultural resources are protected going forward. As the Section 106 process continues, I urge parties to consider and address measures that can be taken to ensure that such ancestral sites are protected.

With that said, we are restricted by the text of the statute, and it is incumbent on the Board to apply the law as written, rather than reading into the statute a standard broader than what Congress explicitly set forth. The plain text of the statute states that, for Section 110(k) to apply, the Board must find that UP acted “with intent to avoid the requirements” of the Section 106 historic review process. As discussed, the record does not support such a finding.

BOARD MEMBER PRIMUS, dissenting:

I agree with Member Hedlund that UP engaged in anticipatory demolition in violation of Section 110(k) of the NHPA. Moreover, I want to commend her for her extremely thorough and spot-on analysis of UP's role in the extensive ground disturbing activities that occurred in connection to the PIRATE project and her response to UP's fallacious assertion that those activities, done by third parties at UP's behest, could not have violated Section 110(k). I previously made my thoughts clear about UP's role and responsibility for the project's delay in the Board's decision served November 14, 2024. See November 2024 Decision, FD 36501, slip op. at 6-7 (Member Primus concurring). The actions taken on behalf of UP were no accident, nor a case of the left hand not knowing what the right hand was doing. Quite the contrary. UP

figured no harm, no foul, with respect to initiating the construction projects at the heart of this matter. Unfortunately for UP and the affected Tribes, there was irreparable harm resulting from this flagrant foul.

Though I agree with Member Hedlund's analysis, I nonetheless remain unable to vote in favor of moving the environmental and historic review process forward without the Board first deciding whether UP violated Section 110(k). Language within the November 2024 Decision, supported by all Board members, specifically stated that the question of whether UP violated Section 110(k) would "be resolved before any further environmental and historic review in this docket proceeds." November 2024 Decision, FD 36501, slip op. at 5. I agreed with that position then and continue to do so now. As Board members, we should follow our own prescribed directive and not move forward until we have resolved the Section 110(k) issue. This how our process has historically worked, and I find no reason to do otherwise now.

Accordingly, I respectfully dissent.