

## GUARDING AMERICA'S HERITAGE . . .

The National Trust **Legal Defense Fund** works with local preservation advocates across the country, fighting to protect the irreplaceable qualities that make our communities special. Our first goal is to avoid the need to go to court at all, by using advocacy to encourage better government decisions that protect historic sites, neighborhoods, and landscapes. When necessary, however, the **LDF** is prepared to litigate to protect the Nation's historic resources.

*This update, summarizing a few of our current advocacy efforts, represents only a fraction of the controversies we work to resolve each year.* More information is available on the Trust's website: [www.preservationnation.org/legal](http://www.preservationnation.org/legal).



## NEW LITIGATION . . .

### NATIONAL TRUST FILES SUIT AGAINST VETERANS AFFAIRS AND FEMA TO PROTECT NEW ORLEANS' MID-CITY HISTORIC DISTRICT

On May 1, the National Trust filed a lawsuit against the Department of Veterans Affairs (VA) and the Federal Emergency Management Agency (FEMA), challenging the final selection of a 67-acre site in the Mid-City Historic District in New Orleans for construction of two major new medical centers—one for the VA, and the other for Louisiana State University (LSU), which would be funded in part by a FEMA grant for damage to historic Charity Hospital. The proposed new hospitals—as currently planned—would require the acquisition and demolition of at least 25 square blocks within the City of New Orleans, including at least 15 square blocks and up to 165 contributing buildings within the Mid-City Historic District, which is listed in the National Register of Historic Places.

The National Trust and a broad coalition of local partners have urged the VA and FEMA to adopt other alternatives, including re-using Charity Hospital, which would avoid or minimize the destruction of historic properties. The VA and LSU proposal would displace more than 600 people, while the alternatives would displace none, and would not require the demolition of a single home. Many of the homes and businesses within the proposed footprint of the project, as well as a historic 1879 school, have already been painstakingly rehabilitated by their owners since Hurricane Katrina, and are now threatened with destruction.

The National Trust's lawsuit charges that the VA and FEMA violated the National Environmental Policy Act (NEPA) by segment-

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ing the consideration of “site selection” impacts from the actual design, construction, and operation of the hospitals, so as to avoid the preparation and scrutiny inherent in a full-scale Environmental Impact Statement (EIS). The lawsuit also challenges the agencies’ conclusion that the adverse impacts of the projects on historic properties are not “significant.”



New design for Charity Hospital  
[Foundation for Historic Louisiana/  
RMJM Architects

For more than a year, the National Trust has been engaged as a consulting party in the intensive historic preservation review process for both the VA and LSU medical centers. During this time, the National Trust repeatedly raised objections to the agencies’ failure to prepare an EIS and failure to acknowledge the significance of the destructive impacts on historic properties.

The lawsuit was filed in federal district court for the District of Columbia. The National Trust is represented *pro bono* by the Institute for Public Representation at the Georgetown University Law Center.

## UPDATE ON LITIGATION . . .

### **LDF RESPONDS TO APPELLATE DECISION THAT CHICAGO LANDMARKS ORDINANCE WAS SUBJECT TO CHALLENGE ON VAGUENESS GROUNDS**

On January 30, 2009, the Illinois Appellate Court caused a media sensation throughout the United States when it ruled that Chicago’s landmark preservation ordinance may be unconstitutional. Contrary to significant legal precedent on the validity of historic preservation ordinances, the court in *Hanna v. City of Chicago* ruled that the plaintiffs, individual owners of residential property in two Chicago historic districts, had stated a cause of action sufficient to allow the case to be heard by the trial court. Specifically, the court found that at least two of the plaintiffs’ claims were legally sufficient, namely that (1) the criteria for designation under Chicago’s preservation ordinance were unconstitutionally vague and that the city had unlawfully delegated legislative authority to the Commission on Chicago Landmarks (the Landmarks Commission).

The National Trust’s legal team, in response, has worked to defend Chicago’s ordinance by taking the lead in drafting a strong and well-supported statement in support of the City of Chicago’s petition for review of the decision by the Illinois Supreme Court. The statement was filed jointly by the National Trust, Landmarks Illinois, Preservation Action, the National Alliance of Preservation Commissions, and 16 other *amici*. Although the Illinois Supreme Court, under its rules, denied the *amici*’s motion for leave to file the statement, the state Supreme Court has been apprised of the significance of this case and the fact that courts have upheld preservation ordinances against vagueness challenges and unlawful delegation of administrative authority challenges in at least 42 states and the District of Columbia. The National Trust, Landmarks Illinois, and the other *co-amici* are represented *pro bono* by the law firm of Neal & Leroy, LLC, in Chicago.

## FEDERAL COURTS UPHOLD COAL MINING REGULATION RESTRICTING MINING IN PROTECTED AREAS, AFTER NINE YEARS OF LITIGATION

On December 1, 2008, the U.S. Supreme Court denied review in a case involving a federal coal mining regulation, bringing to an end nine years of litigation over the rule, which was originally issued by the Office of Surface Mining (OSM) on December 17, 1999. In contrast to most of the National Trust's mining litigation through the years, this case involved a regulation that was actually supported by environmental and preservation groups.

The 1977 federal statute that regulates coal mining prohibits mining within or near sensitive sites—such as National Register-listed historic places, parks, homes, schools, churches, cemeteries, roads, national park units, national forests, national trails, wilderness areas, wild and scenic rivers, and wildlife refuges. The statute allows an exemption from these restrictions if a mining company can demonstrate “valid existing rights.” OSM adopted five different interpretations of the valid existing rights standard over the years, but in 1999 issued a rule that any applicant seeking to invoke the valid existing rights exemption must demonstrate that a “good faith effort” had been made to obtain all needed permits *before* the area became protected (either by passage of the 1977 legislation for sites already included in one of the protected categories, or by later designation, such as National Register listing).

The National Mining Association objected to the stringent standard, and filed a lawsuit challenging the rule. OSM estimated that its definition would protect more than 3,000 acres that would otherwise be vulnerable to mining under the less restrictive standard sought by the National Mining Association. The National Trust, together with the National Wildlife Federation, Citizens Coal Council, and Kentucky Resources Council, intervened in support of OSM's regulation. The coalition was represented *pro bono* by Walton Morris of Charlottesville, VA, and before the U.S. Supreme Court by the Public Citizen Litigation Group. The federal district court for the District of Columbia upheld the Valid Existing Rights regulation in a decision issued May 4, 2006, and the U.S. Court of Appeals for the D.C. Circuit agreed, in a decision issued January 15, 2008.

The Valid Existing Rights victory provided some consolation for preservation advocates, in the wake of two other major losses in litigation involving the mining industry during the past decade. First, a companion regulation issued by OSM in 1999 removed the protection afforded to sensitive sites from “subsidence” caused by underground mining, thus leaving even National Register-listed structures unprotected from subsidence damage. The coalition's challenge to the subsidence regulation was initially successful in federal district court in March 2002, but the D.C. Circuit reversed and upheld the pro-industry regulation in June 2003. Meanwhile, in April 2003, the D.C. Circuit issued its decision in *National Mining Association v. Fowler*, overriding the 1992 amendment to the National Historic Preservation Act in which Congress attempted to include delegated coal mining permits issued by the states within the scope of Section 106 (codifying a National Trust litigation victory achieved in 1991). OSM has never come into compliance with Section 106, but the Trust is hopeful that the new administration may for the first time provide a meaningful opportunity for the consideration of historic properties affected by coal mining.

## VERMONT ENVIRONMENTAL COURT APPROVES USE OF FIBER CEMENT BOARD SIDING IN BURLINGTON

On January 30, 2009, Environmental Judge Thomas S. Durkin of the Vermont Environmental Court ruled in favor of a commercial property owner, ALPH Realty, in the court's *de novo* review of the Burlington Development Review Board's denial of the landowner's request to replace the historic wood siding on three of its apartment buildings with fiber cement siding. Based on the city's then-existing preservation standards and first-hand observations of the property, Judge Durkin concluded that the applicant's proposed use of "Hardi-panel" would "enhance" the structures and be compatible with nearby, existing properties.



Buildings in Battery-King Street Historic District  
[Courtesy of Burlington Historic Preservation Review Committee]

Although the court acknowledged that "[h]ardipanel siding [would] not exactly replicate the wooden clapboards," particularly when viewed through the eyes of an historical or architectural expert, it nonetheless approved the applicant's use of the siding based on the applicant's representation that it could "be installed to closely resemble clapboard siding, including the reveal portions."

The National Trust had filed an amicus brief in support of the City, which urged the court to deny the request. Among other arguments, the National Trust stressed that retention of a building's original fabric is critical to its authenticity as a historic resource, fiber cement board and wood siding are not equivalent fabrics, and the full life cycle of the fiber cement board is unknown.

It is unlikely that the court's ruling will have an impact beyond the specific situation at issue in the case, because Burlington has amended its ordinance to require compliance with the Secretary of the Interior's Standards for Rehabilitation. These standards, applied by preservation commissions throughout the United States, provide that the "removal of distinctive materials or alteration of features, spaces, and spatial relationships that characterize a property" must be avoided.

## UPDATE ON ADVOCACY . . .

### NATIONAL TRUST TESTIFIES AGAINST WEAKENING OF LOCAL PRESERVATION ORDINANCE IN MARYLAND

On March 31, 2009, Julia Miller, Special Counsel and Education Coordinator in the National Trust's law department and Rob Nieweg, Director of the National Trust's Southern Field Office, submitted statements and testified in opposition to proposed amendments to Montgomery County, Maryland's historic preservation ordinance that would significantly weaken the county's preservation program. Among other changes, the legislation would make decisions not to recommend designation of historic resources by the planning board un-reviewable by

the County Council. The proposed amendment would also introduce nearly impossible hurdles to designation if the designation is opposed by an individual property owner.

Among other arguments, the National Trust identified significant legal and policy issues that weigh against adoption of the proposed changes. The County Council is not expected to vote on the measure until this summer.

## UPDATE ON PUBLIC LANDS . . .

### **TENTH CIRCUIT COURT OF APPEALS AFFIRMS LOWER COURT'S DECISION UPHOLDING RESTRICTIONS ON VEHICLE USE WITHIN GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT IN UTAH**

On April 13, 2009, the Tenth Circuit Court of Appeals denied an appeal by Kane County, Utah seeking to invalidate a 1999 decision by BLM to close roads in Grand Staircase-Escalante National Monument. The court's decision affirms a lower court's ruling that BLM was not obligated to determine whether the roads were county roads under Revised Statute 2477 prior to closing roads in the Monument. This victory upholds BLM's proactive steps to manage the Monument for protection of historic and natural resources.

BLM prepared the management plan through a public participation process and environmental analyses, restricting motorized travel as a means of preventing and limiting impacts to the Monument. After BLM adopted the plan in 1999, the local counties defiantly removed BLM road signs and posted illegal signs that encouraged the use of closed routes. Kane County ultimately brought the lawsuit in an attempt to invalidate BLM's road closures. The National Trust, along with The Wilderness Society, Sierra Club, and Southern Utah Wilderness Alliance, participated in the lawsuit as an intervening defendant (on the government's side), in part to ensure consideration of the public's interest in protecting the Monument's significant cultural resources from damage by motorized vehicles.

President Clinton established Grand Staircase-Escalante National Monument in 1996 through the Antiquities Act as the first National Monument to be managed by BLM. He designated the Monument, in part, because of the areas rich cultural resources, which include prehistoric Ancestral Puebloan and Fremont remains, Navajo and Paiute sacred sites, historic trails, and sites connected to Mormon Pioneers and other early settlers. Although BLM has surveyed only a very small percentage of the Monument's 1.7 million acres, over 4,000 cultural resources have been identified.



Grand Staircase-Escalante National Monument [Conservation System Alliance/Ray Mathis]

The National Trust and the other groups were represented by Earthjustice's Denver office.

## **LITIGATION TO PROTECT PREHISTORIC ROCK ART IN NINE MILE CANYON YIELDS POSITIVE RESULT: INTERIOR SECRETARY SALAZAR WITHDRAWS OIL & GAS LEASES**

Preservation and conservation organizations, including the Trust, won a major victory on January 20, 2009, when a federal district court enjoined the sale of controversial oil and gas leases near Nine Mile Canyon and other special areas in Utah. Following this decision, on February 5, 2009, Interior Secretary Ken Salazar took the court's order one step further and permanently withdrew the contested oil and gas leases. These steps will ensure that BLM adequately considers the effects of potential oil and gas development near Nine Mile Canyon before deciding to re-offer the leases in the future.

On December 17, 2008, the National Trust and several conservation organizations filed a lawsuit in federal district court in the District of Columbia, challenging the lease sale along with the resource management plans for three field offices in Utah that authorized the sale. Several days later, the coalition of plaintiffs filed a motion for a temporary restraining order to prevent the Secretary of the Interior from formally transferring the leases to companies that purchased the leases at an auction held by the Department of the Interior on December 18, 2008. The sale, which was first proposed in early November 2008, generated widespread criticism because it included land adjacent to a number of national parks in Utah as well as land near Nine Mile Canyon.

While the court and Secretary Salazar have resolved the National Trust's concerns with the proposed leases, the National Trust's claims challenging the resource management plans—the Price, Vernal and Moab field office plans—are still ripe for review, and remain before the court. The lawsuit maintains that BLM did not adequately comply with several federal laws, including the National Historic Preservation Act, in finalizing the plans. Specifically, the lawsuit claims that the agency's plans fail to examine the impacts of designating thousands of miles of off-road vehicle routes and authorizing oil and gas leasing across millions of acres on cultural and natural resources.

The National Trust is represented by lawyers from Earthjustice in Denver, Natural Resources Defense Council in Washington, D.C., and Southern Utah Wilderness Alliance in Salt Lake City.

## **NATIONAL TRUST JOINS LAWSUIT CHALLENGING BLM'S FINAL PLAN FOR MANAGING TWO NATIONAL MONUMENTS IN NORTHERN ARIZONA**

On January 26, 2009, the National Trust, along with The Wilderness Society, Sierra Club, and others, filed a complaint challenging BLM's resource management plan for Grand Canyon-Parashant and Vermilion Cliffs National Monuments in Northern Arizona. The lawsuit contends that BLM's plan approves potential uses that may harm identified monument resources, raising claims under the proclamations designating the Monuments, and under the National Historic Preservation Act, the National Environmental Policy Act, and the Federal Land Policy and Management Act. Protection of monument resources, the lawsuit argues, should be the primary focus in the monument plans, taking precedents over activities (such as road designation) that jeopardize or harm these resources.

In 2000, President Clinton designated Grand Canyon-Parashant and Vermilion Cliffs National Monuments through the Antiquities Act of 1906 in recognition of the monuments' significant cultural and historic objects, as well as scientific objects of interest such as the endangered desert tortoise and California condor. The Presidential Proclamations creating the Monuments also emphasized the remote landscape as a quality worthy of national protection. Together the Monuments comprise approximately 2.8 million acres and are managed by BLM.

In creating these Monuments, both located within the Colorado Plateau, the Proclamations mandated that BLM create management plans, including travel management plans, focused on protecting the Monuments' objects of interest. Thousands of identified and unidentified historic, cultural, and archaeological resources exist within the monuments' boundaries. Unfortunately, less than 5 percent of the acreage within the monuments has been surveyed for cultural resources.

This lawsuit raises important legal questions about how BLM should manage national monuments designated by the President through the Antiquities Act. The importance of this case is highlighted by the fact that there is very little precedent regarding BLM's management of national monuments. Nevertheless, there is persuasive factual information to support the claims that the lawsuit will raise. In fact, the coalition of groups joining this lawsuit has submitted extensive evidence into the record, including archaeological survey information, about the likely impacts associated with the designation of roads within the monuments.

### **NATIONAL TRUST FILES AMICUS BRIEF SUPPORTING CHALLENGE OF A FEDERAL COURT'S INTERPRETATION OF THE ANTIQUITIES ACT OF 1906**

On March 13, 2009, the National Trust, together with the Society for American Archaeology and the Lawyers' Committee for Cultural Heritage Preservation, filed an amicus brief in support of an action brought by the Western Watersheds Project asking a federal district court in Arizona to reconsider an opinion it issued regarding the enforceability of the Antiquities Act of 1906. The court's opinion, interpreting the Antiquities Act, held that the federal courts lack the authority to review directives mandated in President Clinton's proclamation establishing the Sonoran Desert National Monument in Arizona. The opinion could have negative consequences on enforceability of management directives for monuments created through the Antiquities Act.



Sonoran Desert Landscape [Peter Bungart,  
Circa Cultural Consulting]

In August 2008, the Western Watersheds Project filed suit in federal district court claiming that BLM had failed to complete a grazing compatibility analysis and resource management plan for the Sonoran Desert National Monument, as required by the monument's January 2001 presidential proclamation. On February 2, 2009, the court dismissed the case, finding that direct judicial review of agency action required by a presidential proclamation is not available, unless the proclamation expressly cites a "specific statutory foundation" other than the Antiquities Act. The Western Watersheds Project filed a motion asking the court to reconsider its opinion on February 16, 2009.

The National Trust is concerned that the court's limited interpretation of the Antiquities Act could make presidential prescriptions for managing and protecting monument objects unenforceable. Such a possibility is particularly relevant to the national monuments designated by President Clinton and managed by BLM, many of which provide for specific management mandates aimed at protecting significant historic, cultural and archaeological sites.

One example is the Sonoran Desert National Monument. Historic objects in Sonoran Desert include “many significant archaeological . . . sites, including rock art sites,” and “[s]igns of large villages and permanent habitat sites . . .,” and “a much used trail corridor 23 miles long in which are found remnants of several important historic trails, including the Juan Bautista de Anza National Historic Trail, the Mormon Battalion Trail, and the Butterfield Overland Stage Route.” The proclamation required BLM to manage the Monument in a manner that protects the Monument’s historic and scientific objects, directing BLM to take specific actions, including the preparation of a grazing compatibility analysis and RMP. The Western Watersheds Project’s lawsuit challenged BLM’s failure to comply with these requirements.

The court accepted the Trust’s *amicus* brief, and has scheduled oral argument for May 13, 2009.

## CONTRIBUTORS, SPONSORS, AND SUPPORTERS . . .

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Jerold S. Kayden, Esq., Cambridge, MA  
James R. Logan, IV, Esq., New Orleans, LA  
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**National Trust  
Legal Defense Fund**  
1785 Massachusetts Avenue, NW  
Washington, D.C. 20036  
Tel. 202-588-6035 • Fax. 202-588-6272  
[LAW@NTHP.ORG](mailto:LAW@NTHP.ORG) • [WWW.PRESERVATIONNATION.ORG](http://WWW.PRESERVATIONNATION.ORG)