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## LDF UPDATE – FALL 2004

The National Trust **Legal Defense Fund** responds on many fronts to help local communities around the country protect their historic character, their neighborhoods, their unique places, and their quality of life. The LDF team works with preservation advocates all over the country, not only in the courtroom, but also in city council chambers and executive offices at the federal, state, and local levels, 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 **Legal Defense Fund** is prepared to litigate to protect the Nation's historic resources.

The following update summarizes a few of the recent developments in our current advocacy efforts. These cases represent only a fraction of the preservation controversies we work to resolve each year. (More information on recent LDF developments is available on the Trust's website at [HTTP://WWW.NTHP.ORG/LAW/LDF.HTML](http://www.nthp.org/law/ldf.html).)



### **ARMY CORPS OFFERS SETTLEMENT PROPOSAL IN LAWSUIT TO STOP RESIDENTIAL DEVELOPMENT NEAR OATLANDS PLANTATION**

*National Trust for Historic Preservation, et al. v. U.S. Army Corps of Engineers,*  
No. 1:01-cv-287 (E.D. Va., filed Mar. 17, 2004)  
Status: Settlement proposed

As the bulldozers roll on a ridge adjacent to Oatlands Plantation, in Leesburg, Virginia, the U.S. Department of Justice has come forward with a last-minute overture for settlement, in an effort to stave off a summary judgment motion about to be filed by the National Trust, the Piedmont Environmental Council, and the Audubon Naturalist Society, in a lawsuit against the Army Corps of Engineers. The case challenges the Army Corps' failure to comply with Section 106 of the National Historic Preservation Act (NHPA) prior to issuing a permit authorizing the filling of wetlands and streams for construction of a major housing development known as Courtland Farm Rural Village in Loudoun County, Virginia, (which has been deemed the fastest growing county in the nation). The Courtland Farm development plans call for 277 homes on 200 acres, which would carve a highly visible swath through the viewshed of Oatlands Plantation, one of the Trust's Historic Sites.



The Courtland Farm plan calls for replacing the wooded area along the ridge with hundreds of homes. The 200-acre development borders Oatlands Plantation near Leesburg, Virginia. [Sustainable Loudoun]

More details about the settlement proposal will be provided at the Public Advocacy Committee meeting on September 26, 2004.

Last year, the Army Corps concluded that the permit would not adversely affect Oatlands or the rural setting of the Oatlands Historic District, because the Corps refused to consider any aspect of the housing development beyond the filling of wetlands and streams for road crossings and stormwater management ponds. However, the State Historic Preservation Office disagreed with the Corps' finding of "no adverse effect," as did the Advisory Council on Historic Preservation, and a variety of other consulting parties, including the Trust. Instead of resolving those objections about adverse effects, the Army Corps simply issued the permit, refusing to look at the effects of the housing development as a whole.

In the event that the parties are not able to reach a settlement, the case would be heard on October 15, 2004 by a federal district judge in Alexandria, VA. Shea & Gardner in Washington, DC is providing *pro bono* representation of the National Trust and the other plaintiffs in the litigation.



## NEW LITIGATION

### TRUST FILES AMICUS BRIEF IN RELIGIOUS LAND USE CASE SECOND CIRCUIT CONSIDERS TWO RLUIPA CHALLENGES

*Murphy v. Zoning Commission of New Milford, Conn.*,  
289 F. Supp. 2d 87 (D. Conn. 2003),  
appeal docketed, No. 03-9329 (2d Cir., filed 2004)  
Status: Briefing completed; case awaiting oral argument

On June 4, 2004, the National Trust filed an *amicus* brief with the U.S. Court of Appeals for the Second Circuit, in a case challenging the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The brief was joined by the Municipal Art Society of New York, the Preservation League of New York State, the New York Landmarks Conservancy, the New York Metro Chapter of the American Planning Association, the Greenwich Village Society for Historic Preservation, and the Brooklyn Heights Association.

Although the *New Milford* case does not involve historic properties (and in fact, none of the cases interpreting RLUIPA to date have involved historic preservation issues), the Trust and a broad coalition of New York preservation and planning groups were concerned about the importance of influencing the views of the U.S. Court of Appeals for the Second Circuit, because of the significance of the Second Circuit's ruling in *Rector, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). RLUIPA creates a federal cause of action to challenge any land use regulation that imposes a "substantial burden" on religious exercise, (unless the regulation satisfies a strict scrutiny test), and *St. Bartholomew's* is the leading appellate decision defining "substantial burden" in the context of a constitutional challenge to a preservation ordinance.

The *New Milford* case involved a couple who began hosting regular religious gatherings of 40-50 people at their home on a residential cul-de-sac. When the local zoning commission issued an order limiting the gatherings to 25 non-family members, the homeowners filed suit, and the district court held that the limitations on the size of the meetings imposed a substantial burden on religious exercise, in violation of RLUIPA.

The Second Circuit is also considering another RLUIPA case, *Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003), *appeal docketed*, No. 03-9042 (2d Cir., argued Mar. 2004), in which the Zoning Board of Appeals had denied a special use permit for a proposed 44,000-square-foot

expansion of a religious school. The district court overturned the zoning decision, and held that it violated RLUIPA by imposing a “substantial burden” on the religious school.

In both of the cases now pending before the Second Circuit, the local governments have asked the court of appeals to overturn the district court rulings upholding the constitutionality of RLUIPA, and instead to follow the reasoning of another district court, *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), *appeal docketed*, No. 04-55320 (9<sup>th</sup> Cir. filed 2004), which held RLUIPA unconstitutional.

The *amicus* brief in the *New Milford* case argued that RLUIPA is unconstitutional, both because it creates an improper strict scrutiny test for neutral, generally applicable laws, and also because Congress failed to demonstrate the need for RLUIPA as a “remedial” measure to compensate for violations of the Fourteenth Amendment. The *amicus* brief also argued that the New Milford order, which limited the gatherings to 25 non-family members, was not a “substantial burden” on religious exercise. The New York City office of Arnold & Porter represented the *amici* on a *pro bono* basis.



## NATIONAL TRUST SUCCESSFULLY NEGOTIATES FOR GREATER PROTECTIONS IN FCC NATIONWIDE PROGRAMMATIC AGREEMENT

On Friday, September 10, 2004, the Federal Communications Commission (FCC) at long last approved a Nationwide Programmatic Agreement (PA) for implementing compliance with Section 106 of the National Historic Preservation Act. The PA was the result of nearly four years of negotiations among the FCC, industry representatives, State Historic Preservation Officers (SHPOs), the Advisory Council on Historic Preservation (ACHP), and the National Trust—including some dramatic last-minute negotiations over the scope of certain exemptions in the agreement.

Formal comments from the public were filed in August 2003 on a published draft of the PA. Since that time, however, the FCC Commissioners had become deadlocked over the PA. The Chairman and one other Commissioner had voted in support of the PA, but two Commissioners opposed the PA because they believe the FCC lacks jurisdiction to require compliance with Section 106 for the construction of telecommunications towers in the first place. A fifth Commissioner, Michael J. Copps, withheld his vote based on his concern that certain exemptions created by the PA were overbroad. Copps, a former history professor, was sympathetic to the Trust’s position that the exemptions as originally proposed could serve as major loopholes with inadequate safeguards for the protection of historic properties.



Canterbury Shaker Village, a National Historic Landmark District, remains threatened by the visual intrusion of a proposed cell tower. [Canterbury Shaker Village]

In an effort to improve the PA, while resolving the stalemate, the Trust reached out to telecommunications industry groups to seek a potential compromise that would add safeguards to the most troubling of the exemptions. Some industry representatives were willing to negotiate, hoping that a consensus compromise on modifying the exemptions would be enough to persuade Commissioner Copps to vote in favor of the PA and get it adopted. Those industry groups included American Tower Corp., Cingular, T-Mobile, SBA Communications, and Western Wireless.

Our discussions focused on the exemption for “industrial and commercial” sites. As originally proposed, this exemption would have allowed towers up to 400 feet tall without any review under Section 106, as long as the tower was built on an industrial or commercial site of 10,000 square feet or more, and there were no structures over 45 years old within 200 feet of the tower. This would have allowed a single, relatively small commercial structure such as a drug store to serve as a Trojan Horse, bringing in an

unlimited number of extraordinarily high towers, exempt from Section 106 review, even if historic properties were located just a few hundred feet away from the new towers—close enough to be physically struck if the tower were to fall. The whole purpose of the exemptions—to streamline review where the likelihood of adverse effects is minimal—would be contradicted by such an expansive loophole.

As a compromise, the Trust and industry representatives agreed to: reduce the tower height from 400 feet down to 125 feet; increase the minimum size threshold for the industrial/commercial site from 10,000 square feet to 80-100,000 square feet; and increase the buffer zone around the tower from 200 feet to 500 feet, while broadening it to protect all types of historic resources, not just structures over 45 years. The Trust submitted this proposal to the FCC Chairman on August 25, and the industry coalition wrote to support the compromise, urging prompt approval of the PA.

At the last minute, however, the compromise nearly fell through, as the ACHP (a signatory to the PA) weighed in on behalf of other industry groups, such as the National Association of Broadcasters (whose towers tend to be taller), and the Cellular Telecommunications and Internet Association (CTIA), who wanted the exemption to be broader. The ACHP successfully fought to increase the height of the exempted towers from 125 feet to 200 feet.

Ultimately, despite the setback from the ACHP, the other elements of the Trust's compromise remained intact—expanding by tenfold the size of the industrial or commercial structure needed to trigger the exemption, increasing the buffer zone by 150 percent, and including consideration of landscape resources as well as structures within the buffer zone. The Trust's advocacy made a real difference in improving the Programmatic Agreement. Unfortunately, notwithstanding the ACHP's appeasement efforts, the CTIA announced it is likely to challenge the PA in court.



## USING ADMINISTRATIVE ADVOCACY TO PROTECT HISTORIC RESOURCES WITHOUT LITIGATION

### NINE MILE CANYON ADDED TO 11 MOST ENDANGERED LIST FOR 2004 AS THE TRUST PASSES BLM TO IMPROVE STEWARDSHIP AND PROTECTION OF CULTURAL RESOURCES

For more than a year, the National Trust has been working to minimize the adverse impacts of energy development and recreation in Utah's Nine Mile Canyon, in collaboration with local, state-wide, and national conservation and preservation groups. In May 2004, the Trust included Nine Mile Canyon on the List of 11 Most Endangered Historic Places. The Canyon is often called "the world's longest outdoor art gallery," with more than 10,000 images carved and painted onto canyon walls by Native Americans. The prehistoric cultures inhabiting Nine Mile Canyon left a legacy of rock shelters, granaries, and rock art throughout the Canyon area. Nine Mile Canyon is also an area of diverse historic-era sites, including the remains of stagecoach stops, settlers' cabins, ranches, and even many of the iron telegraph poles installed by the famed Buffalo Soldiers in the 19<sup>th</sup> century. These remains still stand as reminders of the area's pioneer history. Unfortunately, the stewardship of



The Great Hunt Scene, otherwise known as the "Cottonwood Panel," is one of 10,000 images carved into the wall of Nine Mile Canyon, contributing to its reputation as the world's longest outdoor art gallery. [NTHP]

Nine Mile Canyon is in the hands of the Bureau of Land Management (BLM), the most severely underfunded of all the federal land-managing agencies.

Two energy development projects initiated by Bill Barrett Corporation have the potential to harm fragile rock art, significant structures, and the cultural landscape within Nine Mile Canyon and its associated canyons. The Stone Cabin Seismic Project, which is already nearly complete, uses dynamite and vibration to survey for future oil and gas development in a 57,500-acre area. The West Tavaputs Plateau Drilling Program, approved by BLM in late July, would involve drilling up to 38 new wells in a 43,000-acre area, installing up to 50 miles of pipeline, three new compressor stations, and other infrastructure, and could result in an estimated 16,000 to 21,000 new round trips by heavy truck trips through the fragile canyons.

The Trust has been especially concerned about the potential for dynamite and truck traffic to damage rock art and structures. BLM's own data shows that rock art and historic structures are vulnerable to damage from dynamite up to 300 feet away. Yet, in reviewing the Stone Cabin Seismic Project, BLM had only required a cultural resource survey up to 50 feet away from points where dynamite charges would be used within the canyons and along canyon rims. The Trust put heavy pressure on BLM to develop additional survey and mitigation measures using the 300-foot diameter, while at the same time, reaching out to Bill Barrett Corp. to encourage the company to conduct the additional survey and mitigation measures voluntarily, as a "corporate good neighbor" policy. Meanwhile, in April 2004, the Southern Utah Wilderness Alliance and Natural Resources Defense Council filed suit against BLM, in close collaboration with the Trust, challenging the agency's failure to comply with Section 106 of the NHPA prior to approving the Stone Cabin Seismic Project. Although the federal district court ultimately upheld BLM's decision in July, the combination of the Trust's advocacy and the environmental litigation led to a voluntarily commitment from Bill Barrett Corp. to expand the survey and mitigation corridor from 100 feet wide to 600 feet wide within the canyons and along canyon rims, areas with a higher density of cultural resources.

The Trust adopted a similar approach to the West Tavaputs Plateau Drilling Program, combining outreach to the company with hard-hitting comments to BLM in the administrative process. The most severe adverse effects from the exploratory drilling program are attributable to vibration and dust from heavy truck traffic, and the long-term cumulative effects of future oil and gas development. Notwithstanding the severity of these effects, BLM decided to approve the project in late July, insisting (over the Trust's objections) that no adverse effects would result from the project. The LDF continues to explore options for challenging BLM's decision, including the potential for federal litigation to enforce compliance with Section 106 of the NHPA. At the same time, the Trust is actively encouraging the company to explore ways to avoid and minimize potential adverse effects from trucks and long-term oil and gas development.

## **ADMINISTRATIVE APPEAL OF OIL & GAS LEASES NEAR ZUNI SALT LAKE STILL PENDING BEFORE INTERIOR BOARD OF LAND APPEALS**

*National Trust for Historic Preservation v. Linda Rundell, et al.,*

No. 2004-129 (I.B.L.A., filed Feb. 2, 2004)

Status: Briefing completed; appeal pending

The National Trust has completed the briefing in its administrative appeal, pending before the Interior Board of Land Appeals (IBLA), which seeks to set aside oil and gas leases adjacent to the Zuni Salt Lake and Sanctuary Zone. The Trust's "Statement of Reasons" was filed on April 5, 2004, and our Reply Brief was filed September 17, 2004. The appeal seeks to enforce compliance with Section 106 of the National Historic Preservation Act by the Bureau of Land Management (BLM) prior to issuing oil and gas leases adjacent to the Zuni Salt Lake and Sanctuary Zone. Hydrologic connections to Zuni Salt Lake and potential adverse effects to the Sanctuary Zone have not yet been evaluated. The Trust continues to assert



Zuni Salt Lake and Sanctuary Zone, Catron and Cibola Counties, NM [Carolyn Johnson, Citizens Coal Council].

that BLM should revoke these leases until such time as the potential effects on unique cultural resources are better understood.

The Zuni Salt Lake, a Traditional Cultural Property listed on the National Register, is home to Salt Woman, called *Ma'lokyattsik'i* by the Zuni Pueblo, and is a place where the Zuni, their ancestors, and other tribes like the Hopi, Acoma, and Laguna Indians have made pilgrimages for thousands of years to request spiritual guidance and rain, to make offerings, and to collect salt for ceremonial, ritual, and domestic uses. Traditional pilgrimage trails connect the lake to the Zuni villages and to other sacred sites. In addition, the Sanctuary Zone, an 182,000-acre area surrounding the lake, contains burial grounds and shrines, and by tradition is a neutral zone where warring tribes could come together without conflict.

## TRUST LDF WORKS TO PROTECT CULTURAL RESOURCES ON PUBLIC LANDS FROM SUBURBAN RESIDENTIAL DEVELOPMENT

Suburban expansion in the Western U.S. continues to threaten the integrity of cultural and historic resources, as well as rural landscapes. The Trust has made an active effort to influence planning decisions at both the local and federal level. Advocating for responsible development, i.e., development that takes into consideration the significant resources that may be affected, can lead not only to better choices and decisions on the part of federal, state, and private entities, but can also help prevent unnecessary litigation.



In the Los Robles Archaeological District some areas, like the one shown at the far left, have been completely bladed in preparation for the La Osa subdivision, destroying natural vegetation and potentially damaging archaeological remains of the Hohokam tribe dating back 1,500 years. At the site of the proposed Mesa Escondido subdivision, left, erosion runoff is causing damage to the Aztec Ruins National Monument. [NTHP, Dale W. Anderson]

### *Ironwood Forest National Monument, Arizona – Proposed La Osa Ranch Development*

In January 2004, an Arizona developer sought approval from the Pinal County Planning Board for 67,000 homes and businesses. The planned area of development would encompass around 20,000 acres of private, state trust, and Bureau of Land Management lands. Unfortunately, the area contains literally thousands of significant Hohokam sites dating back 1,500 years. The Los Robles Archaeological District, which was listed in the National Register of Historic Places in 1988, falls directly within the planned area development. The Ironwood Forest National Monument is also immediately adjacent to the proposed development, a monument designated specifically to protect three National Register areas and many other historic resources and scientific objects.

Late last year, the developer, without required approvals, bulldozed and bladed roughly 600 acres, destroying nine archaeological sites, including two prehistoric village sites and portions of the Los Robles Archaeological District. Several of the destroyed sites were located on BLM and state-trust lands. In response, the National Trust, along with local conservationists and preservationists, pressured the Pinal

County Planning Board to deny the developer's permit. The Trust also expressed its concern through correspondence to the Arizona Attorney General and other agencies with the authority to prosecute the developer regarding the developer's complete disregard of both state and federal preservation laws. As a result, State and Federal prosecutors are pursuing criminal charges against the developer, and seeking potentially millions of dollars in restitution.

***Aztec Ruins National Monument, Aztec, New Mexico – Proposed Mesa Escondido Subdivision***

A proposed housing development immediately adjacent to Aztec Ruins National Monument threatens the integrity of Aztec Ruins and would destroy a prehistoric Chacoan road. The National Trust successfully convinced the Environmental Protection Agency (EPA) that the developer's Storm Water Permit, issued under the Clean Water Act, triggers Section 106 of the NHPA. The Aztec Planning Board approved the developer's proposed plat, despite concerns expressed by the National Trust, the EPA, and local preservationists that the developer had not yet complied with Section 106. Without receiving EPA's approval of the individual Storm Water Permit, the developer began bulldozing an area previously identified to the developer as a prehistoric Chacoan road. As advocated by the Trust, the EPA is currently considering whether to deny the developer's permit altogether, based on the developer's "anticipatory demolition," under Section 110(k) of the NHPA.

**PUBLIC LANDS ADVOCACY: LDF COMMENTS ON A RANGE OF OTHER PROJECTS AUTHORIZED BY BLM AND FOREST SERVICE**

LDF continues to be actively involved in the administrative process for developing Resource Management Plans (RMPs) under the Federal Land Policy and Management Act (FLPMA), as well as the consultation process under Section 106 of the National Historic Preservation Act (NHPA). BLM is currently in the process of revising roughly 90 RMPs across the West. Because RMPs establish permissible uses, set up limitations for such uses, and seek to identify cultural and historic properties at risk, it is important that the Trust advocates for greater protection and ensures that BLM follows the procedural requirements of the NHPA, the National Environmental Policy Act (NEPA), and FLPMA.

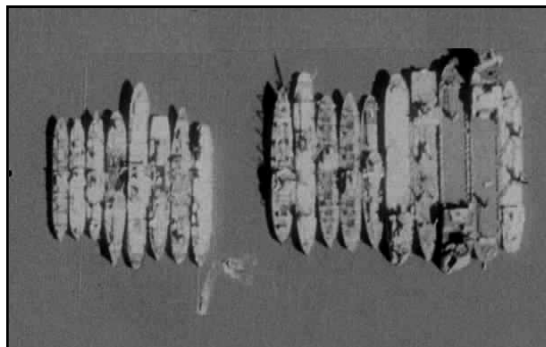
Additionally, one of the biggest current threats to traditional religious and cultural properties is the Administration's push to expedite energy development projects, such as mining and oil and gas drilling. The Trust continues to place special emphasis on protecting recently designated National Monuments, and on pressuring BLM to comply with Section 106 *prior to* leasing federal lands for energy development, a legal requirement under the NHPA that BLM currently fails to follow. The Trust is involved in the following RMPs, energy development projects, and other activities that potentially threaten cultural resources:

- Management Plans for newly-designated National Monuments, including Canyons of the Ancients in CO, Agua Fria, Vermilion Cliffs, Grand Canyon-Parashant, Sonoran Desert, and Ironwood Forest in AZ, Upper Missouri River Breaks in MT;
- Management Plans for other BLM areas, including Monticello, Price, and Vernal Field Offices in UT, Socorro Field Office in NM, Kemmerer RMP in WY;
- The proposed Longwell Badger-Two Medicine exploratory well in the Blackfeet Traditional Cultural District in MT. The Forest Service is conducting further studies to determine the appropriate boundaries for the Cultural District.

## NATIONAL TRUST PRESSES MARITIME ADMINISTRATION TO COMPLY WITH SECTION 106 PRIOR TO CONSIDERING DISPOSAL OF HISTORIC VESSELS

On June 2, 2004, members of the Trust's Law Department met with representatives of the Maritime Administration (MARAD), the disposal agent for U.S. government vessels of 1,500 gross tons or more, to discuss ways of integrating compliance with Section 106 of the National Historic Preservation Act into the agency's work. The meeting resulted from the National Trust's successful effort to enforce Section 106 by persuading MARAD to cancel plans for destruction of the USS GAGE, a historic World War II vessel, which MARAD was planning to transfer to the Navy for destruction in a training exercise known as a "SINKEX."

As a first step in bringing the program into compliance, MARAD's Office of Ship Operations established an in-house team in March 2004 to study and evaluate the historic context of all ships remaining in the reserve fleets. The team produced a report entitled, "Historic Assessment of Non-Retention Ships in the National Defense Reserve Fleet, Assessment Methodology and First Group Review," which assesses vessel type, history, and condition. Also attached to the report were comments and inquiries made by consulting parties from across the country, including the National Trust. This report was sent to the SHPOs located in each National Defense Reserve Fleet State, Virginia (James River Reserve Fleet), California (Suisun Bay Reserve Fleet), and Texas (Beaumont Reserve Fleet). MARAD is undertaking the review of these ships in phases, beginning with groups of vessels that are the highest priorities for disposal, based on factors such as high levels of contamination and deterioration, and low levels of historic significance. Additional vessel assessments will be made available to the SHPOs as the process moves forward. The National Trust will continue to monitor and review the assessments as they are presented to the various SHPOs.



Ships in James River Reserve Fleet at Fort Eustis, Virginia, shown here, are among those undergoing historic review as part of MARAD disposal procedures. [USGS]

## LDF HELPS LOCAL PRESERVATION GROUPS GAIN MITIGATION FOR FEDERAL PROJECTS THROUGH SECTION 106 CONSULTATION

The LDF is known for going to court to enforce federal agency compliance with Section 106. More often, however, we can increase our effectiveness by working with local and statewide preservation groups to use the Section 106 consultation process, prior to the agency's decision, as a forum for developing creative mitigation measures and safeguards to avoid and minimize harm to historic properties. The best outcomes involve good teamwork among Trust regional office staff, statewide and local preservation groups, the SHPO, and the Advisory Council on Historic Preservation. One recent examples is described below.

## ANTICIPATORY DEMOLITION OF HISTORIC CHURCH IN WINDBER, PA LEADS TO CREATIVE MITIGATION MEASURES FOR NEW CANCER RESEARCH CENTER

The unfortunate anticipatory demolition of St. Mary's Roman Catholic Church in Windber, Pennsylvania in December 2003 ultimately led to successful negotiations with USDA Rural Development and the applicant for federal funds, the Windber Research Institute, on how to appropriately deal with the absence of historic preservation review prior to the demolition of a historic structure. Despite the execution of a Memorandum of Agreement (MOA), which called for a number of creative mitigation measures, the Windber Borough Council is now exploring the possibility of de-listing the Windber historic district from the National Register in order to evade future Section 106 review. Clearly, additional work is needed to repair this damaged community. Michael Nixon represented the Windber Area Historical Society in the MOA negotiations *pro bono*.



St. Mary's Roman Catholic Church (l) and the vacant lot after demolition (below) [NTHP, ACHP]




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## LITIGATION UPDATE

### BRIEFING COMPLETED IN NORTHERN CHEYENNE TRIBE'S LAWSUIT CHALLENGING COAL BED METHANE AND NATURAL GAS DEVELOPMENT IN TONGUE RIVER WATERSHED, MONTANA

*Northern Cheyenne Tribe v. Bureau of Land Management,*  
No. CV-04-17-BLG-RWA (D. Mont., filed Feb. 18, 2004)

Status: Case pending; briefing completed; awaiting hearing date

On July 30, 2004, the National Trust filed a reply *amicus* brief, joined by the Association on American Indian Affairs (AAIA), in support of a motion for summary judgment filed by the Northern Cheyenne Tribe against the Bureau of Land Management (BLM). The Trust and AAIA had filed an earlier *amicus* brief on May 10, 2004. The Tribe's lawsuit challenges BLM's approval of 178 coal bed methane/natural gas wells and construction of supporting infrastructure in the Tongue River watershed near Decker, Montana, which is southeast of Billings on the Wyoming border.

The Tongue River watershed is a significant cultural and religious area for the Northern Cheyenne and several other Indian tribes, including the Crow and the Sioux. The area includes a number of important historic sites, such as rock art,

The Tongue river flows 246 miles from the Bighorn Mountains in Wyoming to the Yellowstone River in Miles City, Montana. The watershed is now threatened by energy development. [Bill Schneider]



medicine wheels, burials, cairns, tipi rings, vision sites, communal kills, eagle-trapping pits, homesteads, medicine lodges, spirit homes, and historic trails. The Tongue River is also the site of important religious ceremonies for the Northern Cheyenne, such as fasts, sweats, and the Sun Dance, Sacred Hat and Ghost Dance ceremonies. This region also includes sites that reflect the turbulent history between Native Americans and the U.S. Army, such as the battlefield where the Tongue River Heights Fight occurred in June 1876.

BLM approved the project without consulting with the Indian tribes, in direct violation of the NHPA, and over the objections of the Advisory Council on Historic Preservation and the Montana SHPO. Though the Area of Potential Effects for the project is nearly 6,700 acres, only ten percent of the area was surveyed for cultural resources. BLM also failed to comply with the National Environmental Policy Act (NEPA) by failing to afford the Tribes and the public an opportunity to review and comment on the project.

The Washington, D.C. office of Pepper Hamilton is representing the Trust and AAIA *pro bono*.



## CONTRIBUTORS, SPONSORS, AND SUPPORTERS

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