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LDF UPDATE – JANUARY 2005

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))



NEW LITIGATION

LITIGATION IS IMMINENT AS THE CITY OF ALBUQUERQUE MOVES CLOSER TO BULLDOZING A COMMUTER EXPRESSWAY THROUGH PETROGLYPH NATIONAL MONUMENT

SAGE Council, et al. v. Chavez, (N.M. Dist. Ct., to be filed Feb. 2005)

On November 2, 2004, Albuquerque voters approved a street bond referendum that includes \$8.7 million dollars for construction of the Paseo del Norte extension, a commuter expressway through the Petroglyph National Monument. As a result, the City is moving forward with plans to build the \$23 million road project, despite long-standing objections from the State Historic Preservation Office (SHPO), the National Trust, and a wide variety of local groups and Indian tribes. Embattled Mayor Martin Chavez, whose term ends in December 2005, has led a 15-year crusade to build the road, which will exacerbate sprawl on Albuquerque's west side.



The City of Albuquerque's plan to build a commuter expressway through Petroglyph National Monument threatens fragile rock art and a landscape sacred to many Indian tribes. [Rod Ventura, N.M. Env'tl. Law Center]

The Trust plans to join with local groups, including SAGE Council (Sacred Alliance for Grassroots Equality), the Southwest Organizing Project, Sierra Club, and individual members of Indian tribes, to challenge the Paseo del Norte extension in state court. At issue is the City's failure to comply with the New Mexico Prehistoric and Historic Sites Preservation Act, which is

modeled after the federal Section 4(f) statute, and prohibits the use of historic sites for any public project unless there is no feasible and prudent alternative to the use, and the project includes all possible planning to preserve and protect and minimize harm to historic site. The Final EIS, issued by the City more than twelve years ago, does not satisfy this strict standard.

The historic site is the 74-acre Las Imagines Archaeological District, which follows the volcanic escarpment west of Albuquerque, and was listed in the National Register and the New Mexico Register of Cultural Properties in 1986. The district includes more than 17,000 prehistoric and historic petroglyphs. A recent ethnographic study has confirmed the religious and cultural ties of numerous tribes to the Las Imagines district, which is considered a sacred area.

Feasible and prudent alternatives to the road project include both the no-build alternative, and the alternative of extending only Unser Boulevard, a north-south arterial, through the escarpment, which has long been considered a much less harmful project by the SHPO and local groups. A May 2004 transportation study by the Mid-Region Council of Governments confirmed that the transportation benefits of the Paseo del Norte extension would be so negligible that, after 20 years, the traffic impact would be worse than if nothing were built at all.

The litigation is expected to be filed in early February 2005, with legal representation by the New Mexico Environmental Law Center based in Santa Fe.

TRUST JOINS PRESERVATION LEAGUE OF NEW YORK IN *AMICUS* BRIEF OPPOSING ARCHITECTURAL DESTRUCTION OF TWO COLUMBUS CIRCLE

Landmark West! v. Burden,
3 Misc. 3d 1102(A), 2004 WL 913217 (N.Y. Sup. Ct. Apr. 15, 2004),
appeal docketed, (N.Y. App. Div., argued Dec. 1, 2004)
(STATUS: awaiting decision by the court)

On November 19, 2004, the Trust filed an *amicus curiae* brief, together with the Preservation League of New York State, in the appeal of a lawsuit seeking to protect the Two Columbus Circle building in New York City, a 1964 building of exceptional architectural importance by Edward Durell Stone, who also designed the Kennedy Center for the Performing Arts in Washington, DC. Two Columbus Circle is included in the Trust's 11 Most Endangered List for 2004, as well as the Preservation League's "Seven to Save" List in New York. This litigation is the only remaining hope for saving the building.

The lawsuit was originally filed in November 2003 by Landmark West!, the Historic Districts Council, the New York/Tri-State chapter of DoCoMoMo (DOcumentation and COnservation of Buildings, Sites and Neighborhoods of the MOdern MOvement), and a number of individual preservationists in New York. The lawsuit seeks to require the City of New York to prepare an Environmental Impact Statement (EIS) prior to selling Two Columbus Circle (formerly the Huntington Hartford Museum) to the Museum of Arts & Design, which plans to strip the exterior of the building and completely replace the façade. The City declined to prepare an EIS on the grounds that the building was not historically significant. (The Landmarks Preservation Commission has not nominated the building for landmark designation, despite pressure from preservationists, and New York City's preservation ordinance does not allow landmark nominations to be made by members of the public.) The lower court



The Museum of Arts and Design threatens to strip Two Columbus Circle, a 1964 Modernist icon designed by Edward Durell Stone, of its architectural integrity. [NTHP]

ruled against the preservationists in April 2004, and held that the City was not required to prepare an EIS.

However, even though the building has not been designated a New York City Landmark, and is less than 50 years old, it would almost certainly qualify for the National Register, because of its “exceptional” architectural importance. National Register eligibility would require consideration of the building as historic under the City Environmental Quality Review (CEQR) rules and Uniform Land Use Review Procedure (ULURP). The New York SHPO issued a letter in January 2003 stating that she would “prefer not to issue a formal determination of eligibility at this time,” and the eligibility issue has not yet been referred to the Keeper of the National Register. The *amicus* brief emphasized that eligibility for the National Register is not limited to cases where a formal determination has been made, and that, at the very least, the City’s obligation to take a “hard look” at the issue, and the likelihood that the building is eligible, put the burden on the City to seek a ruling from the Keeper.

The appeal was argued on December 1, 2004, by Antonia Bryson from the Urban Environmental Law Center in New York. The Preservation League and the Trust are represented by McNamee, Lochner, Titus & Williams, P.C., in Albany, NY.

TRUST JOINS SEATTLE PRESERVATION GROUPS IN CHALLENGING PROPOSED DEMOLITION OF FIRST UNITED METHODIST CHURCH

Friends of First United Methodist Church, et al. v. City of Seattle, et al.,

No. 04-2-27652-7 SEA (Wash. Super. Ct. Jan. 12, 2005)

(STATUS: Case Lost; Appeal to be filed)

The National Trust has joined a coalition of state and local preservation groups in Seattle, Washington, in litigation to challenge the proposed demolition of the First United Methodist Church for construction of a new office building. Although the Superior Court recently ruled against the preservationists, issuing a summary judgment ruling in favor of the City and the Church on January 12, 2005, an appeal is planned to the Washington Court of Appeals in February.

Built in 1907, the First United Methodist Church is the last historic church remaining in the city’s commercial core. The cream-colored terra cotta-clad building, with its large stained glass windows and red tiled dome, stands adjacent to the Rainier Club, a landmark building predating the church. Together, the church and the social club occupy a block hemmed by new development, city offices, and a combination of civic and office buildings, including the 76-story Bank of America Tower and the 62-story Key Tower.



First United Methodist Church, and Rainier Club, Seattle [www.GlassSteelAndStone.com]

Although the church is clearly eligible for local, state, and national landmark status, local landmark designation was blocked by a series of Washington State Supreme Court rulings in the 1990s. In 1995, the court ruled 5-4 that even purely honorary landmark designation, without any regulatory restrictions, would result in an “excessive burden” on religious practice under the state constitution. As a result, local governments in Washington State are uniquely thwarted in their ability to protect religiously affiliated historic properties.

In May 2002, First United Methodist Church announced plans to demolish its domed sanctuary building and replace it with a 33-story office tower with parking and a smaller sanctuary. The historic Rainier Club agreed to transfer development rights to the church in exchange for new health club

facilities and 75 parking spaces in the new building. The church and the Rainier Club jointly applied for and received a Master Use Permit from the city. The Trust named First United Methodist Church to its 2003 list of America's 11 Most Endangered Places as part of the listing for Urban Houses of Worship.

The Environmental Impact Statement (EIS) for the Master Use Permit application found that the proposed 33-story office tower is the only project that will meet the church's "financial and market" objectives, that is, to create land value of \$17-20 million. Citing the Washington State Supreme Court decision, the EIS stated that the City "may not constitutionally regulate" the loss of the historic sanctuary.

The lawsuit argues that the state high court did not exempt religious properties from the procedural requirements of the State Environmental Policy Act, and that the EIS was inadequate, based on its failure to evaluate on-site alternatives that would retain the sanctuary; failure to provide information necessary to objectively weigh alternatives; and failure to establish that the preferred alternative will actually achieve the church's lofty financial objectives. In addition, the lawsuit challenges the City's inclusion of the historic Rainier Club, a designated Seattle landmark, within the scope of the exemption given to the church.

The Trust's local partners in the case include the Washington Trust, Historic Seattle, and Friends of First United Methodist Church, an ad hoc group of influential community leaders established by Trustee Jenny Emerson. The Trust's participation is led by Western Regional Attorney Mike Buhler, and the preservation groups are represented in the litigation by Ater Wynne LLP in Seattle.

TRUST FILES AMICUS BRIEF IN NEW ORLEANS WAL-MART APPEAL

Coliseum Square Ass'n, et al. v. Martinez, et al.,
No. 02-2207 (E.D. La. April 11, 2003),
appeal docketed, No. 03-30875 (5th Cir.)

On December 7, 2004, the Trust filed an *amicus* brief, together with the American Planning Association, in support of a pending appeal by the coalition of New Orleans preservation groups challenging the construction of a Wal-Mart in the historic Lower Garden District. The Wal-Mart is a component of a major HOPE VI project, funded by the U.S. Department of Housing and Urban Development (HUD), to replace the 1500-unit St. Thomas public housing development with a mixed-income and mixed-use redevelopment.

The Trust participated actively in the administrative process for the project, including Section 106 consultation, and the Trust also testified at local public hearings. The Section 106 process revealed adverse effects to historic properties, including traffic, drainage, vibration, economic harm to small businesses in the historic districts, and destruction of 1500 historic public housing units.

The federal lawsuit challenges HUD's failure to comply with the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement, and failure to comply with Section 106 of the NHPA through improper delegation of HUD's Section 106 responsibilities to the local Housing Authority of New Orleans.



Opposition to the Wal-Mart has been strong from local businesses on Magazine Street in New Orleans' Lower Garden District. (NTHP)

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LITIGATION UPDATE

SETTLEMENT WITH ARMY CORPS LEADS TO SLAPP SUIT FILED BY DEVELOPER OF RESIDENTIAL SUBDIVISION NEAR OATLANDS PLANTATION

National Trust for Historic Preservation, et al. v. U.S. Army Corps of Engineers,
No. 1:04cv287 (LMB) (E.D. Va., filed Mar. 17, 2004)
STATUS: Case Settled Oct. 4, 2004

Courtland Farm Loudoun, LLC v. U.S. Army Corps of Engineers, et al.,
No. 1:04cv1231 (CMH/LO) (E.D. Va., filed Oct. 15, 2004)
STATUS: SLAPP Suit Withdrawn by developer Dec. 3, 2004

The past four months have brought a variety of dramatic developments in the ongoing saga involving the lawsuit filed in March 2004 by the National Trust, Piedmont Environmental Council, and Audubon Naturalist Society, to enforce the Army Corps of Engineers' compliance with Section 106 of the National Historic Preservation Act (NHPA). The lawsuit challenged the Corps' failure to comply with Section 106 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. Bulldozing for the development, which includes 277 homes on 200 acres, is already carving a highly visible swath through the viewshed of Oatlands Plantation, one of the Trust's Historic Sites. The Corps had refused to



The developers of Courtland Farm are bulldozing the wooded ridge adjacent to Oatlands Plantation near Leesburg, Virginia, in order to build 277 homes on 200 acres. [Sustainable Loudoun]

consider the effects of the housing development on Oatlands, and instead, considered only the effects of filling the wetlands. This issue reflects a long-standing national policy dispute between the Army Corps and historic preservation agencies, dating back more than 20 years.

On October 4, 2004, the Trust and the other plaintiffs entered into a settlement agreement with the Army Corps, which successfully resolved the lawsuit. The settlement provided virtually everything we sought in the litigation – suspension of the permit, and a reopened Section 106 review, in order to consider the effects of the entire housing development on Oatlands, not just the effects of the wetlands fill. The Army Corps moved

quickly to acknowledge the adverse effect, and scheduled a Section 106 consultation meeting at Oatlands on November 10 to discuss potential mitigation measures. (More importantly, the Corps has begun the process of repealing its own outmoded national regulations on historic preservation.)

But the legal battle did not end with the signing of the settlement agreement. We were thrilled when the county issued a stop work order two days later, halting the bulldozers on the project, based on a county ordinance requiring that all federal permits be validly in place as a precondition to on-site grading. Thus, the suspension of the Army Corps permit had triggered a suspension of the county permits as

well. Less than ten days later, on October 15, 2004, the developer responded by filing a SLAPP suit (Strategic Lawsuit Against Public Participation) in federal court, naming the Army Corps and the County, in addition to the Trust, and seeking \$45 million in damages from the Trust and the local conservation groups with whom we had worked. Even though the developer had refrained from intervening in the original lawsuit against the Corps, the developer now sought a court order to prohibit the Trust from communicating with the county or challenging any aspect of the project. We promptly filed a motion to dismiss the SLAPP suit, reminding the court that our actions were protected by the first amendment right to petition the government for redress of grievances.

Knowing the SLAPP suit was frivolous, the developer dropped the lawsuit six weeks later, on December 3, 2004, in order to avoid defending against our motion to dismiss the case. Nonetheless, the Trust and our local partners had to incur over \$30,000 in legal fees just to oppose the SLAPP suit.

Meanwhile, complicating matters even further, the developer had threatened as a negotiating ploy to remove the fill from the wetlands, in an effort to eliminate the Corps' jurisdiction over the project entirely. The Corps seized the opportunity to be rid of the controversy, and on November 29, the Corps ordered the developer to remove the fill and restore the wetlands (an expensive undertaking), and threatened to enforce the order with fines if the restoration is not complete within a reasonable time. Simultaneously, however, the Corps "terminated" the reopened Section 106 review, which the Trust has threatened to challenge in a new lawsuit.

The battle continues, as we press both the Army Corps and the developer to reconvene the Section 106 review in an effort to incorporate binding mitigation measures that will minimize the visual impact of the development on Oatlands.

The National Trust and the other plaintiffs have been represented *pro bono* by Shea & Gardner in Washington, DC, and by Andrea C. Ferster, Esq., in Washington, DC, and Mark Herring, Esq., in Leesburg, VA.



FEDERAL APPEALS COURT REJECTS LOGGING INDUSTRY'S ESTABLISHMENT CLAUSE CHALLENGE TO FOREST SERVICE PRESERVATION PLAN FOR MEDICINE WHEEL NATIONAL HISTORIC LANDMARK IN WYOMING

Wyoming Sawmills, Inc. v. U.S. Forest Service, et al.,

2004 WL 2091989 (10th Cir. Sept. 20, 2004)

STATUS: Case Won

On September 20, 2004, the U.S. Court of Appeals for the Tenth Circuit affirmed a Wyoming federal district court ruling that the logging industry does not have standing under the First Amendment's Establishment Clause to challenge a Historic Preservation Plan issued by the U.S. Forest Service. The Tenth Circuit held that Wyoming Sawmills had failed to demonstrate that its alleged injury, i.e., the loss of opportunity to bid on timber sales, was redressable. Further, the Tenth Circuit concluded that the Forest Service did not abuse its discretion in determining that the Historic Preservation Plan was not a significant change to the Big Horn Forest Plan, and thus did not require a for-



Medicine Wheel, an 80-foot-wide stone circle, is a Native American sacred site that was threatened by nearby logging.

mal amendment in accordance with the National Forest Management Act (NFMA).

On November 1, 2002, the Trust had joined the National Congress of American Indians in an *amicus* brief filed in support of the Forest Service with the court of appeals. Wyoming Sawmills, represented by the Mountain States Legal Foundation, had argued that the preservation plan, which closed some forest roads and closed off timber sales in sensitive areas near the Medicine Wheel, represented an unconstitutional promotion of Native American religious practices in violation of the Establishment Clause. The district court held that the logging industry did not have standing to challenge the plan under either the Establishment Clause or the NFMA, because its interests were economic in nature, not religious or environmental.

The Medicine Wheel National Historic Landmark is a nationally significant traditional cultural property—an 80-foot-wide stone circle located at an altitude above 10,000 feet, which has deep cultural and religious significance to a number of Indian tribes. Archaeological evidence indicates that people have been present in the area for at least 7,500 years, and there are numerous tepee rings, trails, and other archeological features and artifacts near the Medicine Wheel site. To Plains tribes, the Medicine Wheel, and Medicine Mountain, on which it is located, are important and powerful traditional cultural properties and are actively used by religious practitioners as sacred ceremonial sites.

In 1988, U.S. Forest Service officials at the Bighorn National Forest began to recognize that the agency's management of the Medicine Wheel was inadequate, and they initiated consultation under Section 106 of the National Historic Preservation Act to improve their stewardship of the site. After years of public comment, and consultation involving the State Historic Preservation Officer, Advisory Council on Historic Preservation, and a number of Native American tribes and other consulting parties, a historic preservation plan was developed in 1996. The plan applies to 18,000 acres around the 110-acre national monument. It accommodates the rights of Indian tribes to use the area for religious ceremonies, and allows for limited development in the area to be determined in part by a group of federal, state, and county governments and Indian tribes. The plan also provides for on-site interpretation, visitor management, and limitations on access to the Medicine Wheel by motorized vehicles.

After losing its case on appeal, Wyoming Sawmills filed a petition for rehearing *en banc* on November 4, 2004, which was denied by the court on December 3, 2004. The logging association is considering seeking review by the U.S. Supreme Court. The Trust and the National Congress of American Indians were represented *pro bono* by the Jerome N. Frank Legal Services Organization at Yale Law School, and the Native American Rights Fund in Boulder, CO.



PRESERVATIONISTS WIN KEY ISSUES IN ADMINISTRATIVE LITIGATION CHALLENGING PROPOSED SAINT LAWRENCE CEMENT PLANT IN HISTORIC HUDSON VALLEY

In re Application of St. Lawrence Cement Co., LLC,
No. 4-1040-0001/00001 (N.Y. Dep't of Env'tl Conserv. Sept. 8, 2004)
STATUS: Pending Before Administrative Law Judge

Since 2001, the National Trust has participated as *amicus curiae*, with the Preservation League of New York State, in a state administrative adjudication proceeding opposing the application by St. Lawrence Cement Co. for the proposed construction of a massive cement manufacturing plant in the Historic Hudson Valley. The plant would include more than 22 buildings and structures in Columbia County, NY, the tallest of which would contain stacks up to 40 stories high. The plant would be visible from scores of historic sites, including the Olana State Historic Site, home of landscape painter Frederick Edwin Church.

On September 8, 2004, the New York Commissioner of Environmental Conservation ruled that the parties challenging the St. Lawrence Cement facility could proceed with various challenges to the proposed plant in the historic Hudson River Valley. In addition to affirming the rights of the Trust and other groups to participate in all matters deemed adjudicable, the commissioner expanded the scope of review to allow greater consideration of visual impacts on historic resources in the region.

St. Lawrence's own Draft Environmental Impact Statement conceded that the size of the plant would be "disproportionate in scale to other elements in the regional landscape," but the facility's developers argued that the visual impact review should be limited to the jurisdictions housing the facility. The commissioner, noting the visual dominance the plant would pose in the mid-Hudson region, held that the visual impact review must encompass "the entire relevant viewshed of the project." The commissioner also rejected the last-minute mitigation measures offered by St. Lawrence as insufficient to terminate further review. Underscoring the significance of the issue, the commissioner noted that "a project's unmitigated visual impacts may provide a basis for permit denial." While the challenge can go forward under the commissioner's ruling, the local groups challenging the project will still have the burden of proving that St. Lawrence has not sufficiently mitigated the impact of the plant on historic resources.



The viewshed of Olana State Historic Park, home of landscape artist Frederick Edwin Church, would be affected by the proposed St. Lawrence Cement facility. [Scenic Hudson]

The commissioner also agreed to "ungrandfather" a state permit for a 1,222-acre limestone and shale mine site, within which the proposed facility would be built. The age of the mine facility had allowed it to evade state environmental quality review, but the commissioner's ruling will allow further examination of the project's impact on environmental and historic resources.

In response to the ruling, St. Lawrence Cement submitted a revised proposal for the plant in October 2004, which would reduce the height of the tallest stacks by about 40 feet, but would have the added harmful effect of increasing air pollution from emissions.

William A. Hurst, Esq., of McNamee, Lochner, Titus & Williams, P.C., in Albany, NY, continues to represent the preservation *amicus* groups *pro bono*.



CONTRIBUTORS, SPONSORS, AND SUPPORTERS

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