

LEGAL DEFENSE FUND



NATIONAL TRUST
for HISTORIC PRESERVATION

NATIONAL TRUST LEGAL DEFENSE FUND

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LDF UPDATE – OCTOBER 2003

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).)

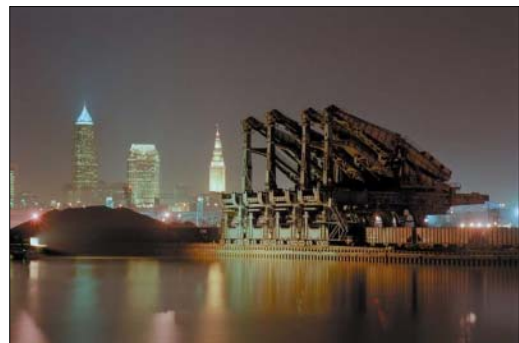


FOCUS ON FEDERAL AGENCY ENFORCEMENT: U.S. ARMY CORPS OF ENGINEERS

Few federal agencies have had more notorious compliance problems with Section 106 of the National Historic Preservation Act (NHPA) than the U.S. Army Corps of Engineers. Many of the Army Corps' problems stem from the agency's own historic preservation regulations, known as "Appendix C" to 33 C.F.R. Part 325, which have been repeatedly criticized by the Advisory Council and the courts as inconsistent with the Council's Section 106 regulations.

The National Trust's very first lawsuit as a plaintiff, filed in 1982, was against the Army Corps. Since that successful case, a number of other courts over the years have also found the Corps in violation of its responsibilities under the NHPA.

In recent years, the Trust's LDF has increased its involvement in litigation against the Army Corps, participating actively as *amicus* in several successful cases in Cincinnati (*Saylor Park*), Cleveland (*Hulett's*), and Charleston, SC (*Pye*). Yet despite these strong court rulings, the Army Corps' regulations remain unchanged. Two new cases in Virginia may provide additional opportunities for meaningful reform at the Army Corps, both through the Advisory Council and through the courts.



Hulett Iron Ore Unloaders, Cleveland, prior to partial demolition and dismantling [Jerry Mann].

ADVISORY COUNCIL ISSUES STRONG COMMENTS OPPOSING ARMY CORPS PERMIT FOR HOUSING DEVELOPMENT AT CHANCELLORSVILLE BATTLEFIELD

The Trust's long-standing campaign to protect the Chancellorsville Battlefield – and to bring the Army Corps into compliance with Section 106 – got a boost this summer from the Advisory Council on Historic Preservation, and may ultimately involve litigation against the Army Corps. In May 2003, the Army Corps decided to terminate consultation under Section 106 on a permit application for a 273-acre suburban housing development within the Chancellorsville Battlefield Historic District. The parcel was part of a larger 790-acre tract, which had earlier been proposed for the massive “Dogwood” development, recently rejected by the Spotsylvania County Board of Supervisors in response to the developer's rezoning request.



Chancellorsville Battlefield near Fredericksburg, VA [Steven Stanley].

In reviewing the permit application, the Army Corps refused to consider the adverse effects of the housing development as a whole, but instead, limited itself to reviewing historic resources within six small stream crossing areas, which were to be paved over for access roads to and through the development. The Trust participated as a consulting party under Section 106, together with other members of the Coalition to Save Chancellorsville Battlefield, including the Civil War Preservation Trust, the National Parks Conservation Association, and nine local groups. The Coalition members all objected to the limited scope of the Corps' review, as did the State Historic Preservation Office and the Advisory Council on Historic Preservation.

Faced with these objections, the Army Corps terminated consultation and requested the Advisory Council's formal comments on the project under Section 106. The Council held a major public hearing in Chancellorsville on July 1, 2003, at which the Trust and scores of others testified. The Trust emphasized (1) the need for a comprehensive survey of the Battlefield, in order to determine which areas are most significant; (2) the requirement to consider the reasonably foreseeable future effects of the housing development on the Battlefield; and (3) the importance of setting aside portions of the applicant's property for long-term protection.

On July 18, the Council issued strong comments criticizing the limited scope of the Army Corps' review, and emphasizing the need for the Corps to revise its Appendix C regulations in order to comply with Section 106 of the NHPA. The Coalition is currently considering litigation against the Army Corps, while at the same time exploring the potential to acquire a portion of the property.

ARMY CORPS ISSUES UNLAWFUL PERMIT ALLOWING MAJOR RESIDENTIAL DEVELOPMENT NEAR OATLANDS



Oatlands, a National Trust site near Leesburg, Virginia [NTHP].

After years of debate, the Army Corps of Engineers authorized a permit on June 25, 2003 for the Courtland Farms Rural Village to proceed with the construction of a road crossing and two stormwater management facilities associated with the development of a major 200-acre residential subdivision. The housing development of 277 homes will be encroach into the viewshed of the Oatlands Historic District, and Oatlands Plantation itself, a National Historic Landmark built in the early 19th century, which has been a National Trust-owned Historic Site since 1965.

When the Army Corps began compliance with Section 106 of the NHPA, the Corps made a determination that the permit would not affect Oatlands or the rural setting of the

Oatlands Historic District, because the Corps refused to consider any aspect of the development beyond the road crossings and stormwater management facilities. However, the State Historic Preservation Office disagreed with the Corps' determination of "no effect," as did the Advisory Council on Historic Preservation, and a variety of other consulting parties, including the Trust, Oatlands, Inc., Little Oatlands, Audubon Naturalist Society, Piedmont Environmental Council, Friends of Banshee Reeks Nature Preserve, Inc., Mind the Gap, Loudoun Wildlife Conservancy, and Loudoun County. Instead of deferring to those objections about adverse effects, the Army Corps simply issued the permit, reiterating its refusal to look at the effects of the housing development as a whole.

As a result, the Trust and other consulting parties are considering litigation against the Corps, in order to enforce compliance with Section 106 of the NHPA, by asking a court to revoke the permit and require that the Section 106 consultation process be reopened, as was done in the *Pye* and *Saylor Park* cases. The Army Corps' decision to issue the permit in this case raises a number of nationally significant policy issues regarding inconsistencies between the regulations of the Army Corps and the Advisory Council, and the scope of the Council's authority to influence "effect" determinations by other agencies.



FIGHTING TO DEFEND SECTION 4(F) AND OPPOSE DESTRUCTIVE TRANSPORTATION POLICIES

The LDF has been hard at work defending Section 4(f) of the Department of Transportation Act on Capitol Hill. Enacted in 1966, Section 4(f) prohibits the use of historic properties for transportation projects unless there is "no feasible and prudent alternative" to doing so, and unless the project includes "all possible planning to minimize harm." Working closely together, the Trust's public policy and legal staff have met with key congressional staff and developed a variety of documents not only critiquing the Bush Administration's proposals to weaken Section 4(f), but also outlining alternative legislative proposals to streamline the federal review process *without* weakening the substantive protections under current law. Meanwhile, the LDF has been actively involved in efforts to oppose or modify a number of transportation projects around the country where Section 4(f) has played a major role in protecting historic places. Here are just a few examples:

HISTORIC BRIDGE SAVED IN STURGEON BAY, WISCONSIN

Since 1998, the National Trust has been actively involved in working with local preservation advocates in Sturgeon Bay, Wisconsin to help protect and preserve the historic Michigan Street Bridge. The 1930 bridge is an unusual rolling-lift bascule bridge, and is an icon for this Door County town. During the summer season, the bridge carries heavy traffic loads and opens almost hourly to allow boat traffic coming through the ship canal. The Wisconsin DOT had initially proposed to demolish and replace the historic bridge, but the LDF, working closely with the regional office, put pressure on the state and federal transportation agencies to preserve the bridge by using Section 4(f) of the Department of Transportation Act and by bringing in a national historic bridge expert, Abba Lichtenstein, to help convince local and state officials that the bridge was in sound condition. More recently, the DOT agreed to preserve the bridge, but attempted to force the town to choose between liability for long-term maintenance of the bridge and an eight-month shutdown of access to the downtown during the rehabilitation process. After several years of reevaluation, the Wisconsin DOT has now changed its plans, with the support of city and county officials, and in late July 2003 announced a



The Michigan Street Bridge in Sturgeon Bay, Wisconsin [NTHP].

After several years of reevaluation, the Wisconsin DOT has now changed its plans, with the support of city and county officials, and in late July 2003 announced a

commitment to maintain and rehabilitate the historic bridge, while building an additional two-lane bridge nearby, which will allow downtown access during the rehabilitation.

A TALE OF TWO CITIES' BUS TRANSFER STATIONS

In Savannah, Georgia and Newport, Kentucky, Section 4(f) helped to put pressure on local transit agencies that began planning their federally funded bus transfer stations without ensuring that harm to historic properties was avoided and minimized. In Savannah, the Chatham Area Transit Authority had proposed building a new bus transfer station in the northwest corner of Savannah's renowned National Historic Landmark District, which would have foreclosed long-term plans for restoration of Elbert Square. After the Trust invoked the need for compliance with Section 4(f), as well as Section 106 of the National Historic Preservation Act, the agency entered into mediation with local preservationists, and emerged with a new win-win solution, just announced in July 2003: rehabilitating an existing parking garage in the historic district for use as the bus transfer station, thus avoiding the need for major new construction, and improving the appearance of a building that is currently a non-contributing eyesore in the district.

In Newport, Kentucky, the local Transit Authority of Northern Kentucky (TANK) was aggressively pursuing eminent domain of a local historic property in order to remove it from the site of a proposed bus transfer station. However, in May and August 2003, Federal Transit Administration (FTA), responding in part to a letter from the Trust's LDF, warned TANK to put the acquisition on hold, because federal law specifically prohibits the acquisition of right-of-way prior to final FTA approval.

In both Savannah and Newport, the FTA, the Advisory Council on Historic Preservation, and the State Historic Preservation Officers were instrumental in bringing additional pressure to bear on the local transit agencies.

PROPOSED REPLACEMENT OF TAPPAN ZEE BRIDGE HITS THE TRUST CLOSE TO HOME

The Tappan Zee Bridge crosses the Hudson River right within view of some of New York's most significant historic sites, including the National Trust's own Lyndhurst, the 1838 Gothic revival mansion owned by the Trust since 1961, as well as Sunnyside, owned by Historic Hudson Valley. As a result, the Trust has been very concerned about a proposal by the New York State Thruway Authority and MTA Metro-North Railroad, in coordination with the Federal Highway Administration and Federal Transit Administration, to replace the Tappan Zee Bridge with a massive new crossing that could be much closer to Lyndhurst, with a much greater adverse visual impact on the property.

The federal and state transportation agencies have initiated the environmental review process, which will include compliance with Section 4(f) and Section 106. The Trust has been working closely with local groups, including Scenic Hudson and Historic Hudson Valley, to attend public meetings and prepare comment letters as the review process gets underway and the agencies attempt to develop a variety of alternatives.

The target date for making a decision on the bridge project is December 2005. In the meantime, the Trust will continue to serve as an active voice for the protection of nearby historic properties and for full compliance with federal preservation laws.

This project would also be affected by the Administration's current legislative proposal to exempt all Interstate highways from compliance with Section 4(f) and Section 106. Since the Tappan Zee Bridge is a part of Interstate 287, the requirements of these federal laws would be waived under the Administration's transportation reauthorization bill.



Lyndhurst, a National Trust Historic Site adjacent to the Tappan Zee Bridge in Tarrytown, NY [NTHP].

PROTECTING SACRED SITES ON PUBLIC LANDS

The Trust's Public Lands Counsel, Michael Smith, is dedicated full-time to protecting archaeological, cultural, and sacred historic places, through active involvement in the administrative process for developing Resource Management Plans 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). The biggest current threat to these resources is the Administration's push to expedite energy development projects, such as mining, oil and gas drilling, and exploration using seismic technology, which involves detonating hundreds of explosive charges to help locate oil and gas. The Trust has placed special emphasis on protecting recently designated National Monuments, and on pressuring the Bureau of Land Management (BLM) to comply with Section 106 *prior to* leasing out federal lands for energy development, a legal requirement under the NHPA that BLM currently fails to follow. Three current issues from New Mexico exemplify the work of the LDF.

ZUNI SALT LAKE AND SANCTUARY ZONE SAVED FROM COAL STRIP MINE

Less than three months after announcing the Trust's 2003 List of America's Most Endangered Historic Places, the first of those sites has been saved. In an unexpected victory, the Board of the Salt River Project, an Arizona utility, announced on August 5, 2003 that it would no longer pursue plans to develop an 18,000-acre coal strip mine known as the Fence Lake Mine, approximately half of which lies directly within the Zuni Salt Lake and Sanctuary Zone, a National Register-eligible Traditional Cultural Property. The Trust issued a public statement commending the company for its decision, and calling on the Interior Department to develop permanent protection for the Sanctuary Area, to protect against future mining proposals.



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

LDF OBJECTIONS PERSUADE BLM TO REMOVE NAVAJO SACRED LANDS FROM SALE OF OIL AND GAS LEASES

A strong letter of protest from the Trust's LDF on July 15, 2003 helped win a reprieve for thousands of archaeological and cultural sites near the Navajo Reservation in northwestern New Mexico. BLM has proposed opening up the area to almost 10,000 new gas wells in the next 20 years. In July, BLM was soliciting bids for oil and gas leases on a number of parcels in the Counselor and Nageezi area, including two key parcels located within the spiritual homeland of the Navajo people, with high concentrations of cultural resource sites. But the Trust submitted a letter raising an array of legal objections, including BLM's failure to comply with the NHPA, and the risk that leasing the parcels would limit or foreclose BLM's ability to carry out its stewardship responsibilities for protecting historic and cultural resources. The Trust's protest was joined by Diné CARE, a Navajo grassroots advocacy organization, and the SHPO also raised concerns. Within days of the letters, BLM pulled the two parcels from the leasing process. While the long-term future of the parcels remains uncertain, the immediate threat to the area has been alleviated, and the Trust will continue to work with local advocates to protect the area.

CITY OF ALBUQUERQUE MOVES CLOSER TO BULLDOZING COMMUTER EXPRESSWAYS THROUGH PETROGLYPH NATIONAL MONUMENT

The City of Albuquerque has stepped up the pressure in its fifteen-year crusade to bulldoze a commuter expressway through the Petroglyph National Monument. On May 19, 2003, the City Council voted to move forward with plans to extend both Paseo del Norte and Unser Boulevard through the Monument, despite long-standing objections from the State Historic Preservation Office, the Trust, and a wide variety of local groups and tribes. 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 a decade ago, does not satisfy this strict standard. Meanwhile, a more recent ethnographic study has confirmed the religious and cultural ties of numerous tribes to the volcanic escarpment of the National Monument. Yet the City has failed to engage in consultation with the tribes.



Construction of Unser Boulevard as it winds along the edge of Petroglyph National Monument, NM. [NTHP]

The LDF is considering litigation in state court, together with local groups and tribes, to enforce the City's compliance with the Act. First, however, Albuquerque voters will have an opportunity to reject funding for the road project, which is included in a major transportation referendum on the ballot for a special election on October 28, 2003. In addition, the road project will require permits or approvals from the U.S. Army Corps of Engineers and the Environmental Protection Agency, which triggers requirements for compliance with Section 106 of the NHPA.

RECENT COURT DECISIONS

MISSOURI COURT OF APPEALS AFFIRMS DECISION TO ENFORCE RESIDENTIAL COVENANT IN KANSAS CITY'S HISTORIC COUNTRY CLUB DISTRICT

Country Club District Homes Ass'n v. Country Club Christian Church,
No. 99CV221311 (Jackson County, Mo., Cir. Ct. April 12, 2002),
aff'd, No. WD61418 (Mo. App. Sept. 2, 2003)

Status: *Case Won*



Country Club Church (above) and one of the historic homes threatened with demolition by the church. [NTHP]



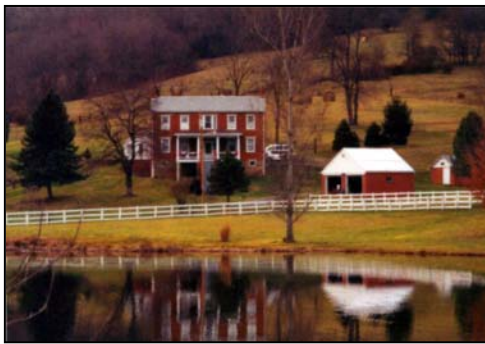
On September 2, 2003 the Missouri Court of Appeals affirmed the ruling of a lower court enforcing a protective covenant in the historic Country Club district in Kansas City. The covenant, which limits the use of the property to "private residence purposes," was invoked by local residents seeking to prevent the Country Club Christian Church from demolishing two historic homes in the district in order to expand the church's parking lots. The Trust had submitted an *amicus brief* on November 20, 2002, together with the Historic Kansas City Foundation, supporting the enforcement of the covenant.

The church had argued that the term "residential purposes" should be inter-

preted broadly, to include church parking. However, the court disagreed, holding that the covenant limits the property to uses that are only for residential purposes, to the exclusion of all other purposes, and thus the Church could not build parking lots on the property. The Court of Appeals also rejected the church's argument that changed circumstances precluded enforcement of the covenant, concluding that the Church did not prove that the change in circumstances was sufficiently radical to defeat the essential purpose of the covenant. The Trust was represented *pro bono* by the firm of King Hershey Coleman Koch & Stone, in Kansas City.

FEDERAL APPEALS COURT DECLINES TO PROTECT HISTORIC PROPERTIES AND OTHER SIGNIFICANT SITES FROM COAL MINE SUBSIDENCE

Citizens Coal Council, et al. v. Norton,
193 F. Supp. 2d 159 (D.D.C. Mar. 28, 2002),
rev'd, 330 F.3d 478 (D.C. Cir. June 3, 2003)
Status: *Case Lost on Appeal*



Kent Farm, Greene County, Pennsylvania, a National Register property directly impacted by surface subsidence from longwall coal mining. [Laurine & Murray Williams]

In a disappointing loss, the U.S. Court of Appeals for the D.C. Circuit issued a decision on June 3, 2003, which reversed a district court ruling that would have resulted in strong protection for historic properties and other sensitive sites from subsidence damage caused by underground coal mining. Subsidence results when the entire landscape above a coal seam drops several feet once the coal is removed. Subsidence can cause irreparable harm to historic properties, which are especially vulnerable to vibration damage.

The Surface Coal Mining and Reclamation Act (SMCRA) prohibits surface mining, as well as the "surface impacts" of underground mining, within National Register-listed historic properties, National Parks, National Forests, and other sensitive sites. In 1999, however, the Office of Surface Mining (OSM) issued a set of regulations interpreting the statute in a way that would remove the prohibition on surface impacts of underground mining in these sensitive areas. The Trust and a coalition of environmental and mining groups challenged the OSM regulations as inconsistent with the requirements of SMCRA. Although the district court agreed and struck down the regulations, the federal appeals court reversed.

The ruling results in a double-whammy for historic properties threatened by coal mining, because of another recent decision by the D.C. Circuit, which overrides the attempt by Congress in 1992 to include delegated federal permit programs within the scope of Section 106 of the NHPA. In *National Mining Ass'n v. Fowler*, No. 02-5041 (D.C. Cir. Apr. 15, 2003), the court ruled that the statutory language of the 1992 NHPA amendments did not succeed in reaching delegated permits, such as mining permits issued by states under OSM's federal oversight. As a result of the *Fowler* decision, coal mining permits issued by the states are no longer subject to Section 106. Nonetheless, NHPA enforcement efforts are likely to focus on OSM's failure to comply with Section 106 prior to approving the delegated state programs in the first instance.

CONTRIBUTORS, SPONSORS, AND SUPPORTERS

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