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LDF UPDATE – SEPTEMBER 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

LAWSUIT FILED TO PROTECT THE HISTORIC MERRITT PARKWAY IN CONNECTICUT

Merritt Parkway Conservancy, et al. v. Mineta, et al.,

No. 3:05CV860 (D. Conn., filed May 31, 2005)

STATUS: Summary Judgment hearing set for Sept. 27, 2005

On May 31, 2005, the National Trust filed suit, together with a broad coalition of state and local preservation and environmental groups, to challenge the design of a massive new interchange on the historic Merritt Parkway in Norwalk, Connecticut. The lawsuit claims that the Federal Highway Administration (FHWA) violated Section 4(f) of the Department of Transportation Act, Section 106 of the National Historic Preservation Act, and the National Environmental Policy Act (NEPA) in approving the plan.

The double interchange in Norwalk was designed more than a decade ago, in connection with plans to extend Route 7 many miles to the north. Even though the extension of Route 7 was cancelled, the massive interchange design remains unchanged. Plans call for elevated ramps running alongside the Parkway that would loom 30



Construction activities have already damaged the stone fascia of the historic Main Avenue Bridge. Connecticut DOT has agreed to stop bridge demolition activities until after the court hearing on Sept. 27.

feet above it in height, the destruction of two historic bridges, and the bulldozing and blasting away of a large swath of the Parkway's character-defining landscape.

Designed and built in the 1930s, the Merritt Parkway is recognized nationally as one of the most significant and most intact historic parkways in the United States. The Parkway was listed on the National Register in 1991, and has 72 historic bridges, each of which has a unique design.

The lawsuit is based on FHWA's failure to incorporate "all possible planning to minimize harm" to the historic Merritt Parkway, as required by Section 4(f), failure to comply with a Memorandum of Agreement (MOA) executed under Section 106, and failure to prepare and Environmental Impact Statement (EIS) or consider alternative interchange designs under NEPA. The MOA required that the Merritt Parkway Advisory Committee be given an opportunity to review and comment on the interchange design, which also must be consistent with the Merritt Parkway design guidelines. Instead of disclosing the interchange design to the Committee, however, the Committee was falsely assured by Connecticut DOT that the looming ramps would be "below the grade" of the Parkway.

The coalition of plaintiffs has filed a motion for summary judgment, which will be heard by the federal district court in New Haven on September 27, 2005. Andrea C. Ferster, of Washington, DC and Philip Walker, of Becker & Walker, PC, in Canton, Connecticut are representing the coalition of preservation and environmental groups.



LITIGATION VICTORIES

MONTANA FEDERAL COURT RULES BLM FAILED TO CONSULT WITH THE NORTHERN CHEYENNE TRIBE PRIOR TO APPROVING COAL BED METHANE DEVELOPMENT IN THE TONGUE RIVER WATERSHED

Northern Cheyenne Tribe v. Bureau of Land Management,
No. CV-04-17-BLG-RWA (D. Mont. June 6, 2005)
STATUS: Case Won



The Tongue River flows 246 miles from the Bighorn Mountains in Wyoming to the Yellowstone River in Miles City, MT. The watershed has cultural and religious significance to the Northern Cheyenne and several other Tribes, including the Crow and the Sioux. [USGS]

A federal district judge in Montana has ruled that the Bureau of Land Management (BLM) violated the National Historic Preservation Act (NHPA) and the agency's trust responsibilities by failing to engage in good faith consultation with the Northern Cheyenne Tribe prior to approving a plan by Fidelity Exploration to drill 178 coal bed methane/natural gas wells and supporting infrastructure within a 7,600-acre area in the Tongue River watershed near Decker, Montana, southeast of Billings on the Wyoming border. The court also barred BLM from relying on its 1997 Nationwide Programmatic Agreement (PA), which short-circuits the consultation process, because BLM had failed to comply with its commitments in the PA to revise agency manuals on tribal consultation in order to implement NHPA reforms enacted by Congress in 1992. The Trust and the Association on American Indian Affairs (AAIA) had filed an *amicus*

brief on May 10, 2004 supporting the Tribe in the successful lawsuit.

Judge Richard A. Anderson was highly critical of BLM for engaging in consultation that not only occurred *after* approval of the project, but which the judge characterized as “*pro forma* at best and misleading at worst,” because BLM had failed to disclose to either the Tribe or the SHPO the fact that the agency’s own archaeologist had conducted a study confirming the religious and cultural significance of a number of sites within the Tongue River watershed. (Immediately upon receiving the new study, the SHPO revoked its prior concurrence in the BLM’s finding that the project would have no effect on historic properties. The Court rejected BLM’s effort to exclude the SHPO’s retraction from the record.)

The ruling serves as important notice to federal land managers regarding the procedure for consultation prior to approving resource exploitation or extraction activities on lands with tribal significance. The Court urged that the agency must make “good faith efforts to consult with the Tribe at every stage” regarding identification, evaluation, and mitigation of impacts on culturally significant sites. The Court also pointed out that, while BLM assumed it was engaging in “consultation” during certain meetings with the Tribe, the Tribe legitimately interpreted those meetings as efforts to develop a protocol or framework for consultation, which was then never implemented.

Although the Tribe prevailed on legal grounds, Fidelity had already drilled all but four of its 178 wells and began installing infrastructure in the area while the Tribe’s initial appeal was pending. The Court ordered a cessation of all further operations, production, and development of the wells, pending further consultation with the Tribe, but the Court also recognized that harm to cultural sites, “can seldom be adequately remedied by money damages.”

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, 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.

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

VIRGINIA SUPREME COURT AFFIRMS VALIDITY OF PRE-1988 CONSERVATION AND PRESERVATION EASEMENTS

United States v. Blackman,
No. 042404 (Va. June 9, 2005)
STATUS: Case Won

On June 9, 2005, the Virginia Supreme Court handed down an important decision upholding the validity of conservation and preservation easements conveyed prior to the enactment of the 1988 Virginia Conservation Easement Act (VCEA), Va. Code §§ 9 10.1-1 009 et seq., concluding that the pre-VCEA easements were valid and enforceable negative easements in gross under Virginia common law. The National Trust and several other conservation and preservation organizations had filed an *amicus curiae* brief with the Court on February 14, 2005, urging the Court to affirm the enforceability of the older easements in Virginia. Fifteen of the Trust’s own easements in Virginia, especially those protecting portions of the Waterford National Historic Landmark District, were at risk of being invalidated by this case, and to-

gether the members of the coalition of *amici* hold hundreds of easements that could have been held invalid by an adverse ruling in the case.

The case arose in the context of an enforcement action filed by the National Park Service (NPS) in federal district court against the owner of an 1850s farmhouse in the Green Springs National Historic Landmark District, who refused to comply with the terms of an easement held by the NPS on his property. The NPS had rejected the owner's plans to remove the front porch, replace the siding, and build an incompatible addition to the house. When the owner began work in defiance of the NPS, the federal court issued a temporary restraining order halting the owner's actions. The owner responded by challenging the validity of the original easement on the property, which had been conveyed by a previous owner in 1973, fifteen years before Virginia's easement law was enacted. Since the Virginia Supreme Court had no precedent on the validity of "negative easements in gross" for conservation and historic preservation purposes under Virginia common law, the federal court certified the question of the easement's validity to the Virginia Supreme Court.

The Virginia Supreme Court found that, in 1962, Virginia had established by statute that any interest or claim in real estate, including easements in gross, could be disposed of by will or deed. The court determined from its prior case law that a Virginia statute recognizing the conveyance of easements in gross was not limited to affirmative easements, but rather, was intended to apply to both affirmative and negative easements in gross.

The court also examined Virginia's public policy toward conservation and preservation values. Through Virginia's enactment of the Open-Space Land Act in 1966, which encouraged the public acquisition of easements in gross, and the creation of the Virginia Outdoors Foundation and the Virginia Historic Landmarks Commission in 1966, the court found that Virginia had a strong public policy supporting the conservation and preservation of Virginia's cultural, historical, and environmental resources. The Court also noted that Article XI of Virginia's Constitution has, since 1970, embraced a general conservation and preservation policy for the benefit of Virginia's residents. The enactment of the VCEA in 1988 further supported the court's findings.

The court relied on its assessment of both statutory law and case law in Virginia, and found that the 1973 conveyance of the easement at issue in this case was valid under Virginia common law. In particular, the court determined that negative easements in gross restricting property for conservation and preservation purposes were not the sort of novel restrictions on property that the common law sought to prohibit. The court also concluded that the enactment of the VCEA in 1988 did not create a new right to create negative easements in gross; instead, the VCEA provided a statutory framework under which tax exemptions were made available to charitable organizations and tax benefits and incentives were made available to grantors of such easements.

Hunton & Williams LLP in Richmond, VA represented the coalition of *amici* organizations in the case.



The easement held by the Trust on the 1882 William Nettle House in Waterford, VA was one of 15 Trust easements that would have been invalidated by an adverse ruling in the *Blackman* case.



LEGISLATIVE DEVELOPMENTS

TRANSPORTATION REAUTHORIZATION BILL INCLUDES NEW DE MINIMIS EXEMPTION FROM SECTION 4(F)

The new transportation bill signed into law August 10, 2005 includes a significant amendment to Section 4(f) of the Department of Transportation Act – the most important amendment in the 39-year history of the law. Section 4(f) prohibits the “use” of historic properties, parks, recreation areas and wildlife refuges, unless there is “no prudent and feasible alternative” to using the protected site, and unless the project includes “all possible planning to minimize harm” to the site. For the first time, the law now includes an exemption for projects whose impact on protected sites will be “de minimis.”

Despite the creation of a new exemption from historic preservation’s strongest law, preservation advocates and environmental groups are celebrating the victory of emerging from the three-year legislative battle with Section 4(f) largely intact. The de minimis exemption has a number of safeguards, which were negotiated by the preservation and environmental groups, and the Administration’s concerted efforts to radically weaken Section 4(f) were thoroughly defeated. Instead, narrowly tailored and strategic amendments, developed through consensus with the American Association of State Highway & Transportation Officials (AASHTO), carried the day.

For historic properties, the de minimis exemption can only be invoked where there is a consensus that the project will have “no adverse effect” on historic properties, or there are no historic properties affected at all. That determination will be made through the Section 106 process, but as a safeguard, must include the following:

- Written concurrence from the state or tribal historic preservation officer that historic properties will not be harmed – and written concurrence by the Advisory Council on Historic Preservation if the ACHP is participating in the review; and
- Involvement of consulting parties in reaching the determination.

In addition to the de minimis exemption, the new law also directs the Federal Highway Administration to adopt regulations within one year to clarify the definition of “prudent and feasible alternatives,” consistent with the Supreme Court’s long-standing interpretation of the law in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

The Trust took a national leadership role in the advocacy campaign to defeat the Administration’s proposals to weaken Section 4(f).



USING ADMINISTRATIVE ADVOCACY TO PROTECT HISTORIC RESOURCES WITHOUT LITIGATION

AIR FORCE COMMITS TO REHABILITATING CAMP PINCHOT, PRESERVING EARLY HISTORY OF U.S. FOREST SERVICE

In response to the Military Housing Privatization Initiative enacted in the 1996 National Defense Authorization Act, all branches of the military are in the process of “privatizing” their housing. The goal of the initiative is to attract investment for capital improvements and maintenance from the private sector, as well as the expertise and efficiency of the private sector, through long-term lease arrangements (typi-

cally 50 years) with private developers. The housing is then available for lease by enlisted military personnel through housing subsidies. When some of the housing to be privatized is also historic, compliance with Section 106 requires negotiation of a Programmatic Agreement (PA) to ensure that effects on historic properties are taken into account. The PA will typically be incorporated into the lease agreement with the private developer to govern the long-term management of the property. During the past year, the Trust LDF has worked closely with SHPOs and the Advisory Council on Historic Preservation (ACHP) in negotiating a number of major housing privatization agreements under Section 106, ranging across the country from Hawaii to Annapolis, MD.

One of the most recent Section 106 reviews for housing privatization – at Eglin Air Force Base and Hurlburt Field in the Florida Panhandle -- has led to an important preservation victory. Eglin AFB includes the Camp Pinchot Historic District, which is an intact complex associated with the earliest years of the U.S. Forest Service. The enclave is named after Gifford Pinchot, the first chief of the Forest Service, who served under Theodore Roosevelt. Camp Pinchot served as headquarters for the Choctawhatchee National Forest, the first national forest in the southeastern United States, and one of the seven original national forests created by President Roosevelt. In 1940, Camp Pinchot was transferred to the Air Force and used for senior officer housing

In initiating consultation under Section 106, the Air Force proposed to demolish the Camp Pinchot district, and to have the private housing developer replace it with modern homes for senior officers. The Forest Service strongly objected, as did the SHPO, ACHP, the Trust, and others involved in the Section 106 consultation. In response to these concerns, the Air Force has recently committed to preserve and re-use the Historic District. Under a proposed lease restriction, the private developer would design a specific rehabilitation plan for review and comment by the Florida SHPO, the ACHP, and consulting parties. The parties are currently in the process of finalizing the language of the PA that will ensure the long-term preservation of the Camp Pinchot Historic District through the period of privatization.



The houses, barns and other structures in the Camp Pinchot Historic District were built in 1910 to house U.S. Forest Service personnel.

UPDATES

MADISON-LENOX HOTEL DEMOLISHED – NEED FOR COORDINATED PRESERVATION ADVOCACY IN DETROIT HIGHLIGHTED

After an extensive fight by local preservationists, the Detroit's historic Madison-Lenox Hotel, which was listed on the National Trust's 11 Most Endangered List in 2004, was demolished in May – leaving behind a vacant lot in downtown Detroit. The owner of the building, Ilitch Holdings, Inc., was denied a demolition request earlier in the year by the City of Detroit's Historic District Commission (HDC). Normally the HDC needs to grant a notice to proceed before a demolition permit may be issued on a historic building. But there is an exception in the preservation ordinance that allows for an emergency issuance of a building permit when it is necessary for the immediate protection of public health and safety. The City is required to notify the HDC when such a permit is issued. Demolition began, based on issuance of an

emergency building permit, and a portion of the hotel was destroyed before preservationists could obtain a temporary restraining order (TRO). Arguments continue as to whether the proper building inspections were made prior to issuance of the permit and whether the HDC was informed of the permit issuance in a timely manner.

The local preservationists were granted a temporary restraining order by the Wayne County Circuit Court, which remained in place for less than 24 hours. The Wayne County Circuit Court did not extend the TRO after the hearing, ruling that nonprofit organizations such as Preservation Wayne and Friends of the Book-Cadillac lacked legal standing to intervene in the dispute. Once the TRO was lifted, the rest of the hotel was demolished. Reacting to the demolition, the Michigan State Historic Preservation Office is reviewing Michigan law on historic preservation ordinances to explore changes that would ensure that the HDC's role cannot be bypassed when it comes to demolitions of historic buildings. In particular, the SHPO's office is reviewing both the emergency building permit issuance language and the right of standing for local preservation groups to enter into a legal battle of this kind.

The LDF has been providing advice and assistance to the local preservationist in this lengthy legal battle, and the National Trust will now be participating as part of a larger task force, the "Greater Detroit Historic Preservation Coalition," which will promote a proactive plan for historic preservation in Detroit and seek support from local philanthropic and corporate organizations. Groups such as Preservation Wayne, Friends of the Book-Cadillac, SHPO, Cityscape Detroit, and at least 15 other groups are all working together on this initiative. The National Trust will facilitate the process, track progress, and provide relevant technical support.



The Madison-Lenox, a three-building complex – including the 8-story Madison, built in 1900; an adjacent two-story restaurant; and the Lenox, built in 1903 – was demolished in June.

CONTRIBUTORS, SPONSORS, AND SUPPORTERS

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