

## GUARDING AMERICA'S HERITAGE . . .

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

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

## NEW LITIGATION . . .

### **LDF Moves to Join Lawsuit Challenging Expansion of Limestone Quarry Adjacent to Belle Grove Plantation and Cedar Creek Battlefield, Vir- ginia**

On August 29, 2008, the National Trust filed a motion to intervene as a plaintiff in a lawsuit challenging the Frederick County Board of Supervisors' decision to rezone 395 acres for the expansion of the Carmeuse/O-N Chemstone Minerals limestone quarry, which is adjacent to Cedar Creek Battlefield & Belle Grove National Historical Park in Virginia. The lawsuit contends that the Board voted to approve the zoning change necessary for the quarry expansion without requiring the analysis and protections requested by neighbors and preservationists. The complaint also raises procedural due process violations under the Virginia and U.S. Constitutions and procedural violations of the County's ordinances.

While the quarry has co-existed with Cedar Creek Battlefield and Belle Grove National Historical Park for many years, the proposed expansion, without an adequate evaluation of the impacts to the property owners and the historic resources, represents an unreasonable location and scale of development. The original plaintiffs—twenty property owners who reside within 1500 feet of the proposed quarry expansion—are particularly concerned about the impacts of the expanded quarry operation on their property. The National Trust seeks to intervene not only to protect our property interest in the Belle Grove Plantation, but also to prevent the direct and indirect destruction of "core" battlefield at Cedar Creek.



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Moreover, the National Trust is concerned about the potential impacts to the historic landscapes connecting Belle Grove and the Cedar Creek Battlefield. The specific threats from the quarry's expansion include visual intrusions in the rural landscapes, blasting damage to adjacent structures, quarry truck traffic along country roads through the Park, and the direct destruction of core battlefield land outside of National Historical Park boundaries.



Belle Grove, with quarry waste pile in background. [National Park Service.]

The National Trust has opposed rezoning for quarry expansion since early 2006 when the Board denied an earlier rezoning proposal. Although the operator's new proposal decreases the size of the expansion from 640 to 395 acres, the public was not given an adequate opportunity to review the revised application and proffers before the Board approved the rezoning plan on May 28, 2008. The plaintiffs have not yet served their complaint and the court will not respond to the Trust's motion to intervene until it is served. A settlement of the case is also possible.

The Cedar Creek Battlefield and Belle Grove Plantation are designated as a National Historic Landmark, and Congress designated the area as a National Historical Park in 2002 to be managed by the Park Service in cooperation with the Trust, Belle Grove, Inc., Shenandoah Valley Battlefields Foundation, Shenandoah County, and the Cedar Creek Battlefield Foundation. This area of the Shenandoah Valley has important properties representing 18<sup>th</sup> and 19<sup>th</sup>-century life in America, and the Cedar Creek Battlefield played a crucial part in the Civil War. The landscape and setting of these resources significantly contributes to their historic integrity. The National Trust owns 283 acres and the 1797 manor house at Belle Grove. Belle Grove, Inc., the National Trust's nonprofit partner and lessee, owns 104 acres and the 1753 Harmony Hall, also within the National Park boundary.

### **LDF Assists Local Preservation Organization in Suit to Enforce Kansas State Historic Preservation Act**

On July 21, 2008, the Shawnee County District Court handed an important victory to a local preservation organization by setting aside the Topeka City Council's decision that there were no feasible and prudent alternatives to the construction of a new parking lot for Grace Episcopal Cathedral, on the grounds that the decision violated the Kansas Historic Preservation Act. The proposed lot would be located in a heavily wooded area in the environs of historic Bethany Place, the site of Bethany College, the first women's college in Kansas.

The City approved the project despite a finding by the Kansas Historic Preservation Officer that the proposed project would "encroach upon, damage or destroy the Bethany Place site" because it would require the removal of several historic trees and change the relationship between two historic buildings on the site and the street.



Bethany Place Landscape, Topeka, KS. [Kansas Preservation Alliance.]

In a detailed, 57-page decision, the court sharply criticized the city for ignoring evidence of feasible and prudent alternatives to the proposed parking lot, and for granting the permit in response to the threat of

litigation under the First Amendment to the U.S. Constitution and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Significantly, the court stated that a decision to deny the Cathedral's parking lot project would not rise to the level of a "direct and substantial burden" on religious exercise.

The court wrote:

Here, no evidence exists before the Court that would remotely indicate that either the Kansas Historic Preservation Act, or the Act's particular implementation here by the Kansas Historical Society, was grounded other than on the sound premise of securing historic environs for the benefit of future citizens. Accordingly, any consideration of deference to the Diocese or Grace Cathedral because of their status as religious entities would have been wholly improper considerations and would not have been a "relevant factor" in approving or disapproving the Diocese's requested permit to build a parking lot on the Bethany Place environs.

Pedro Luis Irigonegaray, Esq. represented the Friends of Bethany Place, a concerned group of neighbors residing near Bethany Place. The National Trust provided assistance in responding to the First Amendment claims raised by Grace Cathedral and the Episcopal Diocese of Topeka. The City has appealed the decision to the Kansas Court of Appeals.

### **National Trust Submits *Amicus* Brief in Illinois Preservation Easement Valuation Case**

On September 19, 2008, the National Trust took the unusual step of seeking to participate as *amicus curiae* in a case before the U.S. District Court for the Northern District of Illinois involving a dispute between two taxpayers and the Internal Revenue Service (IRS) regarding the valuation of a historic preservation easement. The National Trust submitted a brief in opposition to a motion by the government in the case that sought, in effect, to completely bar the taxpayers' deduction for the donation of a historic preservation easement on their home because of alleged deficiencies in the documentation supporting their initial tax filing. The taxpayers had argued that the deficiencies, if any, were minor, and that they should be permitted to demonstrate the value of the deduction at trial.

In *Bruzewicz v. United States*, No. 07-C-4074 (N.D. Ill.), two taxpayers in the Frank Lloyd Wright-Prairie School of Architecture Historic District in Oak Park filed suit against the federal government as a result of the IRS's rejection of a 2002 tax deduction claimed by the taxpayers relating to the charitable donation of a preservation easement on their property to Landmarks Illinois. The IRS had rejected the deduction based on the agency's disagreement with



An easement on this home in a historic district in Oak Park, Illinois, was the subject of a tax dispute in federal district court in Illinois. [Howard Prossnitz]

the valuation methodology used in the taxpayers' appraisal, and because the appraisal and other supporting documentation provided by the taxpayers allegedly did not contain certain information required for a qualified appraisal. The IRS asserted that the easement donation was valueless, citing the fact that the property was already subject to preservation restrictions under local preservation law (even though those restrictions were, in many respects, simply advisory).

Seeking to avoid a trial on the valuation question, the government filed a summary judgment motion, arguing that the taxpayers' failure to fully comply

with substantiation requirements of the tax code and regulations meant that the deduction was not valid in the first place, and that such deficiencies could not be cured after the fact. The IRS argued that the taxpayers' failure to comply with every one of a variety of technical requirements—including, for example, that the appraisers had not included a statement describing their qualifications in the appraisal—should be a complete bar to the taxpayer receiving a charitable deduction.

In recent years, the IRS has taken an extremely aggressive audit approach for taxpayers donating historic preservation easements, and in many cases has argued that the value of such easements is zero. The National Trust's legal staff has met with IRS officials to seek to ensure that valuation reviews are done without prejudice, and are based on accurate data—whether developed by the taxpayer or by the IRS. The National Trust recognizes that, in a number of cases, the IRS may have valid concerns about claimed easement appraisals, and that the agency has the right—and even the obligation—to challenge such valuations when it has grounds to do so. This case, however, suggests that the IRS may be attempting to use very technical grounds to disqualify easement deductions altogether. This would set a very dangerous precedent for easement valuation cases because it would summarily deprive taxpayers of the opportunity to prove the underlying value of the easement, if the taxpayers failed to meet even one of the numerous technical substantiation requirements established by the IRS.

In this particular case, the Court ultimately declined to allow the brief submitted by the National Trust to be entered in the case, and the National Trust's motion for leave to file was denied on October 1, 2008. In considering the motion, however, the Court reviewed in detail the arguments set forth in the National Trust's brief. Consequently, the National Trust believes that its action in seeking leave to participate as *amicus* should help to highlight for the Court the seriousness of the issues involved in the case.

The National Trust's brief, produced in-house, was filed by local *pro bono* counsel Bryan Sims, Esq., of Thompson, Rosenthal & Watts, LLP, Naperville, Illinois.

## UPDATE ON FEDERAL LITIGATION . . .

### **U.S. Supreme Court Denies Petition for Certiorari Filed by Defenders of Wildlife Challenging Homeland Security Waiver of Federal Laws Applicable to Construction of the Border Fence**

On June 23, 2008, the U.S. Supreme Court denied a petition for *certiorari* filed by Defenders of Wildlife and the Sierra Club challenging the constitutionality of Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. § 1103. IIRIRA gives the Secretary of Homeland Security complete control over the process of building a border fence along the U.S.-Mexico border, including the power to waive all federal, state, and local laws that would otherwise apply to the project. This legislation prohibits any oversight from the courts, and Secretary Chertoff has now on three occasions exercised broad authority under the law to waive environmental laws that would otherwise apply to the extensive construction activities relating to the border fence.

Defenders of Wildlife and the Sierra Club filed the petition for Supreme Court review in response to an early decision by Secretary Chertoff to waive 19 federal laws, including the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act, after the two environmental organizations obtained a federal court injunction last September stopping construction of a section of the border fence in the San Pedro Riparian National Conservation Area in Arizona. Secretary Chertoff has since used IIRIRA to waive 30 federal laws for 470 miles of proposed U.S.-Mexico border fence.



The Secretary of the Department of Homeland Security waived 19 federal laws, including the National Historic Preservation Act and NEPA, for the U.S.-Mexico border fence. [DHS]

The National Trust joined the Tohono O’odham Nation and a number of environmental and religious groups in filing an *amicus* brief in support of Defenders’ petition before the Supreme Court. The *amicus* brief raised grave concerns about the implications of waiving these laws on significant cultural and natural resources, and highlighted the important values protected by the laws. Although no further recourse exists for the organizations challenging the waivers in this case, several other district court cases have been filed to challenge Secretary Chertoff’s use of the IIRIRA waiver authority. We will continue to monitor this issue closely, and in particular tracking potential effects to historic resources located along the border.

## RECENT CONGRESSIONAL ACTIVITY . . .

### **National Trust Testifies on Capital Hill Opposing Potential Railroad Exemption from Federal Preservation Laws and Negotiates Successful Amendment Protecting Section 106**

On June 5, 2008, National Trust Deputy General Counsel Elizabeth Merritt, testified before the Subcommittee on Railroads, Pipelines and Hazardous Materials of the House Committee on Transportation and Infrastructure, opposing a major exemption from federal preservation laws proposed by the Alaska Railroad and the North Carolina Railroad. The proposal would have exempted historic railroad corridors and related properties from Section 106 of the National Historic Preservation Act (NHPA) and Section 4(f) of the Department of Transportation Act. This was, in effect, an attempt to imitate the exemption that Congress granted to the Interstate Highway System in 2005.

Representatives of the Alaska Railroad began pushing for this exemption because of their frustration that Section 106 and Section 4(f) review delayed their ability to replace or repair bridges within the corridor. Representatives of the North Carolina Railroad pushed for the exemption on the grounds that a planned high-speed commuter rail in the Southeast High-Speed Rail Corridor could be approved more quickly without federal preservation review.

In her testimony on behalf of the National Trust, Ms. Merritt argued that the current system provides basic protections for the historic elements of the railroad system against overzealous development, as well as a host of other threatening plans, while at the same time allowing for significant administrative mechanisms that give the railroads the ability to voice their concerns. Section 106 and 4(f) review ensures that all possible alternatives are at least given consideration before any changes are made to historic properties. The position of the Na-

tional Trust is that an exemption was unnecessary and overly broad to the point that it could do irreparable harm to the historic elements of the country's railroad system.

Ultimately, Representative James Oberstar (D-MN) was able to introduce an amendment to the Amtrak reauthorization bill requiring the Secretary of Transportation to conduct a study, in consultation with the Advisory Council on Historic Preservation, the National Conference of State Historic Preservation Officers, the Department of the Interior and representatives from the railroads, to develop recommendations for streamlining compliance with Section 106 and Section 4(f) for railroad projects. The amendment - which was negotiated and drafted by the National Trust and the Alaska Railroad - also called for "immediate action" to cooperate with both railroads in an effort to expedite the review process for their projects.

## UPDATE ON PUBLIC LANDS . . .

### **National Trust Commissions Study on Alternative Access Routes for Energy Development Near Nine Mile Canyon**

On September 29, 2008, the National Trust submitted a study to the Bureau of Land Management (BLM) that provides significant new information about the feasibility of alternative access routes to the West Tavaputs Plateau (WTP) Natural Gas Field near Nine Mile Canyon. Prepared by KPFF Consulting Engineers, the study concluded that feasible alternative access routes do exist, which would eliminate or substantially reduce the need for industrial trucks to use Nine Mile Canyon road to access oil and gas project areas on the Plateau. The National Trust formally requested that BLM prepare a detailed assessment of the study's findings through a supplement to the draft environmental impact statement (Draft EIS) for the WTP Natural Gas Full Field Development Plan. Proposed by BLM in February 2008, the development would increase traffic in Nine Mile Canyon by as much as 554 percent above the current level, and would also lead to the construction of over 800 new natural gas wells and 500 new well pads on the Plateau.



Truck traffic related to nearby energy development endangers the fragile rock art of Nine Mile Canyon. [NTHP, by Amy Cole.]

For more than six years, the National Trust, the Hopi Tribe, Nine Mile Canyon Coalition, and other organizations have warned BLM that natural gas development would significantly affect Nine Mile Canyon's internationally recognized rock art. These groups have repeatedly recommended that BLM consider alternative routes to access the WTP as a means to avoid or minimize the adverse effects of industrial traffic on the canyon's cultural resources. However, BLM chose not to perform a detailed evaluation of alternative access routes in the Draft EIS, despite confirmation of what many advocates of Nine Mile Canyon have feared for some time—that dust caused by heavy vehicle traffic is damaging rock art panels located in close proximity to canyon roads. The Draft EIS also found magnesium chloride, a corrosive chemical agent previously applied as a dust suppressant in the canyon, at the Great Hunt Scene, one of the most significant rock art panels in Nine Mile Canyon.



[NTHP, by Amy Cole.]

After receiving requests from the National Trust, which outlined a number of serious problems with BLM's approach to the Section 106 process, the Advisory Council on Historic Preservation (ACHP) notified BLM of its intention to participate in Section 106 consultation for the project on September 29, 2008. In its letter to BLM, the ACHP noted that the "irregularities [identified by the National Trust] bring the adequacy of identification efforts and assessment of effects performed through the NEPA process and now being used for the Section 106 process into question." The ACHP also cited the April 2008 request of the Hopi Tribe,

which has identified Nine Mile Canyon as a Traditional Cultural Property, as a reason for becoming involved. With the submission of the Trust's feasibility study and the Advisory Council's involvement, the Trust is hopeful that BLM will reevaluate and seriously consider alternative access routes that would avoid many of the impacts of industrial traffic on the significant resources in Nine Mile Canyon.

### **Recent LDF Comments on Resource Management Plans for BLM Lands**

In September 2008, the National Trust's Law Department filed administrative protests of proposed resource management plans (RMPs) for two Bureau of Land Management (BLM) field offices in Utah— the Price and Vernal Field Offices. Pursuant to its organic act, BLM is required to prepare and revise RMPs, which establish resource management guidelines and designate areas as either open or closed to specific types of activities, including activities with the potential to adversely affect cultural resources like oil and gas leasing and development and off-highway vehicle (OHV) use. Additionally, through the RMPs, BLM is required to evaluate and designate areas with "relevant and important" cultural and/or historic values for heightened protection.

The National Trust's protests objected to several aspects of the proposed RMPs, including BLM's decision to "open" the land managed by both field offices almost entirely to oil and gas leasing—approximately 97 percent of Vernal and 75 percent of Price—even though only a small fraction of these areas have been surveyed for cultural resources. The Trust also challenged the plans because they exempted the designation of "existing" OHV routes from Section 106 of the NHPA. Over 4,600 miles of OHV routes currently "exist" in the Vernal Field Office, while approximately 2,400 currently "exist" in the Price Field Office. Many of these "existing" routes were created only recently by OHV users and have thus never been surveyed for cultural resources or evaluated in accordance with the Section 106 process. Finally, the Trust objected to decisions within the proposed RMPs concerning several areas that poses "relevant and important" cultural and/or historic values, including Range Creek and Nine Mile Canyon. BLM must respond to the National Trust's protests before issuing its final decisions on the proposed plans.

## Federal District Court Upholds BLM Management Plan to Limit Offroad Vehicle Use in Utah's Grand Staircase-Escalante National Monument



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

On June 29, 2007, the U.S. District Court for the District of Utah dismissed a lawsuit filed by two Utah counties (Kane and Garfield Counties) against the Bureau of Land Management (BLM), rejecting the counties' challenge to BLM's management plan for the Grand Staircase-Escalante National Monument in southern Utah. The counties immediately appealed the decision to the Tenth Circuit, and the case has been fully briefed with oral argument to take place later this year or early next year.

The counties argue that the district court erred in ruling that BLM was not obligated to address the counties' claims to public rights-of-way within the Monument prior to promulgating the management plan. The counties have long maintained that certain roads within the Monument are considered county roads, and, therefore, BLM lacks the authority to restrict vehicle use on those roads, as it did through the management plan.

The National Trust joined the Southern Utah Wilderness Alliance, Sierra Club, and The Wilderness Society as intervening defendants in the case in November 2005. The management plan, through a public participation process and environmental analysis, restricted vehicle use as a means of preventing and limiting impacts to the Monument, including nearly 4,000 identified cultural resources. After BLM adopted the plan in 1999, the counties defiantly removed BLM road signs and posted illegal signs that encouraged the use of closed routes. The National Trust intervened as defendants in part to ensure consideration of the public interest in protecting the Monument's significant cultural resources from damage by motorized vehicle use.

The 1.7 million-acre Grand Staircase-Escalante National Monument was created in 1996 as the first National Monument to be managed by BLM. The cultural resources within the Monument include prehistoric Ancestral Puebloan and Fremont remains, Navajo and Paiute sacred sites, historic trails, and sites connected to Mormon Pioneers and other early settlers.

The National Trust and its partners will continue to fight to protect the Monument from inappropriate vehicle use. The Denver office of Earthjustice is representing the National Trust and the other environmental interveners in the appeal.

## SECTION 106 AND NEW ORLEANS (CONT'D)

### **New Orleans Demolition Activity Continues**

The dust had not even settled from the demolition of 4,500 historic public housing units in New Orleans this spring when the next major federally funded demolition project began gathering steam, in yet another demonstration of the power of Louisiana politics.

This time, the proposed project is a massive new medical complex, which includes two independent components—a new VA medical center, funded by the Department of Veterans Affairs, and a proposal to replace the historic Charity Hospital and almost two dozen other buildings with a new Louisiana State University (LSU) medical center. The LSU complex would be funded in part by FEMA, based on damages to Charity Hospital, since FEMA allows its damage payments to be used for purposes other than actually repairing the damage.

Unfortunately, the proposed sites for the two facilities include 17 square blocks of the Mid-City National Register Historic District. Approximately 150-200 historic homes, which are contributing to the National Register district, would be bulldozed for the two projects. For this reason, the National Trust listed Charity Hospital and the Lower Mid-City neighborhood on the Trust's 2008 List of 11 Most Endangered Historic Places.

The federal agencies involved in these projects are making an effort through Section 106 and NEPA to evaluate alternative sites for both facilities. Nonetheless, officials of the City of New Orleans and the State of Louisiana have adamantly refused to consider other sites, even though good alternatives exist. For example, the VA medical center has an alternative known as the Lindy Boggs site, because it includes the Lindy Boggs Hospital (closed since Hurricane Katrina). The Lindy Boggs site is just one mile away, is outside the boundaries of any historic district, and would not require the demolition of a single home. The LSU medical center also has a preservation alternative—the rehabilitation and reuse of the historic Charity Hospital complex. A study released in August 2008 by the Historical Foundation of Louisiana has evaluated Charity Hospital and concluded that rehabilitating the hospital building would be less expensive, and would return medical services to residents faster, than demolishing a historic neighborhood and building a new complex from scratch.



Big Charity Hospital, New Orleans.  
[NTHP by Walter Gallis]

Despite these good alternatives, which would easily and almost completely avoid harm to historic properties, the City and State remain firmly opposed to the less harmful plans, and continue to move the projects forward on their terms.

With help from the Advisory Council on Historic Preservation, the VA and FEMA have combined their Section 106 reviews because of the close relationship between the two projects. The agencies have adopted an aggressively expedited consultation schedule for Section 106, which has required one or two meetings a month throughout the summer, with very short comment deadlines. Walter Gallis in the Trust's New Orleans Field Office has worked closely with the LDF's Elizabeth Merritt in an effort to keep up with the intensive workload.

While the National Trust has not entirely given up hope that the federal agencies may actually select a less harmful site, legal and regional staff are working on trying to develop mitigation measures for the Lower Mid-City neighborhood in the event that our worst fears are realized and the demolition goes forward. The Trust is especially advocating for local designation of the Mid-City Historic District as a mechanism for ensur-

ing that the remainder of the historic district will be protected from speculative demolition and spill-over development resulting from the new medical centers.

## CONTRIBUTORS, SPONSORS, AND SUPPORTERS . . .

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