

National Trust Legal Defense Fund

MAY 2008 UPDATE



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.nationaltrust.org/law.

NEW LITIGATION . . .

TRUST JOINS STATE AND LOCAL CONSERVATION GROUPS CHALLENGING INTERSTATE I-81 EXPANSION THROUGH VIRGINIA'S SHENANDOAH VALLEY

In June 2007, the Federal Highway Administration (FHWA) approved a Tier 1 Final Environmental Impact Statement (FEIS) for widening Interstate 81 through the Shenandoah Valley in Virginia, despite significant objections from the National Trust and other preservation organizations. Significantly, FHWA invoked a new optional short statute of limitations for the Tier 1 decision, which allows only 180 days from the decision to file suit – a provision added in the SAFETEA-LU transportation reauthorization legislation passed in 2005. Following an unsuccessful attempt to persuade FHWA to withdraw its shortened statute of limitations for the Tier 1 decision, the Trust opted to join a lawsuit, which was filed by the Coalition for Smarter Growth, Shenandoah Valley Network, Scenic Virginia, Sierra Club, and others in the U.S. District Court for the Western District of Virginia in December 2007.



Fort Bowman (cir. 1753).

The preferred alternative in the Tier 1 EIS would widen 61 percent of the 325-mile corridor by four additional lanes and 37 percent by two additional lanes. The entire widening project is estimated to cost \$11 billion, which

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would be paid by tolls on cars and trucks. Unfortunately, the FHWA did not include freight rail alternatives that might remove trucks from the highway and reduce the need for the potentially damaging expansion of I-81.

The impacts of a major widening of I-81 would be devastating, as the corridor includes 9 to 10 Civil War battlefields, and 1,238 acres of battlefield core area within the Shenandoah Valley Battlefields National Historic District. Seven other battlefields, already greatly impacted by I-81, would suffer much greater impacts, most notably at Cedar Creek. In addition, two other battlefields, Port Republic & Cross Keys, could be bisected by the proposed I-81 bypass around Harrisonburg. The I-81 project would directly destroy up to 436 acres of the Cedar Creek & Belle Grove National Historical Park, which would represent more than 12 percent of the National Park's acreage. The 1753 Fort Bowman, which is owned by Belle Grove, Inc. and is part of the National Park, could lose up to 34 acres, more than a quarter of this 126-acre property, as well as the historic stone house, which stands only 500 feet from the existing highway.



Belle Grove Plantation [Belle Grove, Inc.]

The I-81 widening proposal also threatens the “String of Pearls” – the historic “Main Street” towns along Route 11 from Winchester to Abingdon, at least 30 of which have historic districts that are formally listed on the National Register. The String of Pearls towns have an enormous economic investment in heritage tourism, which is dependent on protecting the traditional rural character of the Shenandoah Valley. Any significant widening of I-81, which closely parallels Route 11, would damage the historic character of these communities by inducing a surge of commercial, industrial, and residential development at interchanges and along parallel and connecting roadways.

The lawsuit raises claims under NEPA, challenging FHWA's rejection of rail alternatives, which could substantially reduce truck traffic and thus the need for additional lanes. Among other things, the Virginia legislature has specifically directed the Virginia Department of Transportation to study freight rail alternatives for I-81, and that study has not yet been done, so the lawsuit contends that rejecting rail alternatives is premature. In addition, the lawsuit includes a constitutional due process claim, because the public does not have adequate notice of which alternatives may be foreclosed as a result of the accelerated statute of limitations for challenging the Tier 1 EIS.

The Trust's involvement in the I-81 litigation is focused on ensuring that FHWA fully meets its legal obligations to evaluate all information about alternatives that would avoid and minimize harm to significant historic resources.

NATIONAL TRUST JOINS AN INDIAN TRIBE AND OTHER NONPROFIT GROUPS IN A SUPREME COURT *AMICUS* BRIEF CHALLENGING A HOMELAND SECURITY DECISION TO WAIVE ALL LAWS APPLICABLE TO CONSTRUCTION OF A MASSIVE WALL ALONG THE U.S.-MEXICO BORDER

In March 2008, Defenders of Wildlife and the Sierra Club filed a petition for a writ of certiorari to the U.S. Supreme Court challenging the constitutionality of Section

102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), 8 U.S.C. § 1103 note. IIRIRA permits the Secretary of Homeland Security, in his sole discretion, to waive all federal, state, and local laws in order to construct a border fence along the U.S.-Mexico border, while prohibiting any judicial review of the Secretary’s decision to invoke the waiver. The Supreme Court petition was filed in response to an early decision by Secretary Chertoff to waive 19 federal laws, including NEPA, the NHPA, and the Endangered Species Act (ESA), following the issuance of a federal court injunction stopping construction of a section of the border fence in the San Pedro Riparian National Conservation Area in Arizona last September.

In response to the petition, Secretary Chertoff then expanded the waiver on April 1, 2008, to bar the application of 30 federal laws, including the National Park Service’s Organic Act, the Archaeological Resource Protection Act, and virtually every federal law that protects natural and cultural resources, for 470 miles of proposed border wall construction along the U.S.-Mexico border. The waiver area includes tribal lands, such as the Tohono O’odham reservation, national monuments, critical habitat for endangered species, and countless archaeological resources, many of which have not yet been surveyed, identified, or evaluated. In recognition of this unprecedented authority and the wide-sweeping consequences of the Secretary’s action, the Trust joined the Tohono O’odham Nation, Society for American Archaeology, and a number of national environmental groups and religious organizations in an *amicus* brief urging the Supreme Court to review the case. The *amicus* brief raises grave concerns about the implications of waiving these laws on significant cultural and natural resources, and highlights the important values protected by the laws.

Congress passed IIRIRA in 1996, in part, directing the Attorney General to “install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.” 8 U.S.C. § 1103. The statute originally authorized the Attorney General to waive the provisions of ESA and NEPA to the extent “necessary to ensure expeditious construction of the barriers and roads” at the border. *Id.* § 1103 note. In 2005, however, Congress amended Section 102 of the Act to grant the Secretary of Homeland Security authority to waive “all legal requirements” that he may determine necessary, in his “sole discretion,” in order to ensure expeditious construction of the barriers and roads. REAL ID Act of 2005. The Act also precludes all judicial review of any claim that a waiver under Section 102 exceeds the scope of the Secretary’s delegated authority.

The Supreme Court petition raises two constitutional claims about the separation of powers: (1) that the preclusion of judicial review for the Secretary’s waiver decision is an unconstitutional delegation of legislative power; and (2) that the waiver provision violates the requirement in Article I of the Constitution that a law can only be repealed by legislation approved by both Houses of Congress and presented to the President.



San Pedro River, San Pedro Riparian National Conservation Area. [Conservation System Alliance]

In addition to the *amicus* brief joined by the Trust, fourteen members of Congress, led by Rep. Bennie Thompson (D-MS), Homeland Security Committee Chairman, submitted a congressional *amicus* brief urging the Supreme Court to review the case, on the grounds that the waiver directly challenges Congress's constitutional role. A group of constitutional law professors also submitted an *amicus* brief in support of the petition.

UPDATE ON POWERLINES . . .

NATIONAL TRUST SEEKS FEDERAL COURT REVIEW AFTER ENERGY DEPARTMENT DENIES REQUEST TO RECONSIDER MULTI-STATE "NATIONAL CORRIDOR" DESIGNATIONS FOR HIGH-VOLTAGE POWER LINES IN MID-ATLANTIC AND SOUTHWEST U.S.

On April 29, 2008, the Trust joined Piedmont Environmental Council (PEC), National Parks Conservation Association (NPCA), Civil War Preservation Trust (CWPT), and several other organizations as a co-petitioner in an appeal in the U.S. Court of Appeals for the Ninth Circuit challenging the final decision by the Department of Energy (DOE) to designate two National Interest Electric Transmission Corridors (National Corridors). Corridor designation triggers expedited approval requirements for high-voltage powerlines, and can substantially undermine the ability to protect significant historic properties and landscapes. The National Corridors designated by DOE in October 2007 cover the entire states of New Jersey, Delaware, and Maryland; most of New York, Pennsylvania, and West Virginia; substantial portions of the Northern Virginia piedmont; and the entire area between Los Angeles, Phoenix, and San Diego. The lawsuit contends that DOE failed to comply with Section 106 of the NHPA, NEPA, and the Endangered Species Act (ESA) prior to designating the National Corridors.



Historic rural landscapes of the mid-Atlantic, such as the northern Virginia Piedmont, are within one of the two "National Interest Electric Transmission Corridors" designated by the Energy Department. [NTHP]

The Trust has been actively involved in opposing the implementation of Section 1221(a) of the Energy Policy Act of 2005 for almost two years. The law imposes severe time-limits for state agencies reviewing proposed powerlines within the designated National Corridors, allowing only one year to approve transmission lines, after which the Federal Energy Regulatory Commission (FERC) can take over the review, and can authorize the construction of transmission lines, overruling any opposition or denial by other federal, state, or local agencies. Section 1221 also authorizes the broad use of federal "eminent domain" power to advance transmission projects. Overall, the designation of specific National Corridors will have draconian results, including the potential of overriding or preempting reviews by state and local governments, and by other federal agencies.

Following the designation of National Corridors in October 2007, the Trust, along with 19 other groups represented by the Southern Environmental Law Center (SELC), requested an administrative rehearing of the agency's National Corridor designations. In spite of our efforts, DOE denied all rehearing requests on March 6, 2008, arguing that National Corridor designation did not trigger the procedural requirements of NHPA, NEPA or the ESA. Importantly, the legislation authorizing

this corridor designation process explicitly mandated that DOE comply with federal environmental laws.

Similar appeals challenging the National Corridor designations have been filed by a variety of national environmental groups, and more significantly, by six state governments: New York, Pennsylvania, New Jersey, Virginia, Arizona, and California. All appeals have been consolidated in the U.S. Court of Appeals for the Ninth Circuit in California.

Additionally, a growing group of bi-partisan Congressional members continue to express their opposition to DOE's designation and to Section 1221. On February 12, 2008, 14 U.S. Senators sent a letter to Senators Jeff Bingaman (D-NM) and Pete Domenici (R-NM) requesting that the Senate Energy and Natural Resources Committee hold a hearing to fully examine the state and national implications of the National Corridor designations. Until either the courts or Congress resolves these issues, countless natural and historic resources may be at risk of being impacted or lost with very little consideration. The timing for a resolution is becoming ever more critical because many projects have already been proposed within the National Corridors, such as a 240-mile power line through the heart of Virginia, West Virginia, and Pennsylvania's historic landscapes.



Power line Towers cutting through Fauquier County, Virginia. [Piedmont Environmental Council]

Working with a diverse coalition, including PEC, the Trust has sought to raise public awareness about the severe threats to resources associated with National Corridor designation. Among other things, the Trust included the historic properties and landscapes in the Mid-Atlantic Corridor on the 2007 list of *America's 11 Most Endangered Historic Places*. The Trust has also testified to Congress that reform of Section 1221 is needed, in order to enforce NEPA and NHPA review and to minimize or eliminate interference with state regulatory authority.

LDF SUBMITS EXTENSIVE COMMENTS ON THE DRAFT PROGRAMMATIC EIS FOR PROPOSED WEST-WIDE ENERGY CORRIDORS COVERING 6,000 MILES ON FEDERAL LANDS

On February 12, 2008, the Trust submitted extensive comments on the draft Programmatic Environmental Impact Statement (PEIS) for the proposed West-wide energy corridors on federal lands in 11 Western states. The draft PEIS was prepared by multiple federal agencies, including the Bureau of Land Management (BLM) and DOE. Like the National Corridor designations, the authority to designate energy corridors on federal public lands comes from the Energy Policy Act of 2005 (Section 368). Congress directed several federal agencies to locate and designate energy corridors to help facilitate siting for all forms of energy infrastructure. Congress also explicitly required the federal agencies to comply with applicable environmental laws in designating the corridors.

The draft PEIS identified and examined one alternative that would designate over 6,000 miles of corridors on public lands. The width of the corridors varies from several hundred feet to 5 miles. While the energy corridors skirt National Parks

and most National Monuments, there are still many resources that could be dramatically impacted by future infrastructure projects within the corridors. Although the agencies contend that future projects could be designed to avoid specific impacts to resources, the reality is that it will be very difficult if not impossible to avoid and minimize impacts to certain types of resources such as historic landscapes and traditional cultural properties.

The Trust's comments raise several concerns with the draft PEIS. First, the PEIS examines only one alternative, which contradicts NEPA's requirement that an agency evaluate a reasonable range of alternatives. Second, the PEIS provides for a limited analysis of the potential indirect and cumulative impacts associated with the proposed corridors. This is especially critical because the location of the corridor on federal lands will directly dictate the location of corridors on private, state, and tribal lands. Third, the PEIS provides for a limited Section 106 review. Finally, there are numerous historic and cultural resources that may be located adjacent or within the corridors, which are not adequately evaluated. We strongly urged the federal agencies to meet these obligations before it approves the final energy corridors.

Notably, the House Sub-committee on National Parks, Forests, and Public Lands held a hearing on April 15, 2008, to examine the draft PEIS and the implications of the energy corridors on natural, cultural, and tribal resources. Some congressional members may introduce legislation aimed at ensuring that the federal agencies fully satisfy required federal statutes in designating energy corridors.

UPDATE ON FEDERAL LITIGATION . . .

D.C. CIRCUIT REVERSES A LOWER COURT DECISION, AND RULES THAT PRESERVATION PLAINTIFFS AND LOCAL RESIDENTS HAVE STANDING TO ENFORCE SECTION 106 TO PROTECT HISTORIC FORT RITCHIE

On February 5, 2007, the U.S. Court of Appeals for the D.C. Circuit reversed a lower court decision, and held that plaintiffs had "standing" to challenge the Army's compliance with Section 106 of the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) in connection with the redevelopment of historic Fort Ritchie in Maryland. The lawsuit was filed by two individuals who own property within one mile of Fort Ritchie. The federal district court had dismissed the plaintiffs' lawsuit based on the erroneous assumption that the plaintiffs lacked standing to challenge the redevelopment plan for the site under Section 106 and NEPA. The lower court's interpretation was resoundingly rejected on appeal.



Fort Ritchie (Maryland National Guard building) (1926) [USACE]

Fort Ritchie is a former Army base in north-central Maryland, which was closed through Base Realignment And Closure (BRAC) in 1995. It was originally developed in 1926 as a training post for the Maryland National Guard. In 1942, Camp Ritchie was converted to an Army base and used for military intelligence training

and the development of psychological warfare. When the Fort was closed in 1995, the Army complied with Section 106, executing a Programmatic Agreement (PA) and adopting design guidelines for reuse of the property. PenMar Development Corp. (the Local Redevelopment Authority created by the Maryland legislature) leased the property to Corporate Office Properties Trust, who is developing the site as a mixed-use, residential, and high-security office complex. However, the current development proposal violates the design guidelines by calling for the construction of office buildings and parking lots within the historic parade ground.

The Trust, along with the Natural Resources Defense Council, filed an *amicus* brief in support of the plaintiffs' appeal, and also participated in the December 7, 2007, oral argument. The Trust argued that the district court had failed to cite a single NHPA case and had disregarded an entire body of case law in which other courts have upheld standing to enforce the NHPA in similar circumstances.

The D.C. Circuit's decision establishes an important precedent regarding who has standing to enforce agency compliance with Section 106 of the NHPA and NEPA. The Court recognized, as the Trust argued in its *amicus* brief, that in a 1992 decision in *Lujan v. Defenders of Wildlife*, the U.S. Supreme Court had commented in a footnote that owners of property adjacent to the site of a federal project likely have standing to allege procedural violations concerning the approval of the project in federal court. The D.C. Circuit in this case upheld the plaintiffs' standing, and remanded the case back to the lower court for further proceedings.

UPDATE ON STATE LITIGATION . . .

MINNESOTA SUPREME COURT DENIES REVIEW OF PETITION CHALLENGING CONSTRUCTION OF A STADIUM ON HISTORIC NICOLLET ISLAND IN MINNEAPOLIS

On January 29, 2008, the Minnesota Supreme Court denied a petition by the Trust, Preservation Alliance of Minnesota, and Friends of the Riverfront, which challenged the Minneapolis City Council's approval of an athletic stadium proposed by DeLaSalle High School on historic Nicollet Island. The Minnesota Supreme Court's decision marks the end of the road for a long-standing challenge to the City Council's approval of the project, which would destroy historic Grove Street and.

The Minneapolis Court of Appeals had rejected the argument that the Minneapolis City Council failed to comply with the requirements of Minnesota Environmental Rights Act (MERA) in approving a Certificate of Appropriateness for a project that would destroy historic Grove Street on Nicollet Island and harm the St. Anthony Falls Historic District in order to construct DeLaSalle High School's proposed athletic stadium. Our petition for review with the Minnesota Supreme Court focused on the fact that the Court of Appeals' decision directly contradicts Minnesota Supreme Court precedent and misapplies the requirements of MERA. Specifically, the Court



Nicollet Island's historic Grove Street, which dates from 1866. [Friends of the Riverfront]

of Appeals concluded that DeLaSalle High School was entitled to define the project; that its definition should be given deference; and that any alternatives not meeting the school's own definition of the project could be rejected as infeasible and imprudent. Although the court's opinion was designated as "unpublished," limiting the precedential damage from the decision, we were concerned that the decision could undermine the previously strong interpretation of MERA's requirements for protecting historic and environmental resources, as well as allowing serious harm to a significant historic resource.

These arguments fell on deaf ears as the Minnesota Supreme Court elected not to hear our appeal. Although construction of the stadium, and thus condemnation of historic Grove Street, seems imminent, the National Trust and our local partners continue to ensure that elements of the project do not affect other types of resources, including archaeological resources identified within the project area.

The new stadium and athletic complex proposed by DeLaSalle High School includes a 750-person stadium and a parking lot on several acres of open park land on Nicollet Island. All of Nicollet Island is within the St. Anthony Falls Historic District, which is listed on the National Register and also designated by the Minneapolis Heritage Preservation Commission (HPC). Construction of the new stadium would destroy half of Grove Street (a historic street platted in 1866 as part of the original street grid). The lawsuit was prompted by the Minneapolis City Council's approval of the project (which overturned a decision by the HPC to deny the school's application to build the stadium). Public opposition to the project included objections from the National Park Service, the Minnesota SHPO, the Preservation Alliance of Minnesota, and the National Trust.

UPDATE ON PUBLIC LANDS . . .

LDF SUBMITS CRITICAL COMMENTS ON PROPOSED FULL-FIELD OIL AND GAS DRILLING ADJACENT TO NINE MILE CANYON

On May 1, 2008, the Trust submitted extensive comments on BLM's draft EIS for the West Tavaputs Project—a full-field natural gas development project above Nine Mile Canyon near Price, Utah. The Draft EIS proposes up to 807 natural gas wells on 494 well pads with 168 miles of new roads. The Trust's comments raise substantial concerns about the inadequate evaluation of potential impacts to Nine Mile Canyon and its significant cultural resources. The most damaging aspect of the proposal is the plan to use the narrow roads within Nine Mile Canyon as the primary access route for hundreds of trucks each day to travel up to the West Tavaputs Plateau, where the gas drilling will take place.



The Great Hunt Scene, otherwise known as the "Cottonwood Panel."
[NTHP]

New studies at Nine Mile Canyon confirm our worst fears—not only is the rock art already being damaged by dust from truck traffic, but the chemical dust suppressants themselves, which have been used in an effort to limit dust damage, are actually exacerbating harm to the rock art.

Nine Mile Canyon is often called “the world’s longest outdoor art gallery,” with more than 10,000 images carved and painted onto canyon walls by Native Americans. The prehistoric cultures inhabiting Nine Mile Canyon left a legacy of rock shelters, granaries, and rock art throughout the Canyon area. Nine Mile Canyon is also an area of diverse historic-era sites, including the remains of stagecoach stops, settlers’ cabins, ranches, and even many of the iron telegraph poles installed by the famed Buffalo Soldiers in the 19th century. These remains still stand as reminders of the area’s pioneer history. Unfortunately, the stewardship of Nine Mile Canyon is in the hands of BLM, the most severely under-funded of all the federal land-managing agencies. For example, even a basic nomination to the National Register of Historic Places for this extraordinarily significant district, which BLM is legally responsible to prepare under the NHPA, has been funded and prepared by a coalition of private parties, including the Trust. After decades of delay and inaction by BLM, the formal Nine Mile Canyon nomination has recently been submitted to the Keeper of the National Register.

Notwithstanding the importance of alternative access routes, all of the alternatives in the Draft EIS rely on the use of Nine Mile Canyon as the primary route to access the West Tavaputs Plateau. During the project’s first year, BLM estimates that truck traffic in Nine Mile Canyon would increase by 416 percent—from the current average of 106 per day to 441—and would continue to exceed the current level throughout the estimated 38-year life of the project. In addition to the noise and visual intrusion of heavy truck traffic, the more dangerous impact is that the dramatic increase in truck traffic will exacerbate the growing threat of harm to the rock art from dust and chemicals.

According to the new study, even the existing level of traffic in Nine Mile Canyon is causing particulate matter—dust, chemical dust suppressants and vehicle exhaust—to accumulate on many rock art panels, which in turn is damaging the physical integrity and visual aesthetic of the rock art. Unfortunately, the mitigation measures proposed in the Draft EIS would simply continue the current approach of using chemical dust suppressants, and hardening certain road segments with asphalt or chip-seal. Given the resources at risk, an approach of approving the project now and dealing with impacts later is simply unacceptable and not consistent with federal law. The Trust strongly urged BLM to evaluate new alternatives for accessing the Plateau, which would resolve many of the impacts associated with the proposed project.

For more than five years, the Trust has been working to minimize the adverse impacts of oil and gas drilling in Nine Mile Canyon, in collaboration with local, state, and national conservation and preservation groups. To highlight the threats to sensitive resources, the Trust included Nine Mile Canyon in the list of *America’s 11 Most Endangered Historic Places* in 2004. The Trust intends to continue its active opposition to the West Tavaputs Project as currently proposed, based on the irreparable harm it will cause to the rock art along the canyon walls of Nine Mile Canyon. The Trust’s continued involvement and attempts to raise the public profile of this project will be critical in attempting to reduce the impacts of the project as BLM moves forward in the planning process.

CONTRIBUTORS, SPONSORS, AND SUPPORTERS . . .

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