



NATIONAL TRUST LEGAL DEFENSE FUND

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LDF UPDATE – MAY 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 recent developments in our current docket of cases. (More information on recent LDF developments is available at http://www.nthp.org/legal_advocacy/ldf.html.) It is important to note that the cases reported represent only a fraction of the preservation controversies we work to resolve each year.



PROTECTING SACRED SITES, ARCHAEOLOGICAL RESOURCES, AND CULTURAL LANDSCAPES ON PUBLIC LANDS

FEDERAL COURT OF APPEALS AFFIRMS DISTRICT COURT'S DECISION UPHOLDING PRESIDENTIAL AUTHORITY TO DESIGNATE NATIONAL MONUMENTS UNDER 1906 ANTIQUITIES ACT

Mountain States Legal Foundation v. George W. Bush, et al.,
306 F.3d 1132 (D.C. Cir. 2002)

STATUS: *Case Won*

On October 18, 2002, a federal court of appeals in Washington, D.C. affirmed a lower federal court decision dismissing a lawsuit challenging President Clinton's designation of six National Monuments. Earthjustice Legal Defense Fund argued the case on behalf of the National Trust, Society for American Archaeology, the Arizona Archaeological Council, the Wilderness Society, and a number of other national environmental and preservation groups.

The appeal stems from a lawsuit brought by Mountain States Legal Foundation (Mountain States), which challenged President Clinton's authority to designate public lands as National Monuments, in particular, Canyons of the Ancients in Colorado, Cascade-Siskiyou in Oregon, Hanford Reach in Washington State, and Grand Canyon-Parashant, Ironwood Forest, and the Sonoran Desert in Arizona. Mountain States raised several claims: (1) that the power to designate National Monuments belongs exclusively to Congress, rather than the President, and (2) that the Antiquities Act authorizes the creation of National Monuments only for man-made objects. In rejecting and dismissing Mountain States' arguments, the federal district court ruled that the Antiquities Act of 1906 is constitutional and empowers the President not only to create National Monuments and protect man-made objects, but also to designate non-man-made features such as wildlife habitat and geological formations.

On appeal, Mountain States argued that President Clinton's Proclamations went beyond his authority under the Antiquities Act, and that the lower court erred in dismissing its claim. The court of appeals rejected Mountain States' reasoning and upheld the lower court's action to dismiss the claim. The court first held that Mountain States failed to



Important archaeological resources, such as these within the Canyon of the Ancients National Monument, are protected under the Antiquities Act. [BLM]

allege facts that indicate President Clinton's actions were beyond his authority under the Antiquities Act. Because the President's authority to designate National Monuments is valid, the court determined that only factual allegations indicating a breach of such authority could support Mountain States' claim.

This decision is important to historic preservation because it serves to validate the President's authority to set aside public lands to protect "historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest," including ecological interest and values.

TRUST LDF USES SECTION 106 TO MITIGATE HARM FROM HIGHWAYS

Though the LDF has long been known for fighting freeways in court, two recent cases illustrate the Trust's kinder, gentler approach to transportation projects – using the consultation process under Section 106 of the National Historic Preservation Act (NHPA) to influence highway projects *before* going to court. Administrative advocacy through Section 106 requires creativity, flexibility, and teamwork among preservation partners. The outcome is never perfect, but advocacy for roads that lie more lightly on the land can make an enormous difference, both in the projects themselves and in long-term working relationships.

BULLDOZERS ROLL IN HONDO VALLEY, NEW MEXICO

Valley Community Preservation Comm'n, et al. v. Mineta,
No. CIV 02-1306 LH/WWD-ACE (D.N.M. Dec. 20, 2002),
appeal docketed, No. 03-2016 (10th Cir., filed Jan. 8, 2003)
STATUS: *Case lost; appeal pending; Trust not participating directly*

For more than a year, the Trust LDF has been working in close coordination with state and local preservation groups in New Mexico, in a desperate race against the bulldozers, which are rapidly chewing up the serene Hondo Valley. The state highway department is converting the Billy the Kid National Scenic Byway into a major truck thoroughfare.

The Hondo Valley, located halfway between Albuquerque and El Paso, is a living cultural landscape, where families have lived on the land for generations – a fertile valley laced with historic acequias, adobe structures, tiny churches, orchards and roadside fruit stands. The valley is also home to several artists of international renown, including Luis Jimenez, and Michael Hurd, son of Peter Hurd and Henrietta Wyeth.

The existing road through the narrow valley, U.S. 70, has a high level of accidents caused by conflicts between slow-moving local vehicles – such as farm trucks and school busses entering the road from steep driveways with little visibility – and fast-moving vehicles, such as trucks and drunk drivers. Unfortunately, the state decided to respond to this safety issue by building a four-lane, divided highway with a 65-mile-per-hour design speed. The result is massive cuts into steep slopes, leaving scars that will take more than a generation to heal, high concrete retaining walls, and paving right up to the doorsteps of local homes and businesses.

To make matters worse, the state and federal highway agencies approved the project on March 15, 2002, without complying with Section 106 of the National Historic Preservation Act. However, the Advisory Council on Historic Preservation (ACHP) assisted the highway agencies to negotiate an after-the-fact Programmatic Agreement (PA), several months later, in an effort to redress these compliance problems.

The PA creates a Cultural Resources Task Force, which includes the National Trust, the ACHP, and the New Mexico

Heritage Preservation Alliance, and is intended to provide an opportunity for input into the design of the highway as the project goes forward. As a member of the task force, the Trust LDF has participated in numerous field review meetings in the Hondo Valley, in an attempt to reduce the adverse effects of the highway. Unfortunately, most of the options for avoiding and minimizing harm to historic properties were already foreclosed by the decision to build a divided, four-lane highway. Construction of is underway in a number of segments along the road, as the Trust and others continue our efforts to press for a more sensitive road design.

Meanwhile, local preservationists filed suit last year, arguing that the project violated Section 4(f) of the Department of Transportation Act, because an upgraded two-lane alternative would meet the projected traffic needs while improving safety. The federal district court in New Mexico denied a preliminary injunction in the case, but an appeal is currently pending.



Perry Apple House (l) and Ford Landscape (r) in the Hondo Valley [NTHP]

The role of the LDF has been focused to date on using the administrative process, rather than the litigation, in an effort to influence the highway project. In addition, the LDF has provided support and assistance to the lawyer for the local preservation group, Andrea Ferster, Esq. However, widespread violations of the PA have forced the Trust to reconsider this approach, and a lawsuit to enforce the PA is currently being evaluated.

FEDERAL HIGHWAY ADMINISTRATION APPROVES CONSTRUCTION OF TWO OHIO RIVER BRIDGES IN LOUISVILLE

In March 2003, the Advisory Council on Historic Preservation signed a Memorandum of Agreement (MOA), with FHWA, for a massive \$2 billion interstate highway project, which includes two new bridges over the Ohio River, a reconstruction of a major interchange known as Spaghetti Junction, and a beltway northeast of Louisville, connecting northern Kentucky and southern Indiana. The MOA was the culmination of a two-to-three year consultation process under Section 106 of the NHPA, and reflects one of the most complex Section 106 projects ever undertaken in terms of its impact on historic properties. Scores of historic properties and districts were evaluated, along a half-dozen different corridors for the beltway and three different alignments for the downtown bridge. The Country Estates of River Road, which was listed on the Trust's Most Endangered List in 1999, includes four historic districts and ten National Register-listed properties and comprise more than 700 acres. Overall, the adverse effects of the project include noise, visual intrusion, vibration, construction, and secondary and cumulative (sprawl) impacts, as well as physical encroachment on historic districts and properties, which will require demolition or relocation of a number of historic properties. In addition, the highway will tunnel under the historic Drumanard estate at a cost of more than \$70 million.

The National Trust has coordinated closely with a coalition of local preservation groups, including River Fields, as well as a number of Indian tribes. Together with these local partners, the Trust has been actively involved in Section 106 consultation and negotiating the MOA – preparing lengthy comment letters on multi-volume documents, attending more than a dozen day-long meetings, and serving as a strong advocate for a higher level of mitigation. As a result, the MOA includes more creative mitigation measures than most – such as easement acquisition to prevent privately owned properties from being demolished.

However, the Trust and River Fields have consistently argued that the eastern bridge should not be built, because it will have the effect of generating sprawl in southern Indiana and disinvestment from West Louisville, rather than serving any legitimate traffic need. Under Section 4(f) of the Department of Transportation Act, which prohibits using historic properties unless there is no feasible and prudent alternative, the National Trust and River Fields have long contended that building the downtown bridges and reconstruction of Spaghetti Junction is a less harmful, feasible and prudent alternatives to the two-bridge project. Now that the Final EIS has been released, the Trust and River Fields must make the difficult decision about whether to go to court – the only mechanism available for enforcing Section 4(f) – to challenge the eastern bridge.



Historic Drumanard estate in the
Drumanard Historic District, KY
[David French, River Fields]

HISTORIC BRIDGES LINK OUR COMMUNITIES' PAST TO THEIR FUTURE

The LDF has been especially active in efforts to save historic bridges around the country. In 2002, the National Trust listed the Historic Bridges of Indiana on the list of America's Eleven Most Endangered Historic Places, in an effort to elevate attention to these historic resources. In Carroll County, Indiana, for example, the Trust has worked with statewide and local preservation groups to challenge a proposal by the Federal Highway Administration to replace a one-lane truss bridge known as the Wilson Bridge, which carried less than 100 vehicles a day, with a million-dollar concrete highway bridge, at four times the cost of the preservation alternative. Arnold & Porter in Washington, DC is representing the preservation groups *pro bono*.

In many other states and localities around the country, the LDF is joining with state and local preservation groups to urge DOT officials to reconsider their historic bridge replacement plans. For example, in Sturgeon Bay, Wisconsin, Yankton, South Dakota, Fort Worth, Texas, St. Augustine, Florida, and Stillwater, Minnesota, officials have agreed to study preservation alternatives that had previously been rejected. Many of these decisions were made in response to the National Trust's advocacy. In Wisconsin, the reevaluation was inspired by a field visit from National Trust LDF and

regional office staff, in which the Trust retained national bridge expert Abba Lichtenstein to explore with state officials the potential for preserving the historic bridge.

Our public-private partnership in Great Falls, Montana, for example, led to the city's decision to preserve the Historic Tenth Street Bridge. The agreement was negotiated in 1998 as a settlement of our lawsuit against state and federal transportation agencies. Local preservationists raised well over \$100,000 in private contributions, and the first phase of rehabilitation is now complete. The City of Great Falls was also awarded a \$250,000 grant for the bridge project from the Save America's Treasures program in 2001. The success of this ongoing project, which spared the 1920 concrete arch bridge from imminent demolition, has encouraged other communities to explore the potential for saving historic bridges where demolition was previously assumed necessary.



The LDF has worked closely with state and local preservationists to save the historic Wilson Bridge in Carroll County, IN. [NTHP]

ENFORCING FEDERAL AGENCY COMPLIANCE WITH SECTION 106

HISTORIC HYDROELECTRIC PLANT IN NEW YORK THREATENED BY DECOMMISSION THROUGH FAILURE TO COMPLY WITH SECTION 106 BY FEDERAL ENERGY REGULATORY COMMISSION

Fourth Branch Associates v. Federal Energy Regulatory Comm'n,
No. 02-1310 (D.C. Cir., filed Oct. 9, 2002)

STATUS: *Case Pending*

After a lengthy ten year dispute, Niagara Mohawk Power Corporation has agreed to hand over the Mechanicville Hydroelectric facility along with financial support to Fourth Branch Associates to rehabilitate the historic plant and resume operation. The Mechanicville facility may be the only remaining pre-1900 hydroelectric plant in New York with its original equipment intact, and was listed on the National Register of Historic Places in 1989 for its exemplary significance in the fields of industry, architecture, and engineering. In 1993, the Federal Energy Regulatory Commission (FERC) issued a license to Fourth Branch and Niagara Mohawk, as co-licensees, to operate, maintain, and expand the historic Mechanicville Hydroelectric Project. A commercial dispute developed between the two co-licensees, and Fourth Branch turned control over to Niagara Mohawk in 1996. In 1997, Niagara Mohawk advised FERC that the project was no longer economic to operate, and the project has not operated since. Although Fourth Branch wished to restore the plant to full operation and expanded capacity, it did not own the property and failed to demonstrate that it could obtain the necessary funding to purchase the project. Based on these findings, FERC instituted surrender proceedings.



The recently-closed Mechanicville Hydroelectric Plant may be the only remaining pre-1900 hydroelectric plant in New York with its original equipment intact. [NTHP]

In February 2002, FERC issued an Order accepting the license surrender for the Mechanicville project. Prior to issuing the Order and accepting the surrender of the license, however, FERC was required to comply with Section 106. FERC did not develop a Memorandum of Agreement (MOA) in consultation with the SHPO or any other parties. FERC also argued that it terminated Section 106 consultation by implication through an indirect statement in a draft Environmental Assessment (EA) issued in 2001. However, the termination procedures in the Section 106 regulations were not followed; in addition, FERC failed to request the Advisory Council's comments on the undertaking.

In October 2002, Fourth Branch filed suit in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the decision by the FERC allowing for the termination of the license to operate the Mechanicville Hydroelectric Plant in Mechanicville, New York, without complying with Section 106. The National Trust filed a motion

to participate as *amicus curiae* in this case. Rather than participate in the court proceedings, the Advisory Council requested that FERC reconsider its Order based on FERC's failure to properly conclude Section 106 consultations. In light of this request, FERC's counsel filed a motion with the Court to hold Fourth Branch's appeal in abeyance until FERC considered the Advisory Council's request. The Court granted FERC's motion on January 24, 2003.

In February 2003, FERC submitted a Memorandum of Agreement (MOA) to the Advisory Council and to the New York State Historic Preservation Office, which called for the recordation of the historic Mechanicville facility. Both agencies declined to sign the agreement because there were too many unresolved issues. Shortly thereafter, FERC ruled on the Advisory Council's reconsideration request on March 27, 2003, determining that further consultation would be useless because the alternatives to license surrender advocated by the consulting parties opposing license surrender "were beyond the Commission's authority to require or enforce" absent the Niagara Mohawk's agreement. However, FERC acknowledged that it failed to comply with the notice provisions of the Section 106 regulations governing termination. FERC proposed to bring itself into compliance by requesting formal comments from the Advisory Council within 45 days.

In April 2003, Fourth Branch and Niagara Mohawk have executed an agreement settling this dispute by removing Niagara Mohawk from the project license. Fourth Branch, as the sole owner of the Mechanicville Project would return the project to service under the terms and conditions of the 1993 license. Fourth Branch and Niagara Mohawk are awaiting action by FERC on the Offer of Settlement.

IMPORTANT VICTORY AGAINST ARMY CORPS OF ENGINEERS REAFFIRMS VALIDITY OF SECTION 106 REGULATIONS

Sayler Park Village Council v. U.S. Army Corps of Engineers,
No. C-1-02-832 (S.D. Ohio Dec. 30, 2002 and Jan. 13, 2003)

Status: *Case Won*

The Army Corps of Engineers and the Lone Star Cement Co. have appealed the U.S. District Court's decision which determined that the Army Corps violated Section 106. The Army Corps had determined that no historic properties would be affected by a permit issued to Lone Star in November of 2002, and the cement company began construction of a barge loading facility to serve a proposed cement plant on the Ohio River near Cincinnati and immediately adjacent to the Sayler Park Historic District.

The National Trust filed two *amicus* briefs in the case. The court has ruled that the Corps permit was unlawful, and that the Army Corps' regulations and interim guidance policies were not applicable because they were not consistent with the Advisory Council's own Section 106 regulations.

More importantly, the court ruled that she "disagreed" with a recent decision by a federal district judge in the District of Columbia, in *National Mining Ass'n v. Slater*, 167 F. Supp. 2d 265 (D.D.C. 2001), *appeal docketed*, No. 02-5041 (D.C. Cir.), which held that two provisions of the Section 106 regulations (36 C.F.R. §§ 800.4(d)(2), 800.5(c)(3)), were impermissibly "substantive" and therefore beyond the Advisory Council's statutory authority under the National Historic Preservation Act. In the court's view, the regulatory provisions are strictly procedural, because they merely require additional consultation procedures if the Advisory Council disagrees with an agency's determination about the effects of a project on historic properties; the additional procedures do not require the federal agency to make a particular "substantive" determination on the project. This ruling resurrects the disputed provisions of the Section 106 regulations, which have been central to the effectiveness of the consultation process, and which the Advisory Council had declined to pursue on appeal. The result will be extremely important for preservation advocates nationwide as they strive to influence federal agency decisions affecting historic properties.

The Trust's local *pro bono* counsel in the case was James F. McCarthy, III with the law firm of Katz, Teller, Brant & Hild in Cincinnati.



Sayler Park Historic District in Cincinnati is the subject of an important lawsuit involving the validity of two provisions of the Advisory Council's Section 106 regulations. [Gerald Knight]

NATIONAL CAPITAL PLANNING COMMISSION TO REVIEW WASHINGTON MONUMENT PLANS

On May 1, the National Capital Planning Commission approved the design for an addition to Monument Lodge. The addition to Monument Lodge is part of the National Park Service's new plans for the security of the Washington Monument which includes an underground visitors center and upgrading the grounds of the monument to remove temporary security measures. The Legal Defense Fund and the Southern Field Office have been actively involved in consultation with the National Park Service about this project for most of the past year and have been able to substantially influence the future design of an addition to the historic Monument Lodge.

NATIONAL TRUST TESTIFIES BEFORE ARMY CORPS AS SECTION 106 PROCESS IS INITIATED FOR PROPOSED SAINT LAWRENCE CEMENT PLANT IN HISTORIC HUDSON VALLEY

In re Application of St. Lawrence Cement Co., LLC,
No. 4-1040-0001/00001 (N.Y. Dep't of Env'tl Conserv. Dec. 6, 2002)
Status: Pending Before Administrative Law Judge

In March, 2003, the National Trust testified before the Army Corps of Engineers in opposition to the proposed St. Lawrence Cement facility in the historic Hudson River Valley. The Army Corps held the public hearing as a first step in the federal Section 106 process to determine if the proposed plant will have an adverse effect on historic resources in the Hudson Valley. Opposition to the plant has been mounting for two years during the state environmental administrative proceedings.

In its testimony, the National Trust LDF argued that the Army Corps should not limit the area of potential effects to waterfront activities that are the immediate subject of the Corps permit, but take into account the entire St. Lawrence Cement industrial complex. The National Trust also believes the Army Corps should require a new federal Environmental Impact Statement due to the deficiency of the draft EIS prepared for the State administrative processes. Lastly, the National Trust argued that the Army Corps should ultimately deny the requisite permits for the plant because they would not be consistent with the applicable "public interest" standard under the Army Corps' own regulations.

Since 2001, the National Trust LDF has been an amicus curiae participant, with the Preservation League of New York State, in a state administrative adjudication proceeding opposing the construction of the proposed facility. If approved by the state, the project would include a massive cement manufacturing plant on a 40-acre site in Columbia County, N.Y., with more than 22 buildings and structures, the tallest of which would contain stacks up to 40 stories high. The plant would be visible from 87 historic sites, including the Olana State Historic Site, home of landscape painter Frederick Edwin Church.

William A. Hurst, Esq., in Albany, NY, continues to represent the preservation amicus groups pro bono.



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

DEFENDING LOCAL PRESERVATION ADVOCATES
THREATENED BY SLAPP SUITS

**U.S. SUPREME COURT DENIES REVIEW AFTER APPEALS COURT REJECTS ANTITRUST SLAPP
 SUIT CHALLENGING GREEN SPRINGS, VA, LAND DONATION BY
 VERMICULITE MINING COMPANY**

Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.,
 156 F.3d 535 (4th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999),
on remand, 108 F. Supp. 2d 549 (W.D. Va. 2000) (summary judgment),
 144 F. Supp. 2d 558 (W.D. Va. 2001) (post-trial findings & conclusions),
aff'd, 307 F.3d 277 (4th Cir. 2002); *cert. denied*, No. 02-1167 (April 28, 2003)

STATUS: *Case won*

After eight years of litigation and two trips to the federal court of appeals, Historic Green Springs, Inc. (HGSI) celebrated the end of a significant court battle when the U.S. Supreme Court denied *Writ of Certiorari* on April 28, 2003. In doing so, the Supreme Court left in place a unanimous decision by the U.S. Court of Appeals for the Fourth Circuit, holding that HGSI did not violate federal antitrust laws when it accepted a 1,300-acre land donation from W.R. Grace & Co. The lawsuit was originally filed in 1995, in response to a donation of conservation easements and land with vermiculite deposits from W.R. Grace & Co. to Historic Green Springs, Inc. in Louisa County, Virginia. A competitor of W.R. Grace—Virginia Vermiculite, Ltd. (VVL)—alleged that the donation violated federal antitrust laws because it removed the mineral deposits from the market altogether.

The Trust has been involved in this litigation since 1997 when it first filed an amicus brief in support of HGSI in the Fourth Circuit. In March 1998, the Trust, joined by the Land Trust Alliance and the Nature Conservancy, filed an amicus brief in the U.S. Supreme Court in support of HGSI's petition for certiorari. The federal appeals court had ruled in 1998 that HGSI, despite its nonprofit status, was potentially subject to the antitrust claim, because the court considered the land donation to be essentially a "commercial" transaction. The amicus brief had argued that antitrust liability would be inconsistent with national historic preservation and tax policies, both of which encourage donations of conservation easements and other land restrictions.

After a favorable District Court ruling, VVL appealed the decision to the Fourth Circuit. In October 2002, the Court ruled in HGSI's favor by looking at whether the donation of land and the conservation covenants by Grace were a genuine gift or whether they were merely disguised as bilateral action by which "two parties join their resources, rights or economic power together" to cause an antitrust injury. The court found that the donation of land was done at Grace's sole discretion and that such action simply amounted to a "transfer of right, resource, and economic power" from Grace to HGSI. The Court concluded that "[i]t would be an odd result for the mere receipt of a gift to be viewed as proof of concerted action in the antitrust context." In addition, since the court did not find that HGSI and Grace's "concerted actions caused, threatened to cause, or will cause VVL to suffer an injury," it dismissed the claim under the Virginia Conspiracy Act.



The rolling rural landscape of Green Springs, Virginia, has long been protected by the nonprofit Historic Green Springs, Inc., now the target of an antitrust claim that its conservation practices restrain trade. [Historic Green Springs, Inc.]



CONTRIBUTORS, SPONSORS, AND SUPPORTERS

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