

LEGAL DEFENSE FUND



NATIONAL TRUST  
for HISTORIC PRESERVATION

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## LDF UPDATE – MAY 2004

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

#### TRUST LEADS LAWSUIT AGAINST ARMY CORPS OVER UNLAWFUL PERMIT ALLOWING MAJOR RESIDENTIAL DEVELOPMENT NEAR OATLANDS

*National Trust for Historic Preservation v. U.S. Army Corps of Engineers,*  
No. 1:01-cv-287 (E.D. Va., filed Mar. 17, 2004)

The National Trust, the Piedmont Environmental Council, and the Audubon Naturalist Society have sued the Army Corps of Engineers in order to enforce compliance with Section 106 of the NHPA, by asking a federal court to revoke the permit and require consultation under Section 106. The permit authorizes the filling of wetlands and streams for construction of a major housing development known as Courtland Farm Rural Village in Loudoun County, Virginia, which will carve a highly visible swath through the landscape adjacent to Oatlands Plantation, a National Historic Landmark dating back 200 years, which has been a National Trust-owned Historic Site since 1965.



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

The Army Corps made a determination under Section 106 that the permit would not adversely affect Oatlands or the rural setting of the Oatlands Historic District, because the Corps refused to consider any aspect of the development beyond the filling of wetlands and streams for road crossings and stormwater management ponds. However, the State Historic Preservation Office disagreed with the Corps' finding of "no adverse effect," as did the Advisory Council on Historic Preservation, and a variety of other consulting parties, including the Trust, Oatlands, Inc., Little Oatlands, Audubon Naturalist Society, Piedmont Environmental Council, Friends of Banshee Reeks Nature Preserve, Inc., Loudoun Wildlife Conservancy, and Loudoun County. Instead of deferring to those objections about adverse effects, the Army Corps simply issued the permit, reiterating its refusal to look at the effects of the housing development as a whole.

The Army Corps' decision to issue the permit raises a number of nationally significant policy issues regarding inconsistencies between the regulations of the Army Corps and the Advisory Council on Historic Preservation, the scope of the Corps' obligation to consider the foreseeable effects of its permits, and the scope of the Council's authority to influence "effect" determinations by other agencies. Section 106 consultation would seek ways to avoid and minimize the adverse effects of the development on Oatlands.

Despite the lawsuit, the developer of Courtland Farms has begun bulldozing trees on a hillside facing Oatlands, in preparation for construction of the first 74 homes in the 200-acre development, which will ultimately include 277 houses adjacent to Oatlands. The plaintiffs are working to get the case considered by the court on an expedited basis. Shea & Gardner is providing *pro bono* representation of the National Trust and the other plaintiffs in the litigation.

## **TRUST JOINS NORTHERN CHEYENNE TRIBE TO CHALLENGE DRILLING FOR COAL BED METHANE AND NATURAL GAS IN TONGUE RIVER WATERSHED WITHOUT TRIBAL CONSULTATION**

*Northern Cheyenne Tribe v. Bureau of Land Management,*  
No. CV-04-17-BLG-RWA (D. Mont., filed Feb. 18, 2004)

On May 10, 2004, the National Trust filed an *amicus* brief, joined by the Association on American Indian Affairs (AAIA), in support of a motion for summary judgment filed by the Northern Cheyenne Tribe against the Bureau of Land Management (BLM). The Tribe's lawsuit challenges BLM's approval of the drilling of 178 coal bed methane/natural gas wells and construction of supporting infrastructure in the Tongue River watershed near Decker, Montana, which is southeast of Billings, on the Wyoming border.



The Tongue River in southeastern, Montana  
[Montana Preservation Alliance].

The Tongue River watershed is a culturally and religiously important 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.

BLM approved the project without consultation with Indian tribes, in direct violation of the NHPA, and over the objections of the Advisory Council on Historic Preservation and the Montana SHPO. Though the Area of Potential Effects for the project is nearly 6,700 acres, only ten percent of the area was surveyed for cultural resources. BLM also failed to comply with the National Environmental Policy Act (NEPA) by failing to afford the Tribes and the public an opportunity to review and comment on the Project.

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

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## RECENT COURT VICTORIES

### NEW JERSEY APPELLATE COURT UPHOLDS EMERGENCY DESIGNATION OF BLACK CREEK SITE IN VERNON TOWNSHIP

*I/M/O The Historic Designation of the Black Creek Site, Vernon Township, NJ  
by the Commissioner, Dep't of Environmental Protection,  
No. A-4581-01T2 (N.J. App. Div. Apr. 19, 2004)  
Status: Case Won*

On April 19, 2004, the New Jersey Superior Court's Appellate Division affirmed a decision by the New Jersey Environmental Commissioner to designate the Black Creek archaeological site for listing in the State Register of Historic Places. The designation had been challenged by the Township of Vernon, which owns the property and wants to build a 182-acre recreational complex on site.

The court concluded that the Commissioner's emergency designation was supported not only by the archaeological and historical significance of the Black Creek site, but also by the Township's bad faith and its repeated attempts to destroy the site. The court rejected the Township's argument that listing the site on the State Register was arbitrary and capricious, and that the decision was untimely and without due process. The National Trust, together with the Association on American Indian Affairs and Preservation New Jersey, filed an *amicus* brief in support of the New Jersey Department of Environmental Protection.

Black Creek is a 10,000-year-old Native American site, located on 35 acres in northwest New Jersey, and is hailed as one of the most significant prehistoric archaeological sites in New Jersey and the tri-state area. Black Creek is one of only four Native American sites on the New Jersey Register of Historic Places, which includes more than 1,600 sites representing European and colonial influence. The site is also considered sacred by the Lenni-Lenape Indians.



Black Creek is a highly significant prehistoric archaeological site, threatened by proposed construction of a 182-acre recreation complex in Vernon, NJ. [Rick Patterson]

Bulldozers were already rolling as the Commissioner issued the emergency designation in 2002, prompted by the Township's move to preempt the designation by entering into a construction contract before the New Jersey Historic Sites Council could meet to make a final decision on listing the site. The listing of the site on the New Jersey State Register of Historic Places was critical to

protecting the site, because it gives the state the authority to restrict the development and attach conditions to any plans.

**FEDERAL APPEALS COURT UPHOLDS PARK SERVICE POLICY  
ENCOURAGING RESPECT FOR NATIVE AMERICAN RELIGIOUS BELIEFS  
AT RAINBOW BRIDGE NATIONAL MONUMENT, UTAH**

*Natural Arch & Bridge Society v. Alston,*  
2004 WL 569888 (10<sup>th</sup> Cir. March 23, 2004)  
Status: *Case won*

On March 23, 2004, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court decision upholding the National Park Service Park Service's management policy asking visitors at Rainbow Bridge National Monument in Utah to voluntarily refrain from walking under the stone bridge, as Native Americans consider the site sacred to their religious beliefs. The Natural Arch and Bridge Society and several individuals filed suit in 2000, arguing that the policy violates the Establishment Clause and the Equal Protection Clause of the Constitution. The National Trust, together with the Association on American Indian Affairs, filed an *amicus curiae* brief in the Tenth Circuit, in support of the National Park Service.



The Rainbow Bridge National Monument is the world's largest natural bridge and an important Native American sacred site. [USGS]

Without reaching the merits of the plaintiffs' claims, the Tenth Circuit held that the plaintiffs lacked standing to challenge the policy under the First Amendment's Establishment Clause, because they had not shown any specific injury as a result of the policy.

Rainbow Bridge National Monument, located on the banks of Lake Powell in Utah, adjacent to the Glen Canyon National Recreation Area and the Navajo Reservation, is the world's largest natural bridge. One of the seven natural wonders of the world, the bridge has been formed by erosion of the sandstone by water flowing from Navajo Mountain towards the Colorado River. In addition to its status as a natural and scenic landmark, Rainbow Bridge is considered sacred by the Navajo culture as a symbol of deities responsible for creating clouds, rainbows and rain—the essence of life in the desert. A number of Native American tribes, including the Hopi, Pueblo, and San Juan Paiute, consider Rainbow Bridge and other nearby features and sites to be important to their spiritual beliefs and identity as a people. The Park Service, which administers the Glen Canyon National Recreation Area, has a Programmatic Agreement (PA) with several Indian tribes who have cultural affiliations to Rainbow Bridge. The PA calls for consultation with the tribes regarding the management of Rainbow Bridge National Monument.



## LITIGATION UPDATE

### ANOTHER NAIL IN THE COFFIN FOR 710 FREEWAY EXTENSION AS CALIFORNIA WITHDRAWS ITS APPROVAL; PRESERVATION ADVOCATES CELEBRATE VICTORY

*City of South Pasadena, et al. v. Rodney Slater, et al.,*  
56 F. Supp. 2d 1095 (C.D. Cal. 1999) (preliminary injunction under federal law);  
*City of South Pasadena, et al. v. California Transportation Comm'n, et al.,*  
No. BS 080352 (Cal. Super. Ct. Apr. 2004) (state law claims dismissed)  
STATUS: CASE WON. *Federal injunction issued; FHWA and California approval rescinded*

The last several months have seen an incredible turn of events in the long-running battle to stop the Route 710 freeway extension through Pasadena, South Pasadena, and El Sereno in southern California. On December 17, 2003, the Federal Highway Administration (FHWA) suspended its 1998 approval of the freeway, and advised the California Department of Transportation (CalTrans) that a full Supplemental Environmental Impact Statement (EIS) would be required before the project could be considered further. In April 2004, the California Transportation Commission responded by rescinding its own approval of the project – reversing a decision first adopted in 1964. As a result, the lawsuit pending in state court under the California Environmental Quality Act (CEQA) has been dismissed.



Historic home in the Route 710 freeway corridor in South Pasadena [Friezer Photography, Los Angeles].

If CalTrans decides to go forward with a renewed proposal for the freeway, as the City of Alhambra continues to urge, a new EIS will have to include consideration of a full-bore tunnel alternative, the existence of a recently opened light rail line from Pasadena to downtown L.A., and a number of additional historic properties in the corridor that were not previously evaluated. Trust President Richard Moe characterized the federal and state decisions as a “stake through the heart” of the project, in light of the seemingly insurmountable costs of going forward.

The proposed \$1.4 billion freeway would have demolished almost 1,000 homes and 6,000 trees in a six-mile area, cutting through the heart of four National Register historic districts and skirting along the boundaries of two others. In response to a lawsuit filed in 1998 by the Trust, the City of South Pasadena, and a coalition of other groups, a federal district court in L.A. issued an injunction against the project almost five years ago, on grounds that included Section 4(f), NEPA (National Environmental Policy Act), and the Clean Air Act.



## USING ADMINISTRATIVE ADVOCACY TO PROTECT HISTORIC RESOURCES WITHOUT LITIGATION

### PROGRAMMATIC AGREEMENT SIGNED FOR MISSOURI RIVER

After three years of consultation, a Programmatic Agreement was signed in April 2004 by ten Tribes, the National Trust, the State Historic Preservation Officers for Nebraska, South Dakota, North Dakota, and Montana, and the Army Corps of Engineers, and several Native American organizations, which will govern the operation of the six mainstem dams along the Missouri River. The Programmatic Agreement, adopted to comply with Section 106 of the National Historic Preservation Act, establishes a process for management and protection of cultural resources along the Missouri River. The Trust's Legal Defense Fund, Mountains/Plains Office, and Public Policy Department have coordinated to assist the Sioux tribes of North and South Dakota in working with the Army Corps of Engineers to protect culturally sensitive lands along the Missouri River. The fluctuation of the water level along the river as well as wave action is eroding the river bank, exposing burial sites and sacred objects and subjecting them to looting. For the past three years, the National Trust has participated in conferences of tribal elders and federal agencies to plan strategically for the protection and management of these cultural resource sites.



Protection and management of cultural resources sites along the Missouri River is critical. [NTHP]

### PROGRAMMATIC AGREEMENT SIGNED FOR WORLD TRADE CENTER MEMORIAL AND REDEVELOPMENT

Since December, 2003, the Trust has been actively involved in consultation under Section 106 of the National Historic Preservation concerning the redevelopment and memorial proposals for the World Trade Center site in New York City, which has been determined eligible for the National Register. Working closely with the Advisory Council on Historic Preservation, the Trust was instrumental in persuading the Lower Manhattan Development Corporation (which is funded by HUD) to reverse its "No Adverse Effect" finding and instead to develop a Programmatic Agreement (PA) to address the effects of the redevelopment and the memorial on historic properties. The PA spells out a process for the consulting parties to comment on plans for the memorial and for new construction within the World Trade Center site, in an effort to maximize preservation of the physical remnants and artifacts from the twin towers. The PA also includes mitigation commitments that will help to protect the surrounding historic buildings from vibration damage in connection the



The bases of the box-beam columns outlining the twin towers are still visible at the World Trade Center site [Courtesy of the Coalition of 9/11 Families].

intensive construction planned as part of the redevelopment.

In addition to the Advisory Council, the Trust has worked closely with its partners in the Lower Manhattan Emergency Preservation Fund – the Municipal Art Society, the New York Landmarks Conservancy, the Preservation League of New York State, and the World Monuments Fund – as well as the Coalition of 9/11 Families, which has been especially committed to preserving public access to the remains of the twin towers and the slurry wall surrounding the site.

## LDF HELPS BRING DOWN A CELL TOWER IN MCCLELLANDVILLE, DELAWARE

In March, 2004, historic homeowners and concerned neighbors celebrated the removal of an illegally-constructed T-Mobile telecommunications facility in McClellandville, Delaware. As a consulting party, the National Trust voiced its concern about the adverse effect this facility would have on both historic and scenic landscapes. Despite community objection, a 100-foot monopole replaced the existing 30-foot wooden pole. The Delaware SHPO determined that the pole had no adverse effect to historic structures. Neighbors hired an attorney and a preservation consultant who reviewed local law and NHPA compliance. A report was prepared noting the wireless service's failure to appropriately identify historic properties and failure to involve the public by contacting potential consulting parties prior to construction. By replacing the old pole with a new one, T-Mobile had attempted to avoid getting a special use permit (required for new cell tower sites). But since the pole was located within a Delaware state right-of-way, Delaware's Department of Transportation (DelDOT) was involved in the permitting process. Citizens voiced their concern to DelDOT which ultimately concluded that the monopole was installed without notice or public hearing and without the proper permit. On March 10, after standing for fewer than two months, the T-mobile facility was removed.



The removal of the McClellandville cell tower  
[David Rotenstein].

## MARITIME ADMINISTRATION CANCELS PLANS TO DESTROY USS GAGE

The United States Navy has canceled disposal of some of its historic World War II vessels and disposition of one, the *USS Gage*, is pending a historic assessment. The Maritime Administration (MARAD) plans to use historic vessels such as the *USS Gage*, the sole surviving originally configured World War II attack transport, as "SINKEX" targets. The National Trust and other concerned groups such as the APA Historical Preservation Project were granted consulting party status and have been working with MARAD to consider alternatives.



The *USS Gage* off the coast of Japan in 1945  
[The Few Family].

MARAD serves as the U.S. Government's disposal agent for merchant type vessels of 1,500 gross tons or more. There are approximately 130 obsolete vessels located in three fleet sites of the National Defense Reserve Fleet. The *USS Gage* was one of many similar vessels, which the press refers to as the "Ghost Fleet," among

the James River Fleet in Newport News, VA. The vessel has since been towed and now sits in Portsmouth, VA.

Among these obsolete vessels, the USS *Gage* stands in particularly good shape. It has been spared the environmental contamination of many similar vessels, and most of the vessel's historic characteristics are intact. The USS *Gage* is eligible, but has not been listed on the National Register. The National Trust has urged MARAD to consider the *Gage's* historic significance and that its compliance with Sections 106 and 110 of NHPA and Section 4(f) of the Dept. of Transportation Act mandates historic preservation review prior to destroying ships like the USS *Gage*.

## UPDATE ON ZUNI SALT LAKE AND SANCTUARY ZONE

### SAVED FROM COAL STRIP MINE

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

### THREATS FROM OIL & GAS LEASES

In February 2004, the National Trust filed an appeal with the Interior Board of Land Appeals requesting that Bureau of Land Management (BLM) comply with the requirements of Section 106 of the National Historic Preservation Act prior to issuing oil and gas leases adjacent to the Zuni Salt Lake and Sanctuary Zone. Hydrologic connections to Zuni Salt Lake and potential adverse effects to the Sanctuary Zone have not been determined. The BLM should recall these leases until such time as the effects to this area are better understood.



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

The Zuni Salt Lake, a Traditional Cultural Property on the National Register, is home to Salt Woman, called *Ma'lokyattsik'i* by the Zuni Pueblo, and is a place where the Zuni, their ancestors, and other tribes like the Hopi, Acoma, and Laguna Indians have made pilgrimages for thousands of years to request spiritual guidance and rain, to make offerings, and to collect salt for ceremonial, ritual, and domestic uses. Traditional pilgrimage trails connect the lake to the Zuni villages and to other sacred sites. In addition, an 182,000-acre area surrounding the lake, the Sanctuary Zone, contains burial grounds and shrines, and by tradition is a neutral zone where warring tribes could come together without conflict.



## CONTRIBUTORS, SPONSORS, AND SUPPORTERS

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