Return of Organization Exempt from Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code
(except black lung benefit trust or private foundation)

A For the 2002 calendar year, or tax year beginning         , 2002, and ending

B Check if applicable

- Address change
- Name change
- Initial return
- Final return
- Amended return

- Application pending

- Section 501(c)(3) organizations and 4947(a)(1) nonexempt charitable trusts must attach a completed Schedule A

D Employer Identification Number

- Telephone number

- Accounting method

- Other (specify)

H and I are not applicable to section 527 organizations

- Yes
- No

H (a) Is this a group return for affiliates?

- Yes
- No

H (b) If yes, enter number of affiliates

- Yes
- No

H (c) Are all affiliates included?

- Yes
- No

H (d) Does the organization have a separate return filed by an organization covered by a group return?

- Yes
- No

J Organization type (check only one)

- 501(c)

- 4947(a)(1) or

- 527

K Check here if the organization’s gross receipts are normally not more than $25,000. The organization need not file a return with the IRS, but if the organization received a Form 990 Package in the mail, it should file a return without financial data.

L Gross receipts. Add lines 6b, 8b, 9b, and 10b to line 12

- 2, 642, 461

Part I Revenue, Expenses, and Changes in Net Assets or Fund Balances (See Instructions)

1 Contributions, gifts, grants, and similar amounts received
   a Direct public support
   b Indirect public support
   c Government contributions (grants)
   d Total (add lines 1a through 1c) $2,056,798

2 Program service revenue including government fees and contracts (from Part VII, line 93)

3 Membership dues and assessments

4 Interest on savings and temporary cash investments

5 Dividends and interest from securities

6a Gross rents
   b Less rental expenses
   c Net rental income or (loss) (subtract line 6b from line 6a)

7 Other investment income (describe)

8a Gross amount from sales of assets other than inventory
   b Less cost or other basis and sales expenses
   c Gain or (loss) (attach schedule) STATEMENT 1

8d Net gain or (loss) (combine line 8c, columns (A) and (B))

9 Special events and activities (attach schedule)
   a Gross revenue (not including $9a of contributions reported on line 1a)
   b Less direct expenses other than fundraising expenses
   c Net income or (loss) from special events (subtract line 9b from line 9a)

10a Gross sales of inventory, less returns and allowances
   b Less cost of goods sold
   c Gross profit or (loss) from sales of inventory (attach schedule) (subtract line 10b from line 10a)

11 Other revenue (from Part VII, line 103)

12 Total revenue (add lines 1d, 2, 3 4 5, 6c, 7, 8d, 9c, 10c, and 11)

13 Program services (from line 44, column (B))

14 Management and general (from line 44, column (C))

15 Fundraising (from line 44, column (D))

16 Payments to affiliates (attach schedule)

17 Other expenses (from Part III, column (A))

18 Excess (deficit) for the year (subtract line 17 from line 12)

19 Net assets or fund balances at beginning of year (from line 73, column (A))

20 Other changes in assets or fund balances (attach explanation)

21 Net assets or fund balances at end of year (combine lines 18, 19, and 20)

BAA For Paperwork Reduction Act Notice, see the separate instructions

FTEA9079L 09/04/02 Form 990 (2002)
### Part II: Statement of Functional Expenses

All organizations must complete column (A) Columns (B), (C), and (D) are required for section 501(c)(3) and (4) organizations and section 4947(a)(1) nonexempt charitable trusts but optional for others.

<table>
<thead>
<tr>
<th>Item</th>
<th>(A) Total</th>
<th>(B) Program services</th>
<th>(C) Management and general</th>
<th>(D) Fundraising</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grants and allocations (all sch)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(cash) $</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(non cash) $</td>
<td>22</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>23</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Specific assistance to individuals (all sch)</td>
<td>23</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Benefits paid to or for members (all sch)</td>
<td>24</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>25</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compensation of officers, directors, etc</td>
<td>25</td>
<td>241,706</td>
<td>181,280</td>
<td>24,170</td>
</tr>
<tr>
<td>26</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other salaries and wages</td>
<td>26</td>
<td>549,884</td>
<td>412,413</td>
<td>54,988</td>
</tr>
<tr>
<td>27</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pension plan contributions</td>
<td>27</td>
<td>28,601</td>
<td>21,451</td>
<td>2,860</td>
</tr>
<tr>
<td>28</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other employee benefits</td>
<td>28</td>
<td>102,462</td>
<td>76,847</td>
<td>10,246</td>
</tr>
<tr>
<td>29</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payroll taxes</td>
<td>29</td>
<td>54,596</td>
<td>40,947</td>
<td>5,460</td>
</tr>
<tr>
<td>30</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional fundraising fees</td>
<td>30</td>
<td>736,110</td>
<td>268,017</td>
<td>89,339</td>
</tr>
<tr>
<td>31</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accounting fees</td>
<td>31</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>32</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal fees</td>
<td>32</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Supplies</td>
<td>33</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>34</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telephone</td>
<td>34</td>
<td>14,074</td>
<td>10,556</td>
<td>1,407</td>
</tr>
<tr>
<td>35</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postage and shipping</td>
<td>35</td>
<td>20,315</td>
<td>15,236</td>
<td>2,032</td>
</tr>
<tr>
<td>36</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Occupancy</td>
<td>36</td>
<td>55,724</td>
<td>41,793</td>
<td>5,572</td>
</tr>
<tr>
<td>37</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equipment rental and maintenance</td>
<td>37</td>
<td>467</td>
<td>350</td>
<td>47</td>
</tr>
<tr>
<td>38</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Printing and publications</td>
<td>38</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td>39</td>
<td>7,687</td>
<td>5,765</td>
<td>769</td>
</tr>
<tr>
<td>40</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conferences, conventions, and meetings</td>
<td>40</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>41</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interest</td>
<td>41</td>
<td>44,758</td>
<td>33,569</td>
<td>4,476</td>
</tr>
<tr>
<td>42</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Depreciation, depletion, etc (attach schedule)</td>
<td>42</td>
<td>48,296</td>
<td>36,222</td>
<td>4,830</td>
</tr>
<tr>
<td>43</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other expenses not covered above (itemize)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a SEE STATEMENT 3</td>
<td>43a</td>
<td>213,958</td>
<td>160,470</td>
<td>21,395</td>
</tr>
<tr>
<td>b</td>
<td>43b</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c</td>
<td>43c</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d</td>
<td>43d</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e</td>
<td>43e</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>44</td>
<td>Total functional expenses (add lines 22 to 43a)</td>
<td>44</td>
<td>2,118,638</td>
<td>1,304,916</td>
</tr>
</tbody>
</table>

**Joint Costs**: Check [ ] if you are following SOP 98 2

Are any joint costs from a combined educational campaign and fundraising solicitation reported in (B) Program services? [ ] Yes [x] No

If Yes, enter (i) the aggregate amount of these joint costs $________ (ii) the amount allocated to program services $________, (iii) the amount allocated to management and general $________, and (iv) the amount allocated to fundraising $________

---

### Part III: Statement of Program Service Accomplishments

What is the organization's primary exempt purpose? [ ] PUBLIC INTEREST LAW FIRM

All organizations must describe their exempt purpose achievements in a clear, concise manner. State the number of clients served, publications issued, etc. Discuss achievements that are not measurable. (Section 501(c)(3) & (4) organizations and 4947(a)(1) nonexempt charitable trusts must also enter the amount of grants & allocations to others.)

**Program Service Expenses** (Required for 501(c)(3) and (4) organizations and 4947(a)(1) trusts but optional for others)

- [a] LEGAL ACTIVITIES-PUBLIC INTEREST LAW FIRM SEE SCHEDULE 1
  - (Grants and allocations $) 1,304,916
- [b]...
- [c]...
- [d]...
- [e] Other program services
  - (Grants and allocations $) 1,304,916

**Total of Program Service Expenses** (should equal line 44, column (B), program services) 1,304,916
## Part IV: Balance Sheets

(See Instructions)

<table>
<thead>
<tr>
<th>Note</th>
<th>Where required, attached schedules and amounts within the description column should be for end-of-year amounts only</th>
<th>(A) Beginning of year</th>
<th>(B) End of year</th>
</tr>
</thead>
<tbody>
<tr>
<td>45</td>
<td>Cash — non-interest-bearing</td>
<td>82,694.45</td>
<td>26,117.84</td>
</tr>
<tr>
<td>46</td>
<td>Savings and temporary cash investments</td>
<td>77,961.46</td>
<td>381,601.72</td>
</tr>
<tr>
<td>47a</td>
<td>Accounts receivable</td>
<td>47b</td>
<td>47c</td>
</tr>
<tr>
<td></td>
<td>b Less allowance for doubtful accounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>48a</td>
<td>Pledges receivable</td>
<td>83,360</td>
<td>143,287.48</td>
</tr>
<tr>
<td></td>
<td>b Less allowance for doubtful accounts</td>
<td></td>
<td>83,360</td>
</tr>
<tr>
<td>49</td>
<td>Grants receivable</td>
<td></td>
<td>49</td>
</tr>
<tr>
<td>50</td>
<td>Receivables from officers, directors, trustees, and key employees (attach schedule)</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>51a</td>
<td>Other notes &amp; loans receivable (attach sch)</td>
<td>51b</td>
<td>51c</td>
</tr>
<tr>
<td></td>
<td>b Less allowance for doubtful accounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>52</td>
<td>Inventories for sale or use</td>
<td></td>
<td>52</td>
</tr>
<tr>
<td>53</td>
<td>Prepaid expenses and deferred charges</td>
<td></td>
<td>19,960.53</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>28,574.32</td>
</tr>
<tr>
<td>54</td>
<td>Investments — securities (attach schedule)</td>
<td>[Cost] [FMV]</td>
<td>400,429.54</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>143,007.23</td>
</tr>
<tr>
<td>55a</td>
<td>Investments — land, buildings, &amp; equipment basis</td>
<td>55b</td>
<td>55c</td>
</tr>
<tr>
<td></td>
<td>b Less accumulated depreciation (attach schedule)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>56</td>
<td>Investments — other (attach schedule)</td>
<td></td>
<td>56</td>
</tr>
<tr>
<td>57a</td>
<td>Land, buildings, and equipment basis</td>
<td>1,866,702</td>
<td>57c</td>
</tr>
<tr>
<td></td>
<td>b Less accumulated depreciation (attach schedule)</td>
<td></td>
<td>1,651,572</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1,674,198</td>
</tr>
<tr>
<td>58</td>
<td>Other assets (describe [])</td>
<td>614,785.58</td>
<td>605,150.25</td>
</tr>
<tr>
<td>59</td>
<td>Total assets (add lines 45 through 58) (must equal line 74)</td>
<td>2,990,688.59</td>
<td>2,942,007.60</td>
</tr>
<tr>
<td>60</td>
<td>Accounts payable and accrued expenses</td>
<td>39,158.60</td>
<td>195,672.48</td>
</tr>
<tr>
<td>61</td>
<td>Grants payable</td>
<td></td>
<td>61</td>
</tr>
<tr>
<td>62</td>
<td>Deferred revenue</td>
<td></td>
<td>62</td>
</tr>
<tr>
<td>63</td>
<td>Loans from officers, directors, trustees, and key employees (attach schedule)</td>
<td></td>
<td>63</td>
</tr>
<tr>
<td>64a</td>
<td>Tax exempt bond liabilities (attach schedule)</td>
<td>64b</td>
<td>64c</td>
</tr>
<tr>
<td></td>
<td>b Mortgages and other notes payable (attach schedule)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>65</td>
<td>Other liabilities (describe [])</td>
<td>33,919.65</td>
<td>32,177.88</td>
</tr>
<tr>
<td>66</td>
<td>Total liabilities (add lines 60 through 65)</td>
<td>940,252.66</td>
<td>730,881.16</td>
</tr>
</tbody>
</table>

Organizations that follow SFAS 117, check here: [X] and complete lines 67 through 69 and lines 73 and 74

- Unrestricted: 1,619,892.67, 1,764,588.12
- Temporarily restricted: 867,175.64b, 503,032.64c
- Permanently restricted: 33,919.65, 32,177.88

Organizations that do not follow SFAS 117, check here: [ ] and complete lines 70 through 74

- Capital stock, trust principal, or current funds: 70
- Paid in or capital surplus, or land, building, and equipment fund: 71
- Retained earnings, endowment, accumulated income or other funds: 72

73 Total net assets or fund balances (add lines 67 through 69 or lines 70 through 72, column (A) must equal line 19, column (B) must equal line 21)

<table>
<thead>
<tr>
<th>73</th>
<th>Column (A)</th>
<th>Column (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2,050,436.73</td>
<td>2,211,126.84</td>
</tr>
</tbody>
</table>

74 Total liabilities and net assets/fund balances (add lines 66 and 73)

<table>
<thead>
<tr>
<th>74</th>
<th>Column (A)</th>
<th>Column (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2,990,688.74</td>
<td>2,942,007.60</td>
</tr>
</tbody>
</table>

Form 990 is available for public inspection and, for some people, serves as the primary or sole source of information about a particular organization. How the public perceives an organization in such cases may be determined by the information presented on its return. Therefore, please make sure the return is complete and accurate and fully describes, in Part III, the organization's programs and accomplishments.

BAA
### Part IV-A: Reconciliation of Revenue per Audited Financial Statements with Revenue per Return (See instructions)

<table>
<thead>
<tr>
<th>a. Total revenue, gains, and other support per audited financial statements</th>
<th>▶ a</th>
<th>2,313,399</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. Amounts included on line a but not on line 12, Form 990</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Net unrealized gains on investments</td>
<td>▶ b</td>
<td>$26,032</td>
</tr>
<tr>
<td>(2) Donated services and use of facilities</td>
<td>▶ c</td>
<td></td>
</tr>
<tr>
<td>(3) Recoveries of prior year grants</td>
<td>▶ c</td>
<td></td>
</tr>
<tr>
<td>(4) Other (specify)</td>
<td>▶ c</td>
<td></td>
</tr>
<tr>
<td>Add amounts on lines (1) through (4)</td>
<td>▶ c</td>
<td>26,032</td>
</tr>
<tr>
<td>Line a minus line b</td>
<td>▶ c</td>
<td>2,287,367</td>
</tr>
<tr>
<td>d. Amounts included on line 12, Form 990 but not on line a</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Investment expenses not included on line 6b, Form 990</td>
<td>▶ d</td>
<td>$</td>
</tr>
<tr>
<td>(2) Other (specify)</td>
<td>▶ d</td>
<td></td>
</tr>
<tr>
<td>Add amounts on lines (1) and (2)</td>
<td>▶ d</td>
<td></td>
</tr>
<tr>
<td>e. Total revenue per line 12, Form 990 (line c plus line d)</td>
<td>▶ e</td>
<td>2,287,367</td>
</tr>
</tbody>
</table>

### Part IV-B: Reconciliation of Expenses per Audited Financial Statements with Expenses per Return

<table>
<thead>
<tr>
<th>a. Total expenses and losses per audited financial statements</th>
<th>▶ a</th>
<th>2,118,638</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. Amounts included on line a but not on line 17, Form 990</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Donated services and use of facilities</td>
<td>▶ b</td>
<td>$</td>
</tr>
<tr>
<td>(2) Prior year adjustments reported on line 20, Form 990</td>
<td>▶ b</td>
<td></td>
</tr>
<tr>
<td>(3) Losses reported on line 20, Form 990</td>
<td>▶ c</td>
<td>$</td>
</tr>
<tr>
<td>(4) Other (specify)</td>
<td>▶ c</td>
<td></td>
</tr>
<tr>
<td>Add amounts on lines (1) through (4)</td>
<td>▶ c</td>
<td></td>
</tr>
<tr>
<td>Line a minus line b</td>
<td>▶ c</td>
<td>2,118,638</td>
</tr>
<tr>
<td>d. Amounts included on line 17, Form 990 but not on line a</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Investment expenses not included on line 6b, Form 990</td>
<td>▶ d</td>
<td>$</td>
</tr>
<tr>
<td>(2) Other (specify)</td>
<td>▶ d</td>
<td></td>
</tr>
<tr>
<td>Add amounts on lines (1) and (2)</td>
<td>▶ d</td>
<td></td>
</tr>
<tr>
<td>e. Total expenses per line 17, Form 990 (line c plus line d)</td>
<td>▶ e</td>
<td>2,118,638</td>
</tr>
</tbody>
</table>

### Part V: List of Officers, Directors, Trustees, and Key Employees (List each one even if not compensated, see instructions)

<table>
<thead>
<tr>
<th>(A) Name and address</th>
<th>(B) Title and average hours per week devoted to position</th>
<th>(C) Compensation (if not paid, enter 0)</th>
<th>(D) Contributions to employee benefit plans and deferred compensation</th>
<th>(E) Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>JERRY SHEFFELS</td>
<td>CHAIRMAN</td>
<td>20</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2596 SOUTH LEWIS WAY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LAKEWOOD, CO 80227</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WILLIAM PERRY PENDLEY</td>
<td>PRESIDENT</td>
<td>50</td>
<td>199,583</td>
<td>0</td>
</tr>
<tr>
<td>2596 SOUTH LEWIS WAY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LAKEWOOD, CO 80227</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BEVERLY JACKA</td>
<td>VP</td>
<td>50</td>
<td>42,123</td>
<td>0</td>
</tr>
<tr>
<td>2596 SOUTH LEWIS WAY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LAKEWOOD, CO 80227</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JOHN KANE</td>
<td>TREASURER</td>
<td>20</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2596 SOUTH LEWIS WAY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LAKEWOOD, CO 80227</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

75 Did any officer, director, trustee, or key employee receive aggregate compensation of more than $100,000 from your organization and all related organizations, of which more than $10,000 was provided by the related organizations?  
- [ ] Yes  
- [X] No  

If 'Yes,' attach schedule — see instructions
76 Did the organization engage in any activity not previously reported to the IRS? If "Yes," attach a detailed description of each activity.
   Yes  No
   76  X

77 Were any changes made in the organizing or governing documents but not reported to the IRS? If "Yes," attach a conformed copy of the changes.
   Yes  No
   77  X

78a Did the organization have unrelated business gross income of $1,000 or more during the year covered by this report?
   b If "Yes," has it filed a tax return on Form 990-T for this year?
   Yes  No
   78a  X  78b N/A

79 Was there a liquidation, dissolution, termination, or substantial contraction during the year? If "Yes," attach a statement.
   Yes  No
   79  X

80a Is the organization related (other than by association with a statewide or nationwide organization) through common membership, governing bodies, trustees, officers, etc., to any other exempt or nonexempt organization?
   b If "Yes," enter the name of the organization and check whether it is exempt or nonexempt.
   N/A

81a Enter direct or indirect political expenditures. See line 81 instructions.
   81a

82a Did the organization receive donated services or the use of materials, equipment, or facilities at no charge or at substantially less than fair rental value?
   Yes  No
   82a  X

83a Did the organization comply with the public inspection requirements for returns and exemption applications?
   Yes  No
   83a  X

84a Did the organization solicit any contributions or gifts that were not tax deductible?
   Yes  No
   84a  X

85 501(c)(4), (5), or (6) organizations
   a Were substantially all dues nondeductible by members?
   Yes  No
   85a  X

   b Did the organization make only in-house lobbying expenditures of $2,000 or less?
   Yes  No
   85b  X

   c If "Yes" was answered to either 85a or 85b, do not complete 85c through 85h below unless the organization received a waiver for proxy tax owed for the prior year.

65 501(c)(7) organizations
   a Initiation fees and capital contributions included on line 12
   Yes  No
   86a  X

   b Gross receipts, included on line 12, for public use of club facilities
   Yes  No
   86b  X

87 501(c)(12) organizations
   a Gross income from members or shareholders.
   Yes  No
   87a  X

   b Gross income from other sources. (Do not net amounts due or paid to other sources against amounts due or received from them.)
   Yes  No
   87b N/A

88 At any time during the year, did the organization own a 50% or greater interest in a taxable corporation or partnership, or an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? If "Yes," complete Part IX.
   Yes  No
   88  X

89a 501(c)(3) organizations
   a Amount of tax imposed on the organization during the year under section 4911
   , section 4912
   , and section 4955
   .
   b 501(c)(3) and 501(c)(4) organizations
   Did the organization engage in any section 4958 excess benefit transaction during the year or did it become aware of an excess benefit transaction from a prior year? If "Yes," attach a statement explaining each transaction.
   Yes  No
   89b  X

   c Enter amount of tax imposed on the organization managers or disqualified persons during the year under sections 4912, 4955, and 4958
   .
   d Enter amount of tax on line 89c, above, reimbursed by the organization
   .

90a List the states with which a copy of this return is filed
   None

91 The books are in care of
   THE FOUNDATION
   Telephone number 303-292-2021
   Located at 2596 SOUTH LEWIS WAY, LAKEWOOD CO.
   ZIP + 4 80227

92 Section 4947(a)(1) nonexempt charitable trusts filing Form 990 in lieu of Form 1041—Check here and enter the amount of tax-exempt interest received or accrued during the tax year.
   Yes  No
   92  X
**Part VII: Analysis of Income-Producing Activities**

<table>
<thead>
<tr>
<th>Note.</th>
<th>Gross amounts unless otherwise indicated</th>
</tr>
</thead>
<tbody>
<tr>
<td>93</td>
<td>Program service revenue</td>
</tr>
<tr>
<td>a</td>
<td>EAJA ATTORNEY FEES AW</td>
</tr>
<tr>
<td>b</td>
<td></td>
</tr>
<tr>
<td>c</td>
<td></td>
</tr>
<tr>
<td>d</td>
<td></td>
</tr>
<tr>
<td>e</td>
<td>Medicare/Medicaid payments</td>
</tr>
<tr>
<td>g</td>
<td>Fees &amp; contracts from government agencies</td>
</tr>
<tr>
<td>94</td>
<td>Membership dues and assessments</td>
</tr>
</tbody>
</table>
| 95    | Interest on savings & temporary cash in
s
| 96    | Dividends & interest from securities |
| 97    | Net rental income or (loss) from real estate |
| a     | Debt-financed property |
| b     | Not debt-financed property |
| 98    | Net rental income or (loss) from pers prop |
| 99    | Other investment income |
| 100   | Gain or (loss) from sales of assets other than inventory |
| 101   | Net income or (loss) from special events |
| 102   | Gross profit or (loss) from sales of inventory |
| 103   | Other revenue |
| b     | MISC |
| 104   | Subtotal (add columns (B), (D), and (E)) |
| 105   | Total (add line 104, columns (G), (D), and (E)) |

<table>
<thead>
<tr>
<th>Unrelated business income</th>
<th>Excluded by section 512, 513, or 514</th>
<th>Related or exempt function income</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) Business code</td>
<td>(B) Amount</td>
<td>(C) Exclusion code</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>14</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-103,779.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8,821</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15,527</td>
</tr>
<tr>
<td></td>
<td></td>
<td>230,569</td>
</tr>
</tbody>
</table>

Note: Line 105 plus line 1d, Part I, should equal the amount on line 12, Part I.

**Part VIII: Relationship of Activities to the Accomplishment of Exempt Purposes**

Line No | Explain how each activity for which income is reported in column (E) of Part VII contributed importantly to the accomplishment of the organization's exempt purposes (other than by providing funds for such purposes)
--- | ---
103 (B) | MISC INCOME PROVIDED FUNDS TO MEET EXEMPT PURPOSE

**Part IX: Information Regarding Taxable Subsidiaries and Disregarded Entities**

<table>
<thead>
<tr>
<th>(A) Name, address, and EIN of corporation, partnership, or disregarded entity</th>
<th>(B) Percentage of ownership interest</th>
<th>(C) Nature of activities</th>
<th>(D) Total income</th>
<th>(E) End-of-year assets</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>$</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

|          |          |          |          |          |

**Part X: Information Regarding Transfers Associated with Personal Benefit Contracts**

- a Did the organization, during the year, receive any funds, directly or indirectly, to pay premiums on a personal benefit contract? Yes [ ] No [x]
- b Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract? Yes [ ] No [x]

Note: If "Yes to (b), file Form 8870 and Form 4720 (see instructions)"

**Please Sign Here**

Signature of officer: [Signature]

Type or print name and title: WILLIAM JERRY PENDLE

Date: 5 May 03

**Paid Preparer's Use Only**

Preparer's signature: [Signature]

Date: 4/29/03

Check if self-employed [ ]

Preparer's SSN or PTIN (see General Instruction W): P00088237

Form 9-0010661, 10/1/02: Form 990 (2002)

**BAA**

T5E010661 10/1/02
### Part I  Compensation of the Five Highest Paid Employees Other Than Officers, Directors, and Trustees

<table>
<thead>
<tr>
<th>(a) Name and address of each employee paid more than $50,000</th>
<th>(b) Title and average hours per week devoted to position</th>
<th>(c) Compensation</th>
<th>(d) Contributions to employee benefit plans and deferred compensation</th>
<th>(e) Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>JAMES S DETAMORE</td>
<td>STAFF ATTORNEY</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2596 S LEWIS WAY</td>
<td>40</td>
<td>62,292</td>
<td>4,494</td>
<td>0</td>
</tr>
<tr>
<td>STEVE LECHNER</td>
<td>STAFF ATTORNEY</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2596 S LEWIS WAY</td>
<td>40</td>
<td>95,000</td>
<td>6,783</td>
<td>0</td>
</tr>
</tbody>
</table>

Total number of other employees paid over $50,000: 0

### Part II  Compensation of the Five Highest Paid Independent Contractors for Professional Services

<table>
<thead>
<tr>
<th>(a) Name and address of each independent contractor paid more than $50,000</th>
<th>(b) Type of service</th>
<th>(c) Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>EBERLE AND ASSOCIATES</td>
<td>FUNDRAISING</td>
<td>85,326</td>
</tr>
</tbody>
</table>

Total number of others receiving over $50,000 for professional services: 0
Part III Statements About Activities (See instructions)

1. During the year, has the organization attempted to influence national, state, or local legislation, including any attempt to influence public opinion on a legislative matter or referendum? If 'Yes,' enter the total expenses paid or incurred in connection with the lobbying activities.  $ N/A
   (Must equal amounts on line 38, Part VI A, or line 1 of Part VI-B)
   Organizations that made an election under section 501(h) by filing Form 5768 must complete Part VI A. Other organizations checking 'Yes,' must complete Part VI-B AND attach a statement giving a detailed description of the lobbying activities.

2. During the year, has the organization, either directly or indirectly, engaged in any of the following acts with any substantial contributors, trustees, directors, officers, creators, key employees, or members of their families, or with any taxable organization with which any such person is affiliated as an officer, director, trustee, majority owner, or principal beneficiary? (If the answer to any question is 'Yes,' attach a detailed statement explaining the transactions)

   a. Sale, exchange, or leasing of property?  

   b. Lending of money or other extension of credit?

   c. Furnishing of goods, services, or facilities?  

      SEE FORM 990, PART V

   d. Payment of compensation (or payment or reimbursement of expenses if more than $1,000)?

   e. Transfer of any part of its income or assets?

3. Does the organization make grants for scholarships, fellowships, student loans, etc? (See Note below)

4. Do you have a section 403(b) annuity plan for your employees?

   Note: Attach a statement to explain how the organization determines that individuals or organizations receiving grants or loans from it in furtherance of its charitable programs qualify to receive payments.

Part IV Reason for Non-Private Foundation Status (See instructions)

The organization is not a private foundation because it is: (Please check only ONE applicable box)

5. A church, convention of churches, or association of churches Section 170(b)(1)(A)(i)

6. A school Section 170(b)(1)(A)(ii) (Also complete Part V)

7. A hospital or a cooperative hospital service organization Section 170(b)(1)(A)(iii)

8. A Federal, state, or local government or governmental unit Section 170(b)(1)(A)(iv)

9. A medical research organization operated in conjunction with a hospital Section 170(b)(1)(A)(v) Enter the hospital's name, city, and state.

10. An organization operated for the benefit of a college or university owned or operated by a governmental unit Section 170(b)(1)(A)(vi) (Also complete the Support Schedule in Part IV-A)

11a. An organization that normally receives a substantial part of its support from a governmental unit or from the general public Section 170(b)(1)(A)(vii) (Also complete the Support Schedule in Part IV-A)

11b. A community trust Section 170(b)(1)(A)(viii) (Also complete the Support Schedule in Part IV-A)

12. An organization that normally receives (1) more than 33-1/3% of its support from contributions, membership fees, and gross receipts from activities related to its charitable, etc., functions subject to certain exceptions, and (2) no more than 33-1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See section 509(a)(2) (Also complete the Support Schedule in Part IV-A)

13. An organization that is not controlled by any disqualified persons (other than foundation managers) and supports organizations described in (1) lines 5 through 12 above, or (2) section 501(c)(4), (5), or (6), if they meet the test of section 509(a)(2) (See section 509(a)(3))

Provide the following information about the supported organizations (See instructions)

(a) Name(s) of supported organization(s)  

(b) Line number from above

14. An organization organized and operated to test for public safety Section 509(a)(4) (See instructions)
### Support Schedule

**Part IV-A**

**Schedule A (Form 990 or 990-EZ) 2002**

**Mountain States Legal Foundation**

**84-0736725**

Page 3

**Note:** You may use the worksheet in the instructions for converting from the accrual to the cash method of accounting.

#### Calendar year (or fiscal year beginning in)

<table>
<thead>
<tr>
<th></th>
<th>(a) 2001</th>
<th>(b) 2000</th>
<th>(c) 1999</th>
<th>(d) 1998</th>
<th>(e) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Gifts, grants, and contributions received (Do not include unusual grants - See line 28)</td>
<td>2,509,649.</td>
<td>3,323,559</td>
<td>2,360,682</td>
<td>1,089,208</td>
</tr>
<tr>
<td>16</td>
<td>Membership fees received</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Gross receipts from admissions, merchandise sold or services performed, or furnishing of facilities in any activity that is related to the organization's charitable, educational purpose</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Gross income from interest, dividends, amounts received from payments on securities loans (section 512(a)(5)), rents, royalties, and unrelated business taxable income (less section 511 items) from businesses acquired by the organization after June 30, 1975</td>
<td>43,533</td>
<td>42,191</td>
<td>21,487</td>
<td>18,802</td>
</tr>
<tr>
<td>19</td>
<td>Net income from unrelated business activities not included in line 18</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Tax revenues levied for the organization's benefit and either paid to or expended on its behalf</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>The value of services or facilities furnished to the organization by a governmental unit without charge (Do not include the value of services or facilities generally furnished to the public without charge)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Other income (Attach a schedule. Do not include gain or (loss) from sale of capital assets - See STM7)</td>
<td>576</td>
<td>243</td>
<td>1,206</td>
<td>908</td>
</tr>
<tr>
<td>23</td>
<td>Total of lines 15 through 22</td>
<td>2,553,758</td>
<td>3,365,993</td>
<td>2,383,375</td>
<td>1,108,918</td>
</tr>
<tr>
<td>24</td>
<td>Line 23 minus line 17</td>
<td>2,553,758</td>
<td>3,365,993</td>
<td>2,383,375</td>
<td>1,108,918</td>
</tr>
<tr>
<td>25</td>
<td>Enter 1% of line 23</td>
<td>25,538</td>
<td>33,660</td>
<td>23,834</td>
<td>11,089</td>
</tr>
<tr>
<td>26</td>
<td>Organizations described on lines 10 or 11</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>27</td>
<td>Organizations described on line 12</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>Unusual Grants: For an organization described in line 10, 11, or 12 that received any unusual grants during 1998 through 2001, prepare a list for your records to show, for each year, the name of the contributor, the date and amount of the grant, and a brief description of the nature of the grant. Do not file this list with your return. Do not include these grants in line 15</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
29. Does the organization have a racially nondiscriminatory policy toward students by statement in its charter, bylaws, other governing instrument, or in a resolution of its governing body?  

30. Does the organization include a statement of its racially nondiscriminatory policy toward students in all its brochures, catalogues, and other written communications with the public dealing with student admissions, programs, and scholarships?  

31. Has the organization publicized its racially nondiscriminatory policy through newspaper or broadcast media during the period of solicitation for students, or during the registration period if it has no solicitation program, in a way that makes the policy known to all parts of the general community it serves?  
   If ‘Yes,’ please describe; if ‘No’ please explain. (If you need more space, attach a separate statement.)

32. Does the organization maintain the following:  
   a. Records indicating the racial composition of the student body, faculty, and administrative staff?  
   b. Records documenting that scholarships and other financial assistance are awarded on a racially nondiscriminatory basis?  
   c. Copies of all catalogues, brochures, announcements, and other written communications to the public dealing with student admissions, programs, and scholarships?  
   d. Copies of all materials used by the organization or on its behalf to solicit contributions?  
   If you answered ‘No’ to any of the above, please explain. (If you need more space, attach a separate statement.)

33. Does the organization discriminate by race in any way with respect to:  
   a. Students’ rights or privileges?  
   b. Admissions policies?  
   c. Employment of faculty or administrative staff?  
   d. Scholarships or other financial assistance?  
   e. Educational policies?  
   f. Use of facilities?  
   g. Athletic programs?  
   h. Other extracurricular activities?  
   If you answered ‘Yes’ to any of the above, please explain. (If you need more space, attach a separate statement.)

34a. Does the organization receive any financial aid or assistance from a governmental agency?  

34b. Has the organization’s right to such aid ever been revoked or suspended?  
   If you answered ‘Yes’ to either 34a or b, please explain using an attached statement.

35. Does the organization certify that it has complied with the applicable requirements of sections 4.01 through 4.05 of Rev Proc 75-50, 1975-2 C B 587, covering racial nondiscrimination? If ‘No,’ attach an explanation.
### Limits on Lobbying Expenditures

(The term 'expenditures' means amounts paid or incurred)

<table>
<thead>
<tr>
<th></th>
<th>Affiliated group totals</th>
<th>To be completed for ALL electing organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>Total lobbying expenditures to influence public opinion (grassroots lobbying)</td>
<td>36</td>
</tr>
<tr>
<td>37</td>
<td>Total lobbying expenditures to influence a legislative body (direct lobbying)</td>
<td>37</td>
</tr>
<tr>
<td>38</td>
<td>Total lobbying expenditures (add lines 36 and 37)</td>
<td>38</td>
</tr>
<tr>
<td>39</td>
<td>Other exempt purpose expenditures</td>
<td>39</td>
</tr>
<tr>
<td>40</td>
<td>Total exempt purpose expenditures (add lines 38 and 39)</td>
<td>40</td>
</tr>
<tr>
<td>41</td>
<td>Lobbying non-taxable amount Enter the amount from the following table —</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If the amount on line 40 is —</td>
<td>The lobbying non-taxable amount is —</td>
</tr>
<tr>
<td></td>
<td>Not over $500,000</td>
<td>20% of the amount on line 40</td>
</tr>
<tr>
<td></td>
<td>Over $500,000 but not over $1,000,000</td>
<td>$100,000 plus 15% of the excess over $500,000</td>
</tr>
<tr>
<td></td>
<td>Over $1,000,000 but not over $1,500,000</td>
<td>$175,000 plus 10% of the excess over $1,000,000</td>
</tr>
<tr>
<td></td>
<td>Over $1,500,000 but not over $17,000,000</td>
<td>$225,000 plus 5% of the excess over $1,500,000</td>
</tr>
<tr>
<td></td>
<td>Over $17,000,000</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>42</td>
<td>Grassroots non-taxable amount (enter 25% of line 41)</td>
<td>42</td>
</tr>
<tr>
<td>43</td>
<td>Subtract line 42 from line 36 Enter -0 if line 42 is more than line 36</td>
<td>43</td>
</tr>
<tr>
<td>44</td>
<td>Subtract line 41 from line 38 Enter -0 if line 41 is more than line 38</td>
<td>44</td>
</tr>
</tbody>
</table>

**Caution:** If there is an amount on either line 43 or line 44, you must file Form 4720

### 4-Year Averaging Period Under Section 501(h)

(Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the instructions for lines 45 through 50.)

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2002</th>
<th>(b) 2001</th>
<th>(c) 2000</th>
<th>(d) 1999</th>
<th>(e) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>45</td>
<td>Lobbying non-taxable amount</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>Lobbying ceiling amount (150% of line 45(e))</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47</td>
<td>Total lobbying expenditures</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>48</td>
<td>Grassroots non-taxable amount</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>49</td>
<td>Grassroots ceiling amount (150% of line 49(e))</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>50</td>
<td>Grassroots lobbying expenditures</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Part VI-B Lobbying Activity by Nonelecting Public Charities

(For reporting only by organizations that did not complete Part VI-A) (See instructions)

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>a Volunteers</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b Paid staff or management (include compensation in expenses reported on lines c through h)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c Media advertisements</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d Mailings to members, legislators, or the public</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e Publications or published or broadcast statements</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f Grants to other organizations for lobbying purposes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>g Direct contact with legislators, their staffs, government officials, or a legislative body</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>h Rallies, demonstrations, seminars, conventions, speeches, lectures, or any other means</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i Total lobbying expenditures (add lines c through h)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If 'Yes' to any of the above, also attach a statement giving a detailed description of the lobbying activities.
**Part VII Information Regarding Transfers To and Transactions and Relationships With Noncharitable Exempt Organizations (See instructions)**

**51** Did the reporting organization directly or indirectly engage in any of the following with any other organization described in section 501(c) of the Code (other than section 501(c)(3) organizations) or in section 527, relating to political organizations?

<table>
<thead>
<tr>
<th>(a) Transfers from the reporting organization to a noncharitable exempt organization of</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Cash</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>(ii) Other assets</td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

**b Other transactions**

| (i) Sales or exchanges of assets with a noncharitable exempt organization | | X |
| (ii) Purchases of assets from a noncharitable exempt organization | | X |
| (iii) Rental of facilities, equipment, or other assets | | X |
| (iv) Reimbursement arrangements | | X |
| (v) Loans or loan guarantees | | X |
| (vi) Performance of services or membership or fundraising solicitations | | X |

**c Sharing of facilities, equipment, mailing lists, other assets, or paid employees**

<table>
<thead>
<tr>
<th>(a) Line no</th>
<th>(b) Amount involved</th>
<th>(c) Name of noncharitable exempt organization</th>
<th>(d) Description of transfers, transactions, and sharing arrangements</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

52a Is the organization directly or indirectly affiliated with, or related to, one or more tax exempt organizations described in section 501(c) of the Code (other than section 501(c)(3)) or in section 527?

| Yes | X No |

**b If 'Yes', complete the following schedule**

<table>
<thead>
<tr>
<th>(a) Name of organization</th>
<th>(b) Type of organization</th>
<th>(c) Description of relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---
**Form 4562**

**Depreciation and Amortization (Including Information on Listed Property)**

**2002**

**O.M.B No. 1545-0172**

**Identification number:**

- **Name(s) shown on return:** MOUNTAIN STATES LEGAL FOUNDATION
- **Identifying number:** 84-0736725

**Business or activity to which this form relates:** FORM 990/990-PF

---

**Part I. Election To Expense Certain Tangible Property Under Section 179**

1. **Maximum amount** See instructions for a higher limit for certain businesses
   - Value: $24,000

2. **Total cost of section 179 property placed in service (see instructions)**
   - Line 2: $200,000

---

**Note:** If you have any listed property, complete Part IV before you complete Part I.

**6. (a) Description of property**
**(b) Cost (business use only)**
**(c) Elected cost**

7. **Listed property** Enter the amount from line 29
   - Value: 7

8. **Total elected cost of section 179 property** Add amounts in column (c), lines 6 and 7
   - Value: 8

9. **Tentative deduction** Enter the smaller of line 5 or line 8
   - Value: 9

10. **Carryover of disallowed deduction from line 13 of your 2001 Form 4562**
    - Value: 10

11. **Business income limitation** Enter the smaller of business income (not less than zero) or line 5 (see instructions)
    - Value: 11

12. **Section 179 expense deduction Add lines 9 and 10, but do not enter more than line 11**
    - Value: 12

---

**Part II. Special Depreciation Allowance and Other Depreciation**

- **Do not include listed property.**

14. **Special depreciation allowance for qualified property**
    - Value: 14

15. **Property subject to section 168(f)(1) election (see instructions)**
    - Value: 15

16. **Other depreciation (including ACRS) (see instructions)**
    - Value: 48,296

---

**Part III. MACRS Depreciation**

- **Do not include listed property.**

**Section A**

17. **MACRS deductions for assets placed in service in tax years beginning before 2002**
   - Value: 17

18. **If you are electing under section 168(f)(d) to group any assets placed in service during the tax year into one or more general asset accounts, check here**

---

**Section B — Assets Placed in Service During 2002 Tax Year Using the General Depreciation System**

<table>
<thead>
<tr>
<th>(a) Classification of property</th>
<th>(b) Month and year placed in service</th>
<th>(c) Basis for depreciation (business/investment use only — see instructions)</th>
<th>(d) Recovery period</th>
<th>(e) Convention</th>
<th>(f) Method</th>
<th>(g) Depreciation deduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>19a 3-year property</td>
<td></td>
<td></td>
<td>25 yrs</td>
<td>S/L</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b 5-year property</td>
<td></td>
<td></td>
<td>27.5 yrs</td>
<td>MM</td>
<td>S/L</td>
<td></td>
</tr>
<tr>
<td>c 7-year property</td>
<td></td>
<td></td>
<td>27.5 yrs</td>
<td>MM</td>
<td>S/L</td>
<td></td>
</tr>
<tr>
<td>d 10-year property</td>
<td></td>
<td></td>
<td>39 yrs</td>
<td>MM</td>
<td>S/L</td>
<td></td>
</tr>
<tr>
<td>e 15-year property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f 20-year property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>g 25-year property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>h Residential rental property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i Nonresidential real property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Section C — Assets Placed in Service During 2002 Tax Year Using the Alternative Depreciation System**

<table>
<thead>
<tr>
<th>(a) Classification of property</th>
<th>(b) Month and year placed in service</th>
<th>(c) Basis for depreciation (business/investment use only — see instructions)</th>
<th>(d) Recovery period</th>
<th>(e) Convention</th>
<th>(f) Method</th>
<th>(g) Depreciation deduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>20a Class life</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b 12-year</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c 40-year</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

**Part IV. Summary (see instructions)**

21. **Listed property** Enter amount from line 28
   - Value: 21

22. **Total: Add amounts from line 12, lines 14 through 17, lines 19 and 20 in column (g), and line 21**
    - Enter here and on the appropriate lines of your return. Partnerships and S corporations — see instructions
    - Value: 48,296

23. **For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs**

---

**BAA For Paperwork Reduction Act Notice, see instructions**

**FDI20812, 12/12/02**

**Form 4562 (2002)**
STATEMENT 1
FORM 990, PART I, LINE 8
NET GAIN (LOSS) FROM NONINVENTORY SALES

PUBLICLY TRADED SECURITIES

GROSS SALES PRICE 251,315.
COST OR OTHER BASIS. 355,094

TOTAL GAIN (LOSS) PUBLICLY TRADED SECURITIES $-103,779.
TOTAL NET GAIN (LOSS) FROM NONINVENTORY SALES $-103,779

STATEMENT 2
FORM 990, PART I, LINE 20
OTHER CHANGES IN NET ASSETS OR FUND BALANCES

ADJUSTMENT FOR COMPENSATED ABSENCES $-34,071.
UNREALIZED APPRECIATION ON INVESTMENTS 26,032
TOTAL $-8,039

STATEMENT 3
FORM 990, PART II, LINE 43
OTHER EXPENSES

<table>
<thead>
<tr>
<th>Category</th>
<th>(A)</th>
<th>(B) Program Services</th>
<th>(C) Management &amp; General</th>
<th>(D) Fundraising</th>
</tr>
</thead>
<tbody>
<tr>
<td>INSURANCE</td>
<td>15,382</td>
<td>11,537</td>
<td>1,538</td>
<td>2,307</td>
</tr>
<tr>
<td>LIBRARY MAINTENANCE</td>
<td>24,313</td>
<td>18,235</td>
<td>2,431</td>
<td>3,647</td>
</tr>
<tr>
<td>MEETINGS</td>
<td>25,616</td>
<td>19,212</td>
<td>2,562</td>
<td>3,842</td>
</tr>
<tr>
<td>OFFICE EXPENSE</td>
<td>53,295</td>
<td>39,972</td>
<td>5,330</td>
<td>7,994</td>
</tr>
<tr>
<td>PROFESSIONAL SERVICE</td>
<td>83,705</td>
<td>62,779</td>
<td>8,370</td>
<td>12,556</td>
</tr>
<tr>
<td>REPAIRS &amp; MAINT</td>
<td>11,646</td>
<td>8,735</td>
<td>1,164</td>
<td>1,747</td>
</tr>
<tr>
<td>TOTAL</td>
<td>$213,958</td>
<td>$160,470</td>
<td>$21,395</td>
<td>$32,093</td>
</tr>
</tbody>
</table>

STATEMENT 4
FORM 990, PART IV, LINE 57
LAND, BUILDINGS, AND EQUIPMENT

<table>
<thead>
<tr>
<th>Category</th>
<th>Basis</th>
<th>Accum Deprec</th>
<th>Book Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>FURNITURE AND FIXTURES</td>
<td>$135,284</td>
<td>$67,162</td>
<td>$68,122</td>
</tr>
<tr>
<td>MACHINERY AND EQUIPMENT</td>
<td>146,810</td>
<td>59,107</td>
<td>87,703</td>
</tr>
<tr>
<td>BUILDINGS</td>
<td>1,397,718</td>
<td>34,050</td>
<td>1,363,668</td>
</tr>
<tr>
<td>LAND</td>
<td>154,705.</td>
<td></td>
<td>154,705</td>
</tr>
<tr>
<td>MISCELLANEOUS</td>
<td>32,185.</td>
<td>32,185</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>$1,886,702</td>
<td>$192,504</td>
<td>$1,674,198</td>
</tr>
</tbody>
</table>

10:55 AM
STATEMENT 5
FORM 990, PART IV, LINE 58
OTHER ASSETS

BENEFICIAL INT IN ENDOWMENT FUND

TOTAL $605,150

STATEMENT 6
FORM 990, PART IV, LINE 65
OTHER LIABILITIES

ENDOWMENT FUND PAYABLE
PENSION PAYABLE

$ 5,085
$ 27,092.

TOTAL $32,177

STATEMENT 7
SCHEDULE A, PART IV-A, LINE 22
OTHER INCOME

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>(A) 2001</th>
<th>(B) 2000</th>
<th>(C) 1999</th>
<th>(D) 1998</th>
<th>(E) TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL</td>
<td>$ 576.</td>
<td>$ 243.</td>
<td>$ 1,206.</td>
<td>$ 908.</td>
<td>$ 2,933.</td>
</tr>
</tbody>
</table>
AMERICAN QUALITY LANDSCAPE MAINTENANCE, INC., et al. v.
CHERRY CREEK VALLEY WATER AND SANITATION DISTRICT
(Private Property, Takings, Equal Protection)
(Counsel for Plaintiffs American Quality Landscape Maintenance, Inc., et al.)
(Colorado State District Court)

This case was approved by the Board of Directors on June 7, 2002. Sean McEneny is the owner of a small landscaping business, with real property, in Denver, Colorado. He and two other landowners are being threatened verbally and in writing with condemnation actions by the Cherry Creek Valley Water and Sanitation District (CCV) pursuant to the apparently hypothetical creation of water storage facilities. At this time, no formal condemnation action has been filed, although “demands to sell to prevent condemnation” have been issued to them.

For many years, CCV owned more than 30 acres of land adjacent to Los Verdes Golf Course. In the early 1990’s this land was earmarked for a water storage facility in which water would be captured from Cherry Creek and placed in five water storage facilities to service constituents and provide surplus water that could, at times, be sold to others. In 1999, however, CCV agreed to sell its land at a premium to a Los Verdes land developer for golf course expansion and creation of high-end residences to surround Los Verdes. At this time, CCV made known to Mr. McEneny and his neighbors that their property would be the subject of condemnation proceedings by CCV, and on December 13, 2001, CCV sent a formal letter to Mr. McEneny and his neighbors seeking to acquire each of their lots through sale or condemnation.

CCV may be attempting to replace the land sold at a premium to Los Verdes with that of McEneny and his neighbors under the guise of needing land for that same water storage facility for which planning approval has not yet been obtained. Preliminary evidence indicates that CCV already has plans to sell these soon-to-be-acquired lots to a nearby parochial school. The prospective plaintiffs believe that CCV with its power of condemnation has entered the land development business in an attempt to get itself out of its current financial difficulties (Joseph Becker) (Mentor Wherry) (02-4990)

BERNT v. ABBEY, et al.
(Access to Federal Lands, Limited and Ethical Government)
(Counsel for Appellant Bernt) (Ninth Circuit, Nevada, Case No 01-16002)

This case was approved by the Board of Directors on October 8, 1999. On January 3 and 10, 1996, John Bernt physically located several mining claims on federal lands near Jarbridge, Nevada. On January 12, 1996, aware that a land exchange had been proposed in the area, Mr. Bernt called U.S. Forest Service officials in Jarbridge and confirmed that the land upon which he had located his claims had not been segregated.
from mineral entry. On April 17, 1996, Bernt traveled to the BLM office in Elko, Nevada and made copies of the relevant BLM plat maps. These maps show that the land upon which Bernt had made his claims was segregated as of January 19, 1996, in response to a letter sent from the Forest Service on November 15, 1995, requesting that the lands be segregated. Because Bernt’s claims, made on January 3 and 10, 1996, predate the segregation, they are valid claims despite the early, November 15, 1995, request of the Forest Service. On May 3, 1996, Bernt returned to the Elko office and discovered that the plats had been altered since he had copied them and now showed that the property was segregated on November 27, 1995, and also showed a notation alluding to some sort of error. The January 19, 1996, segregation was, however, plainly visible. Finally, Bernt once again visited the Elko office on June 27, 1996, to discover that the plats had again been altered, this round of alteration showed, or attempted to show, that the November 27, 1995, and January 19, 1996, segregations were made in routine chronological order rather than obviously having been backdated. In each case Bernt made copies of the documents.

On appeal to the IBLA, the Board simply ignored Bernt’s evidence of tampering with the public records, noting that anything Bernt saw to the contrary was simply a BLM error that was corrected by the third and final plat.

On February 2, 2000, MSLF filed a Complaint in District Court on behalf of Bernt, arguing that the BLM’s actions violated federal law and must be set aside (D Nev., CV-00-00057-HDM). An answer was filed May 22, 2000. On July 31, 2000, the BLM (as used herein refers to federal defendants) filed motions to stay discovery and compliance with Local Rule 26-1, to substitute the United States for the individually named defendants, and to dismiss all claims outside of the Administrative Procedure Act. Numerous times during July and early August MSLF requested the administrative record in the case, and the record finally was delivered the week of August 7, 2000. On August 16, 2000, MSLF filed a motion requesting an extension of time until September 1, 2000, in which to file responses to the government’s motions.

On September 1, 2000, MSLF filed responses to the BLM’s motions to stay discovery and to substitute the United States for individually named parties and motions for discovery beyond the administrative record and for de novo review and to stay its response to the government’s motion to dismiss. On October 25, 2000, the BLM filed a motion to dismiss on grounds of mootness and a consolidated memorandum in support of its motion to dismiss on grounds of mootness, in response to Bernt’s motion to stay response to the BLM’s motion to dismiss, in reply to plaintiff’s response to the government’s motion to stay discovery, in response to plaintiff’s motion for discovery beyond the administrative record, and in reply to plaintiff’s response to the government’s motion to substitute the United States for individually named plaintiffs. On November 22, 2000, Bernt’s replies in support of his motions (1) for discovery beyond the administrative record and de novo review and (2) to stay response to defendants’ motion to dismiss and his memorandum in response to defendants’ motion to dismiss on grounds of mootness were filed. On February 26, 2001, the BLM filed its reply in support of its motion to dismiss. At a telephonic hearing on all outstanding motions held on March 9, 2001, the court granted the BLM’s motion to dismiss on grounds of mootness. The decision was entered March 12, 2001.
A notice of appeal was filed in the District Court on May 11, 2001, and the appeal was docketed by the Ninth Circuit on May 24, 2001. Bern's opening brief and excerpts of record were filed September 12, 2001. On October 1, 2001, the government filed a motion for extension of time until November 23, 2001, in which to file its response brief and the extension was granted on October 4, 2001. In mid-October, the parties entered the case into the Ninth Circuit mediation program. Briefing was stayed so that settlement discussions could be held. An initial mediation conference was held on December 13, 2001. Settlement negotiations continued during the first half of 2002, and a second mediation conference was held on June 3, 2002. On June 4, 2002, Mr. Bern signed a Consent to Settlement.

On August 12, 2002, the Ninth Circuit again gave the parties additional time in which to finalize the settlement. On August 28, 2002, Mr. Bern signed a Settlement Agreement, but, due to problems with that agreement, the federal government issued and signed a new Settlement Agreement, which was then signed by Mr. Bern on September 25, 2002.

On December 16, 2002, MSLF filed Bern's motion to voluntarily dismiss appeal, in accordance with the settlement agreement, each side is to bear its own costs on appeal (Amanda Koehler) (Mentor Wilson) (99-4506).

**CHOLLA READY MIX, INC. v. FEDERAL HIGHWAY ADMINISTRATION, et al.**

(Establishment Clause, Private Property Rights) (Counsel for Cholla Ready Mix)

(U.S. District Court, Arizona, Civil Action No. CIV 02-1185-PCT-FJM)

This case was approved by the Board of Directors on February 22, 2002. In 1990, the McKinnon family leased and later bought Woodruff Butte in the town of Holbrook in northeastern Arizona from Norman Turley. The McKinnons operated first as Black Rock Construction, Inc., then later as Cholla Ready Mix, Inc. (Cholla). Woodruff Butte gravel is the most valuable aggregate in the region because it has a very high density and a low air content, resulting in extremely high concrete strength and comparatively low oil usage in the paving process. Professional appraisals in the mid-1990's indicated that in full commercial use the butte could generate $300,000 in profits per year for 40-50 years.

Shortly after the McKinnons went into business on the butte, Tanner Companies placed a purchase order for aggregate. The McKinnons applied for and eventually obtained a commercial source permit from the Arizona Department of Transportation (ADOT). The McKinnons then engaged Lyle Stone to do the requisite archeological assessment. Mr. Stone found no adverse impact and mining began.

Woodruff Butte, however, is allegedly sacred to the Zuni and Navajo, being the boundary between the tribes' "ancestral lands" and also the site of various shrines. Before the Tanner order could be filled, pressure from ADOT officials and the Hopi caused Stone to recant his report. ADOT then revoked funds for the mined material, forcing Tanner to seek material elsewhere. Cholla tried negotiating with the tribe, but to no avail. Tribal elders were willing to buy the butte or reach some other compromise but were opposed by younger tribal members who, it should be noted, had to ask for directions to the butte when the McKinnons invited them for talks.
A decade of harassment of the McKinnons by the ADOT and the Indians culminated on January 1, 2001, in revocation of the McKinnons' commercial source permit under newly promulgated regulations that also prevent the McKinnons from obtaining a new permit. Without a permit, the McKinnons cannot supply material for any project to which the ADOT Standard Specifications apply. Among their only remaining customers are ADOT's maintenance department, which is not bound by the Standard Specifications, and the Hopi and Navajo themselves. These purchase orders are not sufficient to sustain the business, which is about to go under for good.

The new regulations were expressly designed to put the McKinnons out of business and the reason is "respect" for Indian religion. The regulations, and the denial of a commercial source permit to the McKinnons and Cholla are an unconstitutional establishment of religion.

MSLF could file for injunctive relief on behalf of Cholla and the McKinnons, including the issuance of a commercial source permit and damages for business losses incurred to date. The Defendants would be ADOT officials including Richard Duarte, who signed the permit denial letter.

The McKinnons, in their personal capacities, are still defendants and cross-claimants in the Hopi's NHPA section 106 suit pending in Arizona federal district court. The court has made no decision regarding the McKinnons' cross-claims, which, however, are likely not supportable. A motion to amend the cross-claims a second time had been pending for nearly a year before Judge Carrol denied it in March. The second amended claims were no better than the existing ones.

The McKinnons' prior attorney in the case pending when McKinnon first approached MSLF, *Hopi Tribe v Federal Highway Administration, et al* (U.S. District Court, Arizona, Civil Action No. 98-CV-1061), had been suspended indefinitely, though neither the McKinnons nor MSLF were aware of the suspension until well after the Board approved the case. Armed with this information, however, Judge Carroll quickly granted MSLF's motions for substitution of counsel and for admission pro hac vice.

Once admitted, MSLF had to decide whether to attempt yet another amendment of the cross-claims to replace the takings and § 106 claims with Establishment Clause and Special Laws claims or, alternatively, to move for dismissal and file a separate suit. It was decided to suggest another amendment at a status conference scheduled for April 17, 2002. The advantage to amending was that it would allow relation back for purposes of statute of limitations, and thereby give Cholla access to greater damages. A possible downside to even making the request was that it might anger the judge, who has a reputation for extreme volatility.

At the status conference on April 17, 2002, however, Judge Carroll himself suggested that MSLF move for leave to amend the claims. MSLF did so on May 14, 2002. With prior warning to the judge at the status conference, MSLF also requested expedited consideration because the statute of limitations for any new suit that may become necessary will expire in June. Following the conference, the judge ordered the Hopi Tribe to show cause why the injunction should not be vacated as moot. On May 24, 2002, the federal defendants filed a motion to dissolve the preliminary injunction in the case, which the judge did at a hearing on June 3, 2002. Following that hearing, on June
13, 2002, MSLF filed a stipulated notice of voluntary dismissal of the McKinns’ cross-claim, and on June 17, 2002, the court ordered that the cross-claim be dismissed

On June 25, 2002, before expiration of the statute of limitations, MSLF filed a complaint, Cholla Ready Mix, Inc v Federal Highway Administration, et al (D Ariz, Civil Action No 02-1185-PCT-DKD), against both federal and State defendants. The state attorney handling the case agreed to waive service, and on August 12, 2002, a stipulation of waiver of service was filed with the Court

On September 23, 2002, the federal defendants filed their answer, requesting that the case be dismissed and that costs be awarded. On September 30, 2002, the State of Arizona filed a motion to dismiss. On October 9, 2002, the Court issued an order, setting a Rule 16 scheduling conference for December 20, 2002. On November 5, 2002, Cholla filed an amended complaint and motion to file an amended complaint and its response to the State of Arizona’s motion to dismiss. On December 13, 2002, the State filed its reply in support of its motion to dismiss and its opposition to Cholla’s motion for leave to file a first amended complaint. A hearing on the motion to dismiss was held on January 10, 2003. On January 17, 2003, the Court dismissed the State of Arizona from the case.

(Chris Massey) (Mentor Wilson, Local Counsel, James) (01-4919)

CITY OF PHOENIX

(Free Enterprise, Equal Protection Constitutional Rights and Liberties)
(Counsel for plaintiff) (U.S. District Court, Arizona)

This case was approved by the Board of Directors on October 5, 2001. Because a suitable client has not been located, the case will be presented for revocation at the February 2003 meeting of the Board of Directors. (Scott Detamore) (01-4889)

CLIFFS SYNFUEL CORP. v. NORTON, et al.
(Private Property Rights) (Counsel for Cliffs Synfuel)
(Supreme Court, Utah, Case No 02-660)

The Board of Directors approved this case on July 9, 2002. On January 29, 2000, the U.S. District Court for the District of Utah ruled in favor of Cliffs Synfuel Corporation on its motion for summary judgment, holding that Cliffs had done the requisite annual assessment work on its oil shale claims to qualify under the savings clause of the Mineral Leasing Act of 1920 and thus maintain its title to those claims. The Court retained jurisdiction of the case and ordered the U.S. Department of the Interior to process Cliffs’ mineral patent application and issue the requested patent within 60 days or show good cause why the applied-for patent had not been issued.

The Department of the Interior appealed the District Court decision to the Tenth Circuit. On May 31, 2002, the Tenth Circuit reversed the District Court decision, holding that the “token” assessment work done did not satisfy the statutory requirement and thus title to the claims passed to the United States.

On June 19, 2002, MSLF was asked to take over as counsel for Cliffs Synfuel, and on July 9, 2002, the case was approved by the Board of Directors. A petition for
rehearing en banc was filed on July 15, 2002. That petition was denied on August 1, 2002. Cliffs Synfuel's parent company, Cleveland Cliffs, Inc., approved the filing of a petition for writ of certiorari, which must be filed in the Supreme Court no later than October 30, 2002.

On October 29, 2002, Cliffs' petition for writ of certiorari was filed with the Supreme Court, and the case was docketed on October 31, 2002. The government's response is due on November 30, 2002. On December 2, 2002, the Solicitor General informed the Court that Secretary Norton waived her right to file a response. The petition was reviewed by the justices at their January 10, 2003, conference, and on January 13, 2003, the petition for writ of certiorari was denied (Steve Lechner) (02-5064)

COMMUNITIES FOR A GREAT NORTHWEST, et al. v. BUSH, et al. (CGNW II)
(ACCESS TO FEDERAL LANDS, LIMITED AND ETHICAL GOVERNMENT)
(COUNSEL FOR CGNW, ET AL.) (U.S. DISTRICT COURT, D.C., CASE NO. 100CV01394)

This case was approved by the Board of Directors February 4, 2000. In January 1998 Michael Dombeck, Chief of the U.S. Forest Service, announced a moratorium on new road building in national forests and in March 1998 imposed an 18-month moratorium on road construction across 33 million acres of national forest during which the Forest Service will develop new policies regarding management of its network of roads.

On October 13, 1999, President Clinton announced "a sweeping new effort to [permanently] preserve millions of pristine acres within America's national forests [from commercial development, including road building, logging, and mining]." To carry out this plan, Clinton issued a memorandum to the Secretary of Agriculture on "Protection of Forest 'Roadless' Areas." The memo directed the Forest Service "to develop, and propose for public comment, regulations to provide appropriate long-term protection for most or all of the[] currently inventoried 'roadless' areas, and to determine whether such protection is warranted for any smaller 'roadless' areas not yet inventoried."

To accomplish the directive, the Clinton Administration announced a public rule-making process. To assist in determining the scope and content of the proposed rule, the Forest Service was directed to (1) prepare a draft Environmental Impact Statement containing various different land management options, (2) select a preferred alternative, and (3) issue a final decision. This process requires no congressional action, but could be overturned by Congress and be subject to legal challenge.

Communities for a Great Northwest (CGNW) asserts that the actions undertaken by the Clinton Administration were an effort to eliminate as many roads as possible, to end all mechanical/motorized uses of national forests, as well as recreational and other multiple-use activities, to terminate economic use of the national forests, to adopt de facto wilderness areas, and to establish new limits of human intrusion into the national forests. These actions could lead to the loss of thousands of jobs and would subject the forests to fire and disease.
CGNW has actively involved in attempting to use the Kootenai National Forest (Kootenai) in Lincoln County in northwest Montana. Seventy-eight percent of the County is federal land, the use of which is essential to the economic and environmental health of the county. In the past, Lincoln County relied on the Forest for jobs in mining and timber harvesting, but present-day policies prevent those economic activities. CGNW has worked in good faith for several years with the Forest Service to plan for a ski hill/summer recreation area near Libby, and it and others have expended considerable resources in meeting the requirements of the Forest Service for such an area. CGNW has invested $20,000 and its members have contributed over 2,000 hours toward the Kootenai Forest recreation plan. The action of the Clinton Administration rendered useless these efforts and substantially delayed the recreation plan.

CGNW filed suit on June 12, 2000, challenging President Clinton’s order to the Forest Service to conduct a roadless area review on 40 million acres of national forests. On August 17, 2000, The Wilderness Society, Sierra Club, Pacific Rivers Council, and Oregon Natural Resources Council filed a motion to intervene as defendants and lodged a motion to dismiss. On August 25, 2000, the federal defendants filed a motion to dismiss.

On September 1, 2000, CGNW filed a motion to stay briefing on intervention until federal defendants’ motion to dismiss was decided and to extend CGNW’s time in which to respond to the federal defendants’ motion to dismiss. This motion was necessary because of communications problems between MSLF and its clients caused by the Montana fires. On September 7, 2000, the court granted the motion and set CGNW’s response to federal defendants’ motion to dismiss due December 4, 2000, and CGNW’s response to the motion to intervene due 14 days after a decision is issued regarding the motion to dismiss.

On September 11, 2000, federal defendants filed a notice of supplemental authority. On October 3, 2000, The Wilderness Society and others filed a motion to reconsider the court’s stay order of September 7, 2000. CGNW responded to the motion on October 17, 2000, and on October 25, 2000, The Wilderness Society replied. On November 9, 2000, the court denied the motion to reconsider.

On December 1, 2000, CGNW filed a motion to amend the Complaint, its amended Complaint, and its opposition to federal defendants’ motion to dismiss. On December 7, 2000, the court granted CGNW’s motion to amend the Complaint and ordered federal defendants to respond within 10 days. On December 8, 2000, the federal defendants filed a motion to withdraw their motion to dismiss the Complaint. On December 12, 2000, CGNW and proposed intervenors filed for entry of a stipulated briefing schedule and proposed intervenors filed an amended motion to intervene.

On December 20, 2000, the court granted the stipulated briefing schedule and ordered CGNW to respond to the amended motion to intervene by January 5, 2001, and the proposed intervenors to reply by January 12, 2001. On January 5, 2001, CGNW filed a motion for extension of time to respond to the amended motion, and on January 9, 2001, CGNW filed its opposition to the amended motion to intervene and an unopposed motion to dismiss the fifth claim for relief in the Complaint. On January 12, 2001, the proposed intervenors filed a reply in support of their amended motion to intervene.
On January 10, 2001, the case was reassigned from Judge June L. Green to Judge Thomas Penfield Jackson. On February 2, 2001, the MSLF Board of Directors approved the addition of the Montana Coalition of Forest Counties as a plaintiff. On February 9, 2001, the Court granted CGNW's unopposed motion to add the Montana Coalition of Forest Counties as plaintiff and ordered that an amended Complaint be filed by March 5, 2001. On March 2, 2001, CGNW filed its amended Complaint.

On March 16, 2001, the proposed intervenors lodged a supplemental authority in support of their motion to intervene and an answer to CGNW's second amended Complaint.

On April 17, 2001, federal defendants filed an unopposed motion for extension of time to answer CGNW's second amended Complaint, citing as cause the ongoing review of the USDA Roadless Area Conservation Rule by the new administration. On May 23, 2001, the federal defendants filed for a second, unopposed enlargement of time, until June 20, 2001, in which to file its answer. The court granted the motion for enlargement of time on May 29, 2001. On June 20, 2001, the court granted to the parties' joint motion for enlargement of time and ordered CGNW to file their third amended Complaint by June 29, 2001, and federal defendants to respond within 45 days of service of that Complaint.


On August 14, 2001, the Court scheduled a Rule 16 initial pretrial/scheduling conference for October 15, 2001. This conference subsequently was rescheduled to October 1, 2001, but on August 17, 2001, federal defendants filed a motion to stay proceedings pending resolution of allegedly identical claims in an earlier filed lawsuit, Kootenai Tribe of Idaho v. Veneman (D. Idaho, Case No. CV01-10-N-EJL), that is purportedly further along in its proceedings. Communities was first filed on June 12, 2000, and Kootenai Tribe was filed on January 8, 2001, however, CGNW's second amended Complaint was not filed until June 29, 2001. On September 5, 2001, CGNW filed its opposition to the motion to stay.

On October 1, 2001, the Court held the scheduling conference. On October 3, 2001, the Court granted the Wilderness Society's motion to intervene and stayed all proceedings until Kootenai Tribe is decided (William Thode, Mentor Pos) (99-4571)

**CONCRETE WORKS OF COLORADO v. CITY AND COUNTY OF DENVER**

(Free Enterprise, Equal Protection Constitutional Rights and Liberties)

(Counsel for Appellee Concrete Works) (Tenth Circuit, Colorado, Case No. 00-1145)

Following the decision of the U.S. Supreme Court in *JA Croson, Inc v City of Richmond*, the City and County of Denver initiated efforts to bring its affirmative action program into compliance with requirements of the Fourteenth Amendment. After two years and hundreds of thousands of dollars, Denver adopted affirmative action goals of almost 30 percent. The Associated General Contractors of Colorado requested the assistance of MSLF in challenging these policies.
Concrete Works of Colorado, Inc (CWC), lost several contracts on which it was low bidder. On January 6, 1992, CWC filed suit against Denver and then requested MSLF's assistance. In February 1992 the Board of Directors approved representation of CWC. On March 16, 1992, MSLF filed an entry of appearance, and on April 29, 1992, a scheduling conference was held. MSLF negotiated a protective order prior to release of discovery documents.

On July 21, 1992, MSLF responded to discovery filed by defendant and filed a second set of discovery requests on August 10. Depositions were taken and on September 21, 1992, Denver filed a motion for summary judgment, to which CWC responded October 20, 1992. A status conference was held November 12, 1992. Oral arguments on Denver's motion for summary judgment were held December 8, 1992, and on February 26, 1993, the District Court granted Denver's motion.

On March 23, 1993, CWC filed a notice of appeal with the Tenth Circuit. On April 9, 1993, Denver filed a cross-appeal challenging the decision of the District Court on the grounds that (1) CWC had standing to bring the action and (2) the ordinance at issue created a racial classification. On May 4, 1993, the Tenth Circuit notified all parties that it was considering summary dismissal of the cross-appeal for lack of jurisdiction, based on the timeliness of the filing. On May 25, 1993, Denver filed a voluntary dismissal of its cross-appeal, and June 1, 1993, the Tenth Circuit dismissed the cross-appeal.

On July 12, 1993, CWC filed its opening brief. Denver's response was filed on September 13, 1993, and CWC's reply on October 12, 1993. Oral arguments were held on March 14, 1994. On September 23, 1994, the Tenth Circuit reversed the decision of the District Court and remanded the case for trial. On January 12, 1995, Denver filed a petition for writ of certiorari with the U.S. Supreme Court. On March 6, 1995, the Supreme Court denied the petition.

A conference with the District Court was held January 18, 1996. On June 25, 1996, Denver filed a motion for clarification of issues on remand, to which, on June 27, 1996, CWC was ordered to respond by July 15, 1996. CWC filed its response on July 12, 1996, and Denver its reply on July 31, 1996. Arguments on the motion were held on February 11, 1997, at which time the Court ruled in CWC's favor and transferred the case to a magistrate for a scheduling conference, which was held on March 31, 1997. Despite CWC's objections, a discovery schedule was set and later extended. CWC filed motions to exclude certain evidence, and various discovery disputes arose. Judge Matsch vacated the discovery schedule so that he could rule on the motions.

At the hearing on the motions, held March 26, 1998, CWC fared well. Its longstanding motion to bifurcate the trial into liability and damages was granted, and trial only on liability would take place first. CWC's motions to depose City Council members were denied on the ground of legislative privilege under the Speech and Debate Clause. Its motions to exclude post-enactment evidence and evidence of discrimination in the lending and bonding industries were neither granted nor denied. CWC began its education of the judge as to the weakness of this evidence. Judge Matsch directed several pointed questions to Denver's attorneys that they were unable to answer. He said that he could not rule until the evidence was before him and that Denver would have a
heavy burden. He also did not rule on CWC's motions to exclude evidence of minority business formation rates but indicated that Denver would have to make a strong showing before this evidence could be allowed.

In a major procedural victory, Judge Matsch ruled that Denver's ordinance was, on its face, race conscious and that the burden of production was on Denver, which would go first at trial. He ruled that Denver must produce its expert reports first and that CWC could then rebut, in the same order as at trial. This ruling reversed the ruling of the Magistrate Judge, which CWC had strongly protested. Judge Matsch did not reach issues concerning CWC's motions to require Denver to pick and choose from among the 135 anecdotal witnesses that it had listed and to give CWC an opportunity to do discovery with respect to those witnesses selected. He did, however, set a scheduling conference for April 24, 1998, at which time a new scheduling order would be issued. He indicated that the case was on the "front burner" and that matters would proceed expeditiously from this point forward.

MSLF's efforts produced results! Denver announced that it was introducing an amendment to its affirmative action ordinance that would prevent prime contractors from utilizing their own minority or woman status and their own work to satisfy minority participation requirements. The program would thus become strictly a subcontractor program. Denver proposed to reduce its minority participation goal from 16 to 10 percent and its women participation goal from 12 to 10 percent. It said that it would challenge CWC's standing as a contractor, but two cases, from the Ninth and Federal Circuits, would grant CWC standing as a principal contractor. Moreover, because CWC has bid as a subcontractor, it would have standing on that basis.

At the April scheduling conference, Judge Matsch again indicated, despite protests of Denver, that Denver's ordinance is facially discriminatory and that Denver had the burden of production and would go first at trial. He invited CWC to renew its motion to exclude evidence of minority business formation rates, which it did. He also stated that he did not want any motions for summary judgment and instead wanted to "get wet all at once in a bath, not progressively through a series of showers." The pretrial conference was set for December 18, 1998, and the trial for two weeks beginning February 8, 1999.

CWC received Denver's expert reports and deposed four of Denver's experts on July 21-23 and 29-31, 1998, the last witness being David Evans in Cambridge, Massachusetts. CWC filed (1) motions seeking that two experts for Denver be struck due to the failure to provide the underlying data to their expert reports, (2) motions to restrict evidence of minority business formation rates, and (3) motions to restrict expert testimony on lending industry discrimination. At a hearing on August 12, 1998, Judge Matsch ordered that the underlying data be provided to CWC, as well as summaries of what Denver's proposed 87 anecdotal witnesses would say, the evidence CWC sought to exclude would be admitted.

CWC's expert reports were filed on September 15, 1998. Denver completed deposing CWC's experts, Lunn and LaNoue, in October 1998. Denver's expert rebuttals were filed on December 15, 1998, and the pretrial report on December 11, 1998. The pretrial conference was held on December 18, 1998.
The first part of the trial, the testimony of all expert witnesses, was held on February 8-15, 1999, and the second part, the testimony of non-expert witnesses, on June 21-29, 1999. Written closing arguments were filed on July 30, 1999. On March 7, 2000, in an 80-page opinion, Judge Matsch ruled in favor of CWC.

On March 21, 2000, per the Federal Rules of Civil Procedure, CWC filed a bill of costs and a motion for award of attorneys' fees and expert witness fees.

The City of Denver filed a motion to stay the court's injunctive order. On March 28, 2000, Judge Matsch denied all the City's motions and tabled CWC's motion regarding fees. On March 29, 2000, he issued a written order to that effect.

On April 6, 2000, the City of Denver filed its notice of appeal from the decision entered on March 7, 2000, and the order on its post-trial motions entered on March 29, 2000. Attorneys from a Chicago, Illinois, firm entered their appearances for the City, as did the City Attorney and Assistant City Attorney. On August 28, 2000, after two unopposed motions for extension of time, Denver's opening brief and appendix was filed. CWC asked for additional time, until November 13, 2000, in which to file its response, on September 19, 2000, the Court granted the extension of time and an enlargement to 21,000 words.

On November 14, 2000, CWC filed its response one day out of time, together with a motion to file response one day late, which was granted that same day. Denver's reply was due December 1, 2000. On November 20, 2000, Denver requested an extension until December 22, 2000, to file its reply and an enlargement to 10,500 words.

On November 16, 2000, Pacific Legal Foundation filed an amicus curiae brief in support of CWC. On December 22, 2000, Denver filed its reply brief and a supplemental appendix. Oral arguments were held on March 13, 2001, at the CU School of Law.

Soon after certiorari was granted in Adarand v. Mineta, the Tenth Circuit ordered the parties to file, simultaneously and within 15 days, briefs as to why the appeal should not be abated pending determination of Adarand by the Supreme Court. Those briefs were filed on May 3, 2001. CWC opposed abatement, arguing that Adarand is inapposite and that Croson controls, not Adarand. Denver argued that, although Adarand does not directly control, some of the Supreme Court's decision in Adarand might have an effect on the Tenth Circuit's thinking in Concrete Works and therefore it did not oppose abatement. Denver asked, however, that both parties be allowed to brief the effects of the Adarand decision. On May 21, 2001, the Court ordered that the case be abated pending a decision by the Supreme Court in Adarand.

On November 28, 2001, CWC filed a motion to withdraw the order of abatement on the grounds that the Supreme Court issued a decision in Adarand v. Mineta stating that the petition for writ of certiorari had been improvidently granted. On December 5, 2001, the Tenth Circuit withdrew its order of abatement. (Scott Detamore) (92-3131)
CRIPPLED HORSE v. NORTON, et al.
(Private Property Rights) (Counsel for Crippled Horse)
(U.S. District Court, Utah, Case No. 2:96-cv-0813G)

Crippled Horse owns 156 oil shale mining claims covering about 24,960 acres in Uintah County, Utah, that were located between September 13, 1917, and December 21, 1919, based on the discovery of a valuable deposit of oil shale on each claim. On March 17, 1988, Crippled Horse properly filed with the Department of the Interior (DOI) patent applications for its claims. To date, DOI has not completed administrative action on any of Crippled Horse’s patent applications. On September 23, 1996, MSLF filed suit against DOI and the Bureau of Land Management (BLM) (herein referred to jointly as DOI), seeking to force DOI to complete administrative action on all of Crippled Horse’s applications. On November 26, 1996, the DOI filed its answer. The case was stayed so that DOI could attempt to process the patent applications. DOI agreed to provide a status report every 60 days to Crippled Horse setting forth its efforts in processing the applications. The March 8, 1999, status report instructed the BLM Mineral Examiner to “cease work” on all remaining mineral reports in this case, citing the recent IBLA decision in U.S. v. Cliffs Synfuel Corp., 146 IBLA 353 (Nov. 23, 1998). The BLM Utah State Office stated that this decision ratifies a “new standard” that should be applied to the pending Mineral Reports.

On November 3, 2000, MSLF moved to reinstate the case and filed a motion for summary judgment and memorandum in support. On November 6, 2000, the Court ordered the case reinstated. On January 5, 2001, DOI filed a memorandum in opposition to Crippled Horse’s motion for summary judgment. On January 25, 2001, MSLF filed its reply. On February 5, 2001, the government filed a motion to strike MSLF’s reply on the grounds that it addresses issues not raised in DOI’s response and because it seeks relief not previously sought. On February 22, 2001, MSLF filed its response to the motion to strike. On March 6, 2001, the government filed its reply. A hearing on all motions was held May 2, 2001.

On June 1, 2001, the government, as ordered by the Court at the May 2 hearing, filed a supplemental memorandum in opposition to Crippled Horse’s motion for summary judgment specifically regarding the “Resumption Doctrine.” Crippled Horse’s response was filed on June 27, 2001. Decisions on the government’s motion to strike and MSLF’s motion for summary judgment are pending.

On May 6, 2002, oral arguments on the Resumption Doctrine were heard by the Tenth Circuit Court of Appeals in Cliffs Synfuel, a case similar to Crippled Horse, and on May 31, 2002, the Court reversed the District Court decision, holding that the “token” assessment work done did not satisfy the statutory requirement and thus title to the claims passed to the United States. MSLF notified the Crippled Horse court of the decision. MSLF took over as attorney for Cliffs Synfuel Corp. on July 9, 2002 (see case chronology in this Update).

Action on Crippled Horse was suspended until MSLF notifies the court of the final disposition of Cliffs Synfuel. On January 13, 2003, the U.S. Supreme Court denied
Cliffs Synfuel's petition for writ of certiorari (Steven Lechner) (Mentor Ruffatto) (Co-Counsel Robert G Pruitt, Jr) (89-2747)

DIMITROV, et al. v. BUREAU OF LAND MANAGEMENT
(Private Property Rights, Due Process)
(Counsel for Dimitrov, et al.) (Administrative Appeal, IBLA 2000-8)

On November 21, 1997, MSLF requested emergency approval of this case, which was granted. The Omnibus Budget Reconciliation Act of August 10, 1993, and implementing regulations at 43 C.F.R. 3833 1-5(b) require that a maintenance fee of $100 for each mining claim, mill site, or tunnel site be paid on or before August 31, 1997, to hold the claim or site for the 1998 assessment year beginning at 12 noon, September 1, 1997. This fee requirement remains in effect through August 31, 1998. The deadline for 1997 was extended to September 2, 1997, because August 31 was a Sunday and September 1 a legal holiday. The claim maintenance fee can be waived for a claimant who certifies, in writing, that on the date the payment is due (1) the claimant and all related parties hold not more than 10 mining claims or sites and (2) the assessment work required under the Mining Law of 1872 has been or will be performed.

On September 2, 1997, in an attempt to qualify for the waiver of the claim maintenance fee, the Kester Counts Family Estate and seven family members sent to the BLM's Montana office (1) a document entitled "Affidavit of Annual Representation Work", (2) a check for $140, (3) a document listing all claims and demonstrating that each claimant held not more than 10 mining claims, and (4) a document stating individual ownership of each claim and its location.

On September 22, 1997, realizing that the documents sent to the BLM may have contained some deficiencies, the Family supplemented its submission with a facsimile copy of the Maintenance Fee Payment Waiver Certification, the original of which was received by the BLM September 30, 1997. On October 9, 1997, the BLM held that the Maintenance Fee Payment Waiver Certification for the mining claims was untimely, and therefore the claims were presumed to be forfeited. On December 12, 1997, MSLF filed an appeal with the IBLA, Dimitrov et al. v. BLM, on behalf of the individuals heirs of the Kester Counts Family Estate. On August 19, 1999, the IBLA ruled that, because the BLM did not fully identify the claims that were declared to be forfeited, the decision of the BLM was set aside and the case remanded to the BLM. On August 31, 1999, the BLM again declared the claim forfeited and, this time, identified the claims. On September 30, 1999, MSLF filed a petition for stay with the IBLA (Steven Lechner) (97-4133)

DOW, et al. v. UNITED STATES, et al.
(Access to Federal Lands, Private Property Rights)
(Counsel for Plaintiffs Stuart and Therese Dow, et al.)
(U.S. District Court, Arizona, Civil Action No CIV 02-2185-PCT-MS)

This case was approved by the Board of Directors on June 7, 2002. The Dow family owns a 640-acre tract of land 25 miles northwest of Phoenix in the Hells Canyon.
Wilderness Area, Yavapai County, Arizona (As of October 2002, the Dow family comprises Stuart and Therese Dow, Peter A and Jane O Dow, Jennifer Murphy Dow, Peter K Dow, and Thomas A Dow, seven individuals holding five separate ownerships of various percentages) On January 23, 1922, pursuant to the Act of Congress of May 20, 1862, entitled “To Secure Homesteads to Actual Settlers on the Public Domain” (12 Stat 392), and the acts supplemental thereto, the property was granted by the United States to the Dow family’s predecessor-in-interest, Ramon A. Contreras. When the United States made this grant, lands owned by the United States surrounded the property and Mr. Contreras accessed the property by crossing those lands.

On November 19, 1926, Alex Dow acquired the property from Mr. Contreras through a quit claim deed and until recently the property was actively ranned. At an unknown time, J Douglas Dow inherited the property from Alex Dow. Years later, three brothers, Peter, Stuart, and Brydon, purchased the Property from their father, J Douglas Dow. In December 2001, Peter and Jane O Dow gave a portion of the property to their three children, Jennifer, Peter K., and Thomas A Dow.

On September 3, 1964, Congress established the National Wilderness Preservation System (“Wilderness Act”) Pub L 88-577, 78 Stat 890 (1964). On November 28, 1990, Congress enacted the Arizona Desert Wilderness Act of 1990 to provide for the designation of certain public lands as wilderness in the State of Arizona to be managed by the Bureau of Land Management (“BLM”) Pub L 101-628, 104 Stat 4469 (1990). Under Section 101(a)(29), land in Yavapai and Maricopa Counties, Arizona, comprising about 9,200 acres was designated as a wilderness area now known as the Hells Canyon Wilderness. The Dow family believes that its inholding is the most scenic property in the entire area, and, in fact, Hells Canyon is completely within the boundaries of the Dows’ property.

In March 1994, the Dow family began efforts to establish access rights to their property. In March 1995, the BLM provided an appraisal for the Dow property in an attempt to negotiate a trade for other BLM-owned land. The valuation was unacceptable to the Dow family and a trade of land was never accomplished.

On July 15, 1998, pursuant to the direction of Michael Taylor, BLM Field Manager, Phoenix, the Dow family filed a formal access application with the BLM to blade a road across an historic wagon trail in order to gain access to the Property.

In March 2001, after repeated assurances that the request for access was moving forward, Taylor informed Peter Dow that the newly promulgated Wilderness Rule restricted access to the property. Taylor summarized this conversation in a letter dated July 18, 2001, in which he explained that the newly promulgated regulations prohibited the BLM from approving or allowing construction of new access routes in wilderness areas. He also stated that existing routes could not be improved to a condition more highly developed than existed at the time of the wilderness designation. At the time of the designation of the Hells Canyon Wilderness Area, the only mechanical access to the property was by all-terrain or four-wheel drive vehicle using the bottom of Garfias Wash, a route that was never maintained or upgraded. He stated that, based on the new regulations, the BLM can only analyze and consider mechanical access to the property using the bottom of Garfias Wash, but this route can never be maintained or upgraded.
because it was never maintained or upgraded prior to designation of the wilderness area. He said that the Dow family could access the property by foot or horse at any time.

In his letter, Taylor informed Peter Dow that the BLM would process his request for a wilderness access permit for the purpose of family access and property fencing. The BLM would revise an existing draft environmental assessment to conform to the new regulations and would address three alternatives. The Proposed Action alternative would address motorized access using the bottom of Garfias Wash. The No Action alternative would describe the current situation and allow continued non-mechanized foot or horseback access. The third alternative would address fence construction using pack animals. To date, to the Dow family's knowledge, the BLM has yet to complete the environmental assessment.

Administrative remedies may need to be exhausted before a quiet title action (pursuant to 28 U.S.C. § 2409a) can be filed. In 1998, the Dow family submitted a land-use application to the BLM in order to blare a road across government land. Although the BLM has not officially denied this application, it responded negatively to the request with Taylor's letter of July 18, 2001. To date, the BLM has neither completed an environmental assessment nor answered the permit request. Taylor's letter essentially states, however, that the BLM would have to deny the motorized access route requested by the Dow family and that the BLM could consider mechanical access to the Dow property only using the Garfias Wash route. Unfortunately, part of that route is privately owned, and the private landowners have refused to grant the Dow family an easement. Furthermore, the route would not provide complete access. The land use application most likely would need to be amended and a final decision from the BLM pursued in order to exhaust administrative remedies. Moreover, if the BLM issues a final decision regarding the permit, an appeal to the Board of Land Appeals also may be necessary in order to exhaust administrative remedies.

MSLF determined that there are no administrative remedies to be pursued, and on October 31, 2002, a complaint was filed in the District of Arizona and served on November 5, 2002. The federal government filed its answer on January 7, 2003. The parties are awaiting the court's initial scheduling order (Bill Thode) (Mentors Davis, Stanley) (01-4927)

**DUNBAR v. UNITED STATES**
(Private Property Rights, Access to Public Lands)
(Counsel for the Margaret E Dunbar Revocable Living Trust)
(U S District Court, Montana, Case No CV 02-191-M-LBE)

This case was approved by the Board on February 22, 2002. Mr. Thomas H. Dunbar is Trustee for the Thomas and Margaret Dunbar Trusts and thus the representative owner of the Blodgett Reservoir, located within the boundaries of the Bitterroot National Forest and Selway-Bitterroot Wilderness in western Montana. The reservoir has been in continuous ownership of the Dunbar family since its creation in 1911 or earlier.
Currently, Mr Dunbar has in place a 1956 special-use permit with the U S Forest Service that contains no expiration date and has no fee. The Forest Service notified Mr Dunbar that there is insufficient evidence for it to recognize the Blodgett Reservoir as a facility having pre-FLPMA easement status. It issued an ultimatum demanding that he either continue under the current special-use permit, but pay annual fees, sign an easement that would relinquish his valid existing rights, or assert the right-of-way he claims to possess by pursuing a quiet title action.

MSLF proposed filing a quiet title action against the United States on behalf of the Trusts, arguing that the Trusts have a congressionally granted right-of-way for the Blodgett Reservoir and Dam pursuant to the Acts of 1866 and 1891.

Pursuant to the 1866 Act, Mr Dunbar must show that the dam and reservoir were built prior to reservation of the Bitterroot National Forest in 1897 and that the Dunbars had a vested water right under Montana law. A Department of Interior Annual Report for the fiscal year ending June 30, 1899, provides that "[c]ruude dams have been built at the outlet of the small lakes at the heads of Canyon, Bear, and Blodgett creeks." This does not prove that the dam and reservoir were constructed prior to reservation of the Bitterroot Forest Reserve in 1897, but it suggests that the dam was there before 1911, the year the Forest Service contends the dam was constructed. Because an exact date is not mentioned, additional research is necessary to further support this claim.

Mr Dunbar possesses substantial evidence of an 1891 Act easement. There is a special-use permit for construction of a dam in 1911 and another permit requesting to add on to the existing dam in 1912. Furthermore, Mr Dunbar has an application to construct a dam pursuant to the 1891 Act stamped "received" by the Forest Service on July 11, 1911. On the same date, Thomas and Margaret Dunbar recorded a "Notice of Appropriation of Water and Location of Reservoir Site" in the Ravalli County Courthouse. The Forest Service has refused to admit such right-of-way exists because the dam was not built before the reservation of the forest, but it is confused as to this issue. The 1891 Act specifically provides for rights-of-way through public lands and reservations. Additionally, in order to obtain an 1891 Act easement on reserved unsurveyed lands it is essential to prove that the dam builder did not interfere with the proper occupation of the lands by the government during the construction period. The Forest Service has not asserted that the Blodgett Reservoir and Dam interfered with other uses of the Forest.

Final preparation of the Complaint was stalled until it received additional materials from Mr Dunbar's private attorney. After a letter was sent to Mr Dunbar informing him that MSLF would terminate his representation unless those materials were immediately forthcoming, on August 19, 2002, the materials were received. On November 14, 2002, the Complaint and supporting documents were sent to local counsel, Ward Shanahan, for filing, and on November 15, 2002, the Complaint was filed. The answer is due about February 10, 2003.

On December 3, 2002, Magistrate Judge Leif B. Erickson, who is in full charge of both this case and a similar MSLF case, Roth v United States, issued an order setting the Preliminary Pretrial Conference for February 18, 2003. (Amanda Koehler) (Mentor Alan Joscelyn, Local Counsel Ward Shanahan) (01-4918)
ENTERPRISE FLASHER COMPANY v. MINETA, et al.
(Equal Protection Constitutional Rights and Liberties)
(Counsel for Enterprise Flasher) (U S District Court, Delaware)

This case was approved by the Board of Directors on June 8, 1998 Enterprise Flasher Company (EFC) is a Delaware corporation engaged in supplying traffic control and signs for highway construction in the State of Delaware. The company is owned by Jeff Roehm, a non-Hispanic, white male. The State of Delaware employs no affirmative action program of its own or with respect to projects funded entirely with state funds and has done no disparity studies to conclude that the state or its principal contractors have ever discriminated against women or minorities. However, the federal government, under the Intermodal Surface Transportation Efficiency Act (ISTEA), requires that states receiving federal highway monies require good faith efforts of contractors to utilize certified women and minorities for at least 10 percent of a given project. Delaware implements this and has been requiring 13 and 14 percent DBE participation. In 1998, Congress adopted the Transportation Efficiency Act for the Twenty First Century (TEA-21), which retains the 10 percent women and minority participation provisions.

EFC has three primary competitors in Delaware, one of which is woman owned, an African-American-owned firm recently closed. In 1997, the woman-owned firm obtained 77 percent of the dollar amount of the Delaware contracts that called for traffic control, and EFC lost many of those contracts because principal contractors must include minorities or women in order to be responsive to the demands of the federal government, as administered by the State of Delaware.

DOT promulgated new regulations designed to solve any narrow tailoring problems, effective March 4, 1999. MSLF has evaluated the new regulations and their impact on any possible litigation, and is awaiting federal response to the proposed new Delaware DBE Program, filed with the Federal Highway Administration on September 1, 1999, at which time suit will be filed.

On June 15, 2000, a FOIA letter was directed to the Federal Highway Administration seeking all information pertinent to requests for approval of DBE plan, correspondence concerning same DBE plan, approvals of DBE plans, and so forth, for several the states in which MSLF might bring litigation. On July 17, 2000, a letter from received from the FOIA officer stating that our request would be processed as soon as possible. A series of letters followed, the last of which was on November 20, 2000, by MSLF, in which considerably more attention was paid to and arguments made on the fee exempt status of MSLF and the request was considerably narrowed. In January 2002, MSLF received the DBE plans submitted by Delaware, and several other states requested, which had been finally approved by the Federal Highway Administration.

In January 2002, after the Supreme Court's final action in Adarand v Mineta, very specific FOIA requests were made with respect to Delaware's DBE Program in anticipation of filing a Complaint on behalf of Enterprise Flasher in the U S District Court for the District of Delaware. Materials were finally received in late April 2002, and the Complaint was finished in May. The client advised MSLF that before the Complaint was filed he wanted to obtain the signature of the Delaware Secretary of Transportation on an unrelated
source-sol contract and the funding for that contract. After several delays, MSLF received approval to file the suit in October 2002. The documents needed to file the complaint were prepared and sent to local counsel for his signature and filing on November 18, 2002. As of the end of the month, Mr. Logan had not yet filed the complaint or contacted MSLF. On December 2, 2003, MSLF contacted Mr. Logan, who asked that MSLF prepare a summons for the Delaware Attorney General and, by using a newer Delaware study, change some facts in the Complaint, which had been based on Census data, to reflect more accurately current conditions. MSLF sent the summons and modified Complaint to Mr. Logan, but as of this date the Complaint has not been filed. Mr. Logan was contacted on or about January 17, 2003, and informed MSLF that he would be discussing the Complaint with Enterprise Flasher on Monday, January 27, 2003, and a decision would be made as to the filing of the Complaint. (Scott Detamore) (Local counsel Donald Logan, Tighe, Cottrell & Logan) (98-4257)

**FITZGERALD, et al. v. UNITED STATES, et al.**

(Private Property Rights; Access To Private Lands) (Counsel for Fitzgerald, *et al.*)

(U.S. District Court, Arizona, Civil Action No. CIV 02-0069-PCT-PGR)

In 1986, the Forest Supervisor, Sitgreaves National Forest, prepared a Special-Use Permit and requested that the Fitzgerals sign it in order to continue using the only road to their inholding. After reviewing the permit, the Fitzgerals refused to sign the permit because they believed that the restrictions were unlawful and would deprive them of their common law and statutory rights. Because the Fitzgerals refused to relinquish their common law and statutory rights, the Forest Supervisor issued a decision, dated May 27, 1988, to close the road.

On July 11, 1988, the Fitzgerals, represented by MSLF, timely filed an administrative appeal. On December 2, 1993, the Chief of the Forest Service upheld the Forest Supervisor’s decision to close the road. On March 10, 1994, the Fitzgerals filed a Complaint in the District of Arizona seeking to quiet title to the road and judicial review of the Chief’s decision. On October 16, 1995, the Fitzgerals filed a motion for summary judgment. On December 6, 1995, the United States filed a cross-motion for summary judgment. On May 24, 1996, the District Court granted the United States’ motion for summary judgment.

On July 17, 1996, the Fitzgerals filed an appeal with the Ninth Circuit and on February 28, 1997, filed their opening brief. On November 10, 1997, the Ninth Circuit dismissed the appeal without prejudice. On July 13, 1999, the parties moved to vacate the District Court’s judgment and have the case dismissed without prejudice, that motion was granted on July 19, 1999.

On January 14, 2000, the Fitzgerals applied to the Forest Service for another permit. On August 29, 2000, the Forest Service issued a special use permit that was not subject to administrative review or appeal.

On January 14, 2002, MSLF filed a Complaint on behalf of the Fitzgerals, seeking to quiet title to an easement for access to their property and challenging the terms...
and conditions of the special use permit. The government’s answer was filed on March 28, 2002.

On May 2, 2002, the government moved to file an amended answer and the court lodged the answer. On May 23, 2002, the Court granted the government’s motion to file an amended answer and ordered the lodged answer filed. On June 4, 2002, the parties filed a joint case management report.

A scheduling conference was held on June 17, 2002, and on June 18, 2002, the Court issued a scheduling order calling for all discovery to end by October 1, 2002, and all dispositive motions to be filed by November 22, 2002. On September 6, 2002, the parties filed a joint motion to modify the scheduling order issued on June 18, 2002. Under the new schedule, which was approved by the Court, discovery ended on December 2, 2002, and the filing of dispositive motions begins on February 3, 2003. In early January, the Court granted the Fitzgeral’s motion for extension of time, their motion for summary judgment is now due on March 3, 2003. (William Thode) (88-2599)

**GLOSEMEYER, et al. v. COMMISSIONER, I.R.S.**

(Private Property Rights, Limited and Ethical Government) (Counsel for Glosemeysers) (Counsel for Glosemeysers) (District Court, Missouri)

This case was approved by the Board of Directors on January 23, 2003. Maurice L. and Delores J. Glosemeysers own and operate a family farm near Marthasville, Missouri. For almost 100 years, the farm was traversed by a railroad easement formerly owned by the Missouri-Kansas-Texas (“MKT”) Railroad. The Glosemeysers owned all reversionary rights if the easement ceased to be used for railroad purposes. On June 25, 1987, the easement ceased being used for railroad purposes and was converted into a recreational trail pursuant to the National Trails System Act, 16 U.S.C. § 1241, *et seq.* On January 14, 2000, the Court of Federal Claims granted partial summary judgment in favor of the Glosemeysers on the issue of liability. *Glosemeysers v United States*, 45 Fed. Cl. 771 (2000). It ruled that the National Trails System Act effectuated a taking of the Glosemeysers’ property because it precluded the easement from reverting to the Glosemeysers when the easement ceased being used for railroad purposes.

After lengthy settlement negotiations, the United States stipulated that it would pay the Glosemeysers $200,000 as just compensation for the taking. On December 19, 2002, the Court of Federal Claims ordered the United States to pay that amount to the Glosemeysers within 30 days. On January 15, 2003, the United States complied with the Court of Federal Claims’ order by depositing $200,000 into the Glosemeysers’ bank account.

The Court of Federal Claims also granted MSLF until February 3, 2003, in which to move for an award of attorneys’ fees. MSLF estimated that it has incurred $200,000 in attorneys’ fees in representing the Glosemeysers. MSLF is entitled to those fees under the Uniform Relocation and Real Property Acquisition Act. MSLF has learned that the Internal Revenue Service may take the position that such fees must be included in the Glosemeysers’ gross income.
MSLF will pursue, on the Glosemeyers' behalf, a private letter ruling from the IRS. (It is estimated that it would cost the Glosemeyers $3,000 to apply for a private letter ruling.) If the ruling is favorable, MSLF will ask the IRS to publish the ruling. If the ruling is going to be adverse, MSLF will withdraw its request for a private letter ruling and ask the United States to pay MSLF an amount in attorneys' fees that will cause the Glosemeyers to incur a $1,000 increase in taxes. The Glosemeyers will then file a tax return and pay the additional $1,000 and then, with the assistance of MSLF, seek a refund in U.S. District Court for the District of Missouri. (Scott Detamore) (03-5199)

**GLOSEMeyer, et al. v. UNITED STATES**

(Private Property Rights, Takings) (Counsel for Glosemeyers)
(Court of Federal Claims, Missouri, Case No. 93-126L)

Jayne and Maurice Glosemeyer own and operate a family farm near Marthasville, Missouri. The farm is traversed by a railway easement formerly occupied by the Missouri-Kansas-Texas (MKT) Railroad. The Glosemeyers are not permitted to make any use of the 13 acres formerly occupied by the MKT railroad easement. The State subsequently constructed a bicycle path across their farm. The Glosemeyers served as lead plaintiff in a case filed by a coalition of 144 landowners affected by the decision, but this effort failed and the coalition dissolved. The Glosemeyers do not have sufficient resources to continue the fight alone.

On March 4, 1993, MSLF filed a Complaint on behalf of the Glosemeyers in the Court of Federal Claims, and on March 29, 1993, MSLF filed an amicus brief on behalf of the Glosemeyers in another rails-to-trails case, *Preseault v United States*. On July 26, 1993, the Court of Federal Claims issued an order staying *Glosemeyer* until the Federal Circuit decided *Preseault*. The *Preseault* opinion was filed on September 14, 1995. On October 10, 1995, MSLF was ordered by the Court of Federal Claims to submit a "statement briefly reflecting their views on the effect of *Preseault*". MSLF filed a joint statement of views on *Preseault* on October 18, 1995. On October 27, 1995, the Court stayed *Glosemeyer* pending a Supreme Court decision on the petition for writ of certiorari in *Preseault*, in which MSLF filed an amicus brief.

On November 20, 1995, the Federal Circuit vacated the September 14, 1995, judgment in *Preseault* and withdrew the opinion. A poll of the judges in active service conducted at the suggestion of an active judge resulted in a decision to rehear the appeal en banc. On January 24, 1996, the Federal Circuit extended the filing date for supplemental briefs to February 8, 1996. Oral arguments were held February 13, 1996.

On November 5, 1996, the Federal Circuit issued a 6-3 en banc decision in *Preseault*, finding that a taking had occurred. It reversed the decision of the Court of Federal Claims and remanded the case for further action. Neither the State of Vermont nor the United States filed a petition for writ of certiorari with the Supreme Court, and the case was remanded to the Court of Federal Claims for a determination of damages.

In *Glosemeyer*, the United States filed its required status report regarding *Preseault* on May 16, 1997. On May 23, 1997, the Court ordered that a joint status report be filed by July 16, 1997. The United States served its first set of interrogatories July 18,
1997. The Glosemeyers filed a motion for partial summary judgment and supporting memoranda on July 18, 1997. On August 7, 1997, Judge Bruggink held a conference on the motion for summary judgment and on the United States’ first set of interrogatories. The United States was given 90 days to conduct a title search of the Glosemeyers’ property and file a response to the motion for partial summary judgment. Answers to the government’s first set of interrogatories were submitted on August 26, 1997, and depositions were taken on October 20, 1997. The United States filed its response to the motion for summary judgment on November 10, 1997, and the Glosemeyers filed their reply on December 5, 1997. A hearing on the motion for summary judgment was held on February 20, 1998, and the motion was dismissed without prejudice. The Court ordered that the motion for summary judgment be filed again, with an accompanying statement of facts, by March 20, 1998.

The motion for summary judgment was filed, the United States filed a cross-motion for summary judgment, the Rails to Trails Conservancy was granted amicus status, and on June 24, 1998, the Glosemeyers filed their response. The United States filed its reply on July 16, 1998. The case was partially consolidated with similar cases arising under Missouri law, and briefing was stayed, pending completion of discovery, until January 20, 1999. The Glosemeyers filed a supplemental brief on January 29, 1999, the United States responded, on May 18, 1999, the Glosemeyers replied, and on July 19, 1999, the United States replied.

Oral arguments were held on November 18, 1999, at which time Judge Bruggink indicated that he would rule in favor of the Glosemeyers. The Judge issued his ruling on January 14, 2000, granting summary judgment in favor of the Glosemeyers on the issue of liability and denying summary judgment on behalf of the United States. The Court then separated the cases and ordered that a joint status report proposing further pretrial proceedings be prepared by the parties in Glosemeyer and Grantwood Village and filed with the Court.

The joint status report was filed on February 25, 2000, part of which required the United States to prepare an appraisal. The Glosemeyers obtained their own appraisal in preparation for settlement negotiations. On June 1, 2000, the parties filed a second joint status report in which they agreed to attempt to settle the case. On August 23, 2000, the parties filed a third joint status report agreeing to exchange appraisals by September 30, 2000, and to meet in St. Louis no later than November 15, 2000, in an attempt to negotiate a final settlement. In late October the United States requested that MSLF present an estimate of its attorneys’ fees at the settlement negotiations. On November 15, 2000, the parties met in St. Louis in an attempt to reach a settlement. On January 16, 2001, MSLF attempted to finalize all terms of the settlement issues with counsel for the United States, after which the parties agreed to submit to non-binding arbitration.

On March 5, 2001, the Court, in response to the parties’ fifth joint status report, referred the case to the Clerk of the Court for the Clerk to assign an alternative dispute resolution (ADR) judge. On April 25, 2001, the case was assigned to ADR Senior Judge Wilkes C. Robinson.

session in St. Louis on June 21, 2001, the parties were unable to reach agreement but agreed to continue negotiations for one week. On June 29, 2001, the parties notified Judge Robinson that settlement was no longer a possibility.

On July 10, 2001, the parties filed a joint status report with Judge Bruggink in which they related the events of the alternative dispute resolution, stated their positions on future proceedings, and requested a telephonic status conference. The United States informed the Court that additional discovery was necessary for it to prepare for the damages phase. The Glosemeyers requested the immediate submission of summary judgment motions on the issue of just compensation, motions that could be supported by expert witness evidence. The Glosemeyers requested that, after summary judgment motions, a dispute remained as to genuine issues of material fact, a trial limited to the testimony of expert witnesses should be held.


On January 22, 2002, the United States submitted another settlement offer. The following day, the Glosemeyers rejected the offer and submitted a counteroffer, which the United States accepted subject to the resolution of several issues. On March 28, 2002, the parties filed a joint status report and moved to vacate the existing schedule. [On the same date, MSLF filed an amicus curiae brief supporting the plaintiffs’ application for attorney fees in a related case, Presaault v. United States, et al.] On April 3, 2002, the court ordered the parties to file their next status report by May 1, 2002, which the parties did. On May 6, 2002, the court ordered the parties to file their next status report by May 24, 2002. [On May 22, 2002, in Presaault v. United States, et al., Judge C. O. C. Miller granted attorneys’ fees to the New England Legal Foundation for their work obtaining a judgment against the United States for a Fifth Amendment taking under the Rails to Trails Act. The United States did not appeal the Court’s order.] On May 24, 2002, the parties in Glosemeyer filed a joint status report, and on May 29, 2002, the court ordered the parties to file, by June 4, 2002, either a joint status report or a joint stipulation for dismissal. Upon motion, the Court later extended that date to July 18, 2002.

After a lengthy period of settlement negotiations, the United States stipulated that it would pay the Glosemeyers $200,000 as just compensation for the taking. On December 19, 2002, the Court of Federal Claims ordered the United States to pay that amount to the Glosemeyers within 30 days. On January 15, 2003, the United States complied with the Court’s order by depositing $200,000 into the Glosemeyers’ bank account.

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The Court also granted MSLF until February 3, 2003, in which to move for an award of attorneys’ fees. MSLF estimates that it has incurred $200,000 in attorneys’ fees in representing the Glosemeyers and is entitled to those fees under the Uniform Relocation and Real Property Acquisition Act. MSLF has learned, however, that the Internal Revenue Service may take the position that such fees must be included in the Glosemeyers’ gross income.

On January 23, 2002, the Board of Directors approved representation of the Glosemeyers in seeking a private letter ruling from the Internal Revenue Service regarding taxation of these attorneys’ fees and, if that ruling is adverse, a challenge to the ruling in U.S. District Court. See the preceding entry, Glosemeyer v. Commissioner, I.R.S. (Steve Lechner) (92-3259).

In re HYDRO RESOURCES, INC.
(Private Property Rights, Limited and Ethical Government, Environmental Law)
(Counsel for Licensee Hydro Resources, Inc.) (U.S. Nuclear Regulatory Commission)

This case was approved by the Board of Directors on October 4, 2002. The Grants uranium region in northwestern New Mexico, part of the Colorado Plateau physiographic province, is the most prolific uranium-producing region in the United States. The Westwater Canyon Member of the Morrison Formation in the San Juan Basin hosts the uranium and also is a regional aquifer. Hydro Resources, Inc. (HRI), a wholly owned subsidiary of Uranium Resources, Inc. (URI), the oldest domestic producer of uranium using in situ leaching (ISL) recovery techniques, owns a large portion of the uranium-producing properties in the Grants region.

Uranium deposits similar to those in the Grants uranium region are also present in Nebraska, Texas, and Wyoming. These naturally occurring deposits cause groundwater at many locations to register as radioactive, and the natural water in some areas exceeds federal and state limits for radiation in drinking water. Radon gas is also released from the natural water.

Many of these uranium deposits are commercially mineable using ISL recovery techniques, a recovery method that is environmentally benign. ISL recovery involves the circulation of groundwater with a bubbled oxygen and club-soda-like mixture through a series of injection and extraction wells so as to solubilize the uranium for extraction in what amounts to a large water softener until the uranium ore in the aquifer is depleted.

The HRI properties in the Grants uranium region represent the largest undeveloped high-quality uranium resource in the United States that can be developed using ISL technology. Its total proven and probable in-place resources include 100 million pounds of U3O8 at an average recovery cost of $15 per pound. That amount of U3O8 is equal to the amount of fuel required to power all of the United States’ nuclear reactors for two years.

Licensing of its ISL operations in New Mexico has required significant effort on the part of HRI since its original application in 1988. On January 5, 1998, after a 10-year review including an EIS process jointly managed by the NRC, the Bureau of Indian Affairs, and the BLM, the NRC issued HRI a 5-year license to operate. The FEIS (Final Case Update
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Environmental Impact Statement), which was reviewed by the EPA, states that the environmental impact of ISL uranium recovery would be minor. HRI also has secured the New Mexico State ISL permits required to begin operations at the Church Rock portion of the project and it obtained the necessary water rights. On January 19, 2000, the Navajo Nation lifted its 1983 moratorium on uranium mining for ISL uranium recovery.

During and since licensing, HRI has faced continuous legal challenges to its NRC license by groups opposed to uranium recovery operations. As a result of a 7-year hearing before the NRC and its Atomic Safety and Licensing Board, the Church Rock portion of the project was deemed safe and the opponents’ request that the license be rescinded was denied. The opponents appealed that ALJ ruling to the NRC Commissioners. On July 10, 2000, the appeal was denied. The Commission found the opponents’ arguments “ unpersuasive” and held that the opponents had “identified no ‘clearly erroneous’ factual finding or important legal error.” The Commission ruled that there was no reason to question the ALJ’s findings that HRI was a qualified company and that the project was environmentally safe. With regard to groundwater quality, on January 31, 2001, the Commission concurred with the technical, substantive, and legal findings of the Atomic Safety Licensing Board Presiding Officer that the project, as planned, protects groundwater resources. The Commission also held that the hearing on the other three portions of the project, held in abeyance due to the fact that only the Church Rock site would likely be mined within the next 1-5 years, should go forward.

Opponents comprise a small, but vocal, group of Americans Indians supported by professional environmental activists and lawyers from Albuquerque, Washington, D.C., and Santa Fe. (A group of native Americans from which HRI has leased property and which desires to see uranium produced so that it may receive production royalties was denied standing.) Intervenor opponents are the Eastern Navajo Diné Against Uranium Mining, Southwest Research and Information Center, Marilyn Morris, and Grace Sam.

Although HRI successfully met the challenge to the Church Rock and Crownpoint ISL project, the NRC ordered that HRI either drop the other three project sites from the license or proceed with the litigation.

In November 2001, the NRC appointed a settlement judge in an attempt to avoid another round of protracted litigation. HRI desires settlement and has offered to work with local interests on the funding of a non-uranium business venture, establishing a community review board to conduct project oversight, and agreeing to limits on mining/processing locations. Although the Navajo Nation has supported the settlement discussions, progress has been thwarted by outside interests whose agenda goes beyond this project, to the viability of nuclear power. A last ditch attempt at settlement will take place at the end of October.

If settlement fails, briefing will begin on the following 10 issues, all of which must address the Church Rock, Crownpoint Unit 1, and Crownpoint sites: (1) adequacy of groundwater restoration plans, (2) surety estimates, (3) groundwater protection, (4) liquid waste disposal, (5) surface water protection, (6) compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, and related cultural resource issues, (7) adequacy of the Final Environmental Impact

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Statement (FEIS) under the National Environmental Policy Act; (8) air emission controls, (9) technical qualifications, and (10) consideration of health impacts

The opponent-intervenors will begin the briefing process by filing a written presentation on the first issue, to which HRI must respond within 45 days, to which the NRC must respond within 10 days. A written presentation on the second issue must be filed 45 days after the presentation on the first issue is filed, HRI must respond to the second presentation within 45 days, to which the NRC must respond within 10 days. The remaining issues will be briefed in a similar manner. The need for written questions, oral presentations, or live testimony is to be determined by the Presiding Officer. After completion of the briefing, a decision will be issued by the Presiding Officer, which decision may be appealed to the full Nuclear Regulatory Commission (Chris Massey) (Mentor Hal Pos) (02-5110)

IDAHO AND U.S. DEPARTMENTS OF TRANSPORTATION
(Free Enterprise, Equal Protection Constitutional Rights and Liberties)
(Counsel for plaintiff) (U.S. District Court, Idaho)

This case was approved by the Board of Directors on February 22, 2002. Because a suitable client has not been located, the case will be presented for revocation at the February 2003 meeting of the Board of Directors (Scott Detamore) (Mentor Runft) (01-4953)

LAGUNA GATUNA, INC. v. UNITED STATES
(Private Property Rights, Takings) (Counsel for Laguna Gatuna)
(Court of Federal Claims, New Mexico, Case No. 96-157L)

Laguna Gatuna, Inc (LGI), is a New Mexico corporation whose business is disposal of production water from oil and gas wells. In April 1992 EPA served LGI with a cease and desist order stating that further disposal of brine production waters would subject LGI to penalties under the Clean Water Act (CWA). The area used for disposal of the waters, Laguna Gatuna, is a sinkhole that has been described by the EPA as a "playa lake." CWA jurisdiction was invoked by claiming that the playa lake is "waters of the United States" because migratory birds may use the area for nesting, feeding, or resting. As a result of the cease and desist order, LGI ended its operations. Its only avenue to challenge the finding that the Laguna Gatuna is waters of the United States is to violate the order and face fines of $25,000 a day and a jail sentence. Part of the area covered by Laguna Gatuna is private lands owned by LGI, some is BLM land, and some is state land. The latter two land categories are operated under leasehold. Because LGI lost the opportunity to dispose of production waters, the value of the private land decreased to zero, as did the value of the leaseholds, and LGI claimed a taking under the Fifth Amendment.

On June 24, 1993, a Complaint was filed in U.S. District Court. On August 23, 1993, Stone Southwest Corporation moved to intervene as a party-plaintiff. On September 20, 1993, the United States filed a motion to dismiss, to which LGI replied on October 26, 1993. Oral arguments were held on April 8, 1994, and the court granted the motion to dismiss.

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On June 7, 1994, LGI filed a notice of appeal to the Tenth Circuit. Oral arguments were held on May 18, 1995, and on June 20, 1995, the Tenth Circuit affirmed the District Court decision. LGI filed a petition for writ of certiorari with the U.S. Supreme Court. The United States filed its response on December 11, 1995, and LGI filed its reply on January 4, 1996. On January 16, 1996, the petition was denied.

On March 20, 1996, LGI filed a takings Complaint in the U.S. Court of Federal Claims.

On June 12, 1996, the BLM issued an order stating that the right-of-way agreement with LGI was cancelled because of failure to pay rent. The Claims Court granted the parties' joint motion that the takings action be stayed until LGI appealed the BLM's decision to the IBLA. That appeal was filed on July 12, 1996. On November 7, 1996, the IBLA remanded the case to the BLM for a decision on the request that the rental fees be reduced. On May 31, 1997, the BLM denied LGI's request. LGI appealed that decision to the IBLA, which affirmed the BLM's decision on December 3, 1997. LGI decided not to seek judicial review of the decision but rather to renew its takings claim.

On July 17, 1998, the United States filed a motion to dismiss the takings claim or, in the alternative, for partial summary judgment. On November 16, 1998, LGI filed its opposition to the motion, together with an amended Complaint and joinder of a necessary party. The United States filed its response on January 29, 1999. Oral arguments were held on April 15, 1999, at which time the Court ordered supplemental briefing of one of the issues. The United States filed its brief on April 30, 1999, and LGI filed its brief on May 7, 1999.

On June 25, 1999, the Claims Court ruled in favor of LGI, denying the motion to dismiss. The United States filed its answer and counterclaim on September 20, 1999, and an amended counterclaim on September 22, 1999.

A joint status report was to be filed by January 21, 2000. Because of an irresolvable conflict with opposing counsel, MSLF filed a separate status report on behalf of LGI. The United States moved to compel discovery to which motion LGI responded on March 10, 2000. On March 6, 2000, the United States responded to LGI's discovery requests.

On May 1, 2000, the Court denied the government's motion to compel but did extend discovery, pursuant to later stipulation, to August 25, 2000. It also ordered that separate status reports be filed by September 8, 2000, regarding further scheduling including the briefing of summary judgment motions or the setting of trial. LGI moved to set the matter for trial in January 2001 and to eliminate the filing of any dispositive motions. The Court did not rule on this motion but indicated that it would do so after the status reports were filed. On June 7, 2000, the Court granted LGI's motion to bifurcate the proceedings into liability and damages phases, the proceedings on damages to follow determination of liability.

On July 10, 2000, the United States served a request to produce documents at deposition under Rule 30(b)(5). On July 12, 2000, MSLF filed an extensive objection to the request for production of documents at deposition. On July 19 and 20, 2000, the
depositions of Larry Squires and J W. Neal were taken by the United States, and the United States inspected the premises of Laguna Gatuna. The request for production of documents at deposition was abandoned.

In a telephone conference, the judge set the case for trial and issued a pretrial scheduling order. LGI filed all of its pretrial materials by December 11, 2000, and the United States filed most of its pretrial materials by January 19, 2001. The pretrial conference was held by telephone on February 9, 2001.

Trial was held on February 20-21, 2001, in Albuquerque, New Mexico. In a post-trial conference in chambers, details of post-trial briefing were explored and determined by Judge Bruggink. LGI's post-trial brief was filed on April 6, 2001, the United States' response was filed on April 27, 2001, and LGI's reply was filed on May 18, 2001.

On September 13, 2001, Judge Bruggink of the Court of Federal Claims held that Laguna Gatuna's "leasehold and right-of-way were rendered economically without value by the government's cease and desist order" and, as a result, "Laguna Gatuna's legitimate, investment-backed expectations were thwarted." Therefore, "the leasehold and right-of-way were 'taken' within the meaning of the Fifth Amendment" and "the government must compensate Laguna Gatuna for them." He ordered the parties to meet and consider further proceedings to calculate damages. On October 12, 2001, the United States filed a report on behalf of both parties by, presenting the parties' views on how to proceed. Settlement negotiations are underway, and with the permission of the Court the consideration of further proceedings was stayed.

Settlement discussions on the matter of Laguna Gatuna's damages continued throughout 2002. A agreement was signed near the end of 2002 and Laguna Gatuna received its settlement payment (dates unknown). Settlement of attorneys' fees by the government to MSLF is under discussion. If settlement is unsuccessful, an application for payment of attorneys' fees is due in Court on January 31, 2003 (Scott Detamore) (92-3250).

**LAKE ROOSEVELT VACATIONS v. NORTON, et al.**

(Free Enterprise, Access To Federal Lands, Limited and Ethical Government)

(Counsel for Lake Roosevelt) (D C Circuit, Case No 02-5203)

This case was approved by the Board of Directors on June 4, 1999. Lake Roosevelt Vacations, Inc., is a small, family-owned concessionaire that operates at the Coulee Dam National Recreation Area, which includes Franklin D. Roosevelt Lake, in Ferry County, Washington, 84 miles north-northwest of Spokane, Washington. It operates a rental boating operation near Kettle Falls, Washington.

On October 28, 1999, on behalf of Lake Roosevelt Vacations, MSLF filed a Complaint against the Secretary of the Interior, the Department of the Interior, and the National Park Service (NPS) (jointly referred to herein as the United States) for imposing upon Lake Roosevelt Vacations' concessionaire contract language (1) in violation of the Administrative Procedure Act (APA) and (2) in excess of its regulatory authority under the Concessions Policy Act (CPA), 16 U S C § 20 et seq. MSLF asserted that (1) the NPS has no authority to issue rules implementing the CPA that contravene the intent of
Congress under the CPA, (2) the NPS has no authority to compel a concessionaire to agree to a contract that destroys the concessionaire’s property rights, (3) the regulations and contract language adopted by the NPS violates the APA and the CPA, and (4) the contract that Lake Roosevelt Vacations was compelled to sign, under which its property interest was eradicated, violated the CPA and therefore the contract was null and void.

The United States filed its answer on February 10, 2000. At the status conference held on May 3, 2000, a settlement could not be reached.

The administrative record was filed, and on August 14, 2000, Lake Roosevelt filed a motion to supplement the record. That motion was granted on August 30, 2000. On November 13, 2000, Lake Roosevelt filed a motion for summary judgment. The United States filed its response and a cross-motion for summary judgment on December 13, 2000. On February 12, 2001, Lake Roosevelt filed its response to the cross-motion and its reply to the United States’ response, and on April 24, 2001, the United States filed its reply.

The Court denied the parties’ request for oral argument, and on May 2, 2002, it issued a final, appealable order, denying Lake Roosevelt’s motion for summary judgment and granting the United States’ motion to dismiss or for summary judgment. In its memorandum opinion the Court held that it did not have Article III jurisdiction to consider the plaintiff’s challenges to the repealed regulations regarding preferences and transferring concession contracts, but, to the extent that it has jurisdiction over the plaintiff’s claims, the regulations and the standard concession contract language are not arbitrary or capricious.

On June 27, 2002, Lake Roosevelt filed its notice of appeal. The appeal was docketed by the D.C. Circuit on June 28, 2002. A schedule of preliminary matters was set by the Court, briefing was deferred pending further order of the Court. On August 30, 2002, the federal government filed a motion for summary affirmance. Lake Roosevelt’s response was filed on October 16, 2002, and the government’s reply was filed on November 14, 2002. On December 23, 2002, the D.C. Circuit granted the government’s motion for summary affirmance. MSLF intends to file a petition for rehearing en banc, that petition is due on February 6, 2003. (Amanda Koehler) (Mentor Sullivan) (98-4395)

**MADISON, et al. v. GRAHAM, et al.**

(Private Property Rights, Takings)

(Counsel for Appellants Madison, et al.) (Ninth Circuit, Montana, Case No. 01-35145)

This case was approved by the Board of Directors on October 8, 1999. Charles and Elena d’Autremont own a 275-acre ranch on the Upper Ruby River in Madison County, Montana. Their property encloses approximately one and one half miles of the river, classified according to state law as Class II waters, commercially nonnavigable. For several years, the d’Autremonts ejected a steady stream of trespassers and saw a corresponding improvement in the fishing. Their neighbors followed the same practice, believing that because they held title to and paid taxes on the land under the stream, they were entitled to choose who stood on it. Mr. d’Autremont and his neighbors eventually...
began to allow a small number of fishermen to fish on their property for a fee. These fees were reported as taxable ranch income. When Montana water rights were reestablished through the courts, they filed claims in water court for the flow-through rights to the stream as a commercial fishery but were denied those rights.

In 1985, Montana passed the Stream Access Act, a group of laws that separates waters of the State into two groups according to federal commercial navigability standards. Before the laws were enacted, the d’Autremonts and their neighbors traveled to Helena to file written protests with the legislature, to no avail. The stream on the d’Autremonts’ property was classified as Class II (nonnavigable).

The Stream Access laws provide that all surface waters in the state capable of recreational use may be so used without regard to ownership of the land underlying the waters. Recreational uses are allowed below the normal high-water mark of Class II rivers and streams. In addition, users may “portage” around barriers or obstructions in the water when necessary and go above the high-water mark onto private property. Recreational uses include fishing, swimming, hunting, floating, use of motorized watercraft, building fires below the high-water mark, and “related unavoidable or incidental uses.” Mont. Code Ann. §§ 23-2-301(10), 302(2)-(3).

The Ruby River is about 150 feet from the d’Autremonts’ front door, but since passage of the Stream Access laws, the d’Autremonts and others have lost the very privacy for which they bought their properties. The d’Autremonts filed an appeal with the Montana Department of Fish, Wildlife and Parks (FWP) concerning application of the Stream Access laws to their property. They have received a final statement from the FWP Director rejecting their petition, as well as a statement by one of the commissioners saying that he would never approve such a petition.

On May 31, 2000, MSLF filed a Complaint in federal court on behalf of Davey Madison and other individual property owners (Montana Landowners), including the d’Autremonts, arguing that the Montana Stream Access laws represent an unconstitutional expansion of the public trust doctrine as applied to privately owned streambeds and banks. On August 3, 2000, state government defendants filed a motion to dismiss and on August 9, 2000, a memorandum in support. On September 15, 2000, the Montana Landowners filed their response, and on October 17, 2000, state defendants replied.

On August 14, 2000, the Montana Wildlife Federation, Montana Council of Trout Unlimited, Montana Coalition for Stream Access, and Fishing Outfitters Association of Montana filed an application for intervention and lodged their answer. On August 24, 2000, the Montana Landowners moved to stay their response to the motion to intervene until the court ruled on the motion to dismiss. On September 5, 2000, the applicants filed a response to the motion to stay. On September 19, 2000, the Montana Landowners replied.

On November 21, 2000, the applicants lodged a motion to dismiss and the court ordered the Montana Landowners to file their opposition to intervention by November 27, 2000. The court said that it would rule on the motion for intervention before the motion to dismiss. On November 24, 2000, the Montana Landowners responded to the application for intervention, and on November 27, 2000, the applicants replied.

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November 30, 2000, the court approved the application for intervention and set a hearing for December 13, 2000, on the motions to dismiss. On December 7, 2000, the Montana Landowners filed their opposition to the intervenors' motion to dismiss.

A hearing on the motions to dismiss was held on December 13, 2000, and on January 4, 2001, the court granted the motions to dismiss and dismissed the Complaint with prejudice.

On February 5, 2001, MSLF filed a notice of appeal on behalf of the Montana Landowners. The opening brief and excerpts of record of the Montana Landowners were filed on June 7, 2001. On July 9, 2001, the State of Montana filed its response brief. The reply brief of the Montana Landowners was due on August 9, 2001, however, on August 9, 2001, Montana Landowners filed a motion to enlarge the size of the reply, together with a prototype of the vỏng brief, as required by the Ninth Circuit. The motion was granted and the brief was on filed September 12, 2001. Oral arguments were held on November 6, 2002, at the Federal Courthouse in Boise, Idaho. On December 23, 2002, the Ninth Circuit affirmed the district court's dismissal of the Montana Landowners' Complaint with prejudice, saying the facts alleged by the Landowners give rise only to a takings claim.

MSLF will file a petition for writ of certiorari with the U.S. Supreme Court on behalf of the Montana Landowners. The petition must be filed with the Court by March 24, 2003. (Amanda Koehler) (Mentor Smith) (99-4532)

MANN v. UNITED STATES
(Private Property Rights, Limited and Ethical Government)
(Counsel for Mann) (Federal Circuit, New Mexico, Case No 03-5013)

On November 1, 1981, the Bureau of Land Management (BLM) and Southland Royalty Company entered into a 10-year lease for geothermal resources near Las Cruces, New Mexico. The lease, designated NMNM 40957, was assigned to Chaffee Geothermal Ltd (Chaffee). In December 1985 the lease was assigned from Chaffee to Stanley K. Mann. On May 6, 1986, the BLM approved the assignment of the lease to Mann.

In 1981 and 1982 Chaffee drilled two wells capable of producing in paying quantities. The first well, designated Chaffee-Las Cruces 12-24, showed temperatures of 150°F and flow of 1,750 gallons per minute (gpm). The second, Chaffee-Las Cruces 55-25, indicated temperatures of 160°F and flow of 2,500 gpm. Subsequently, the wells were capped underground and neither has produced. Extensive efforts were made to market the resources and find investors willing to back development.

At some date subsequent, Mann and Larry Hall formed Crowne Geothermal Ltd, a Colorado corporation, recognized as the "operator." Hall contributed to the marketing efforts and designed a greenhouse system that would operate using the geothermal energy. Including Chaffee's efforts, about $2 million has been expended to develop and market the resources.

By letter dated August 7, 1989, Mann informed the BLM of his desire to convert the lease to a long-term lease. Subsequent correspondence from the Minerals
Management Service (MMS) seems to indicate that the conversion was granted by referring to a change in payment responsibilities and by directives to file a Payor Information Form. In a letter dated May 3, 1990, Mann confirmed that the lease was reclassified for long term. The BLM doubled the annual rentals and notified Mann as to future payments and reports. On September 5, 1990, the BLM sent notice to Crowne, attention Mann, advising that the lease account was being transferred to the jurisdiction of the MMS in Denver and that all future reports and monies should be sent to the MMS. Thereafter, Crowne communicated with MMS, not BLM, and kept MMS apprised of Mann's current address. Required reports were filed with MMS and rentals were paid to and accounted for by MMS.

On or about November 23, 1993, the BLM asserted that it sent an undated Lease Determination Decision to Mann at Crowne's California address. Mann did not receive that notice. The Decision stated that because no extension had been requested beyond the primary term "geothermal Lease NMNM 34793" would expire 30 days after receipt of the Decision unless evidence was provided that efforts to utilize the geothermal resources were being made.

Although Mann was not served with the letter, the lease was cancelled. The cancellation was appealed to the IBLA, which denied the appeal. On March 3, 1997, MSLF filed a Complaint in the U.S. District Court for the District of New Mexico challenging cancellation of the lease for failure to provide notice of the cancellation and failure to provide due process of law before the cancellation, and based on estoppel.

This case was voluntarily dismissed by Mann without prejudice, and on April 2, 1998, a Complaint requesting damages for breach of contract and a taking was filed in the Court of Federal Claims (Case No. 98-312C). The federal government answered on July 31, 1998. In a joint status report filed November 16, 1998, a briefing schedule was set.

The parties filed a joint stipulation of facts on February 2, 1999. On February 26, 1999, the government filed a motion to dismiss or, in the alternative, for summary judgment. On August 24, 1999, Mann filed a motion for partial summary judgment on the issue of liability, statement of genuine issues and proposed finding of uncontroverted fact, and memorandum in support of the motion for partial summary judgment and in response to the government's motion to dismiss. On February 18, 2000, the government filed its response to the summary judgment motion and reply in support of its motion to dismiss. On April 24, 2000, Mann filed a reply in support of his motion for partial summary judgment.

Oral arguments were held on June 13, 2001, and on September 3, 2002, the Court ruled in favor of the United States. Mr. Mann approved appeal of the decision to the Federal Circuit.

The notice of appeal was filed with the Court of Federal Claims on October 21, 2002, and the case was docketed in the Federal Circuit Court of Appeals on October 29, 2002. On December 30, 2002, Mann's opening brief was filed and served and the appendix was sent to counsel for the United States for the inclusion of the government's materials. The government's response brief is due on February 11, 2003. (Steven Lechner) (96-3743)
(Equal Protection) (Counsel for Blaine County)
(U S. District Court, Montana, Case No CV 01-91-GF-RFC)

On July 9, 2001, after it was denied intervention in United States v Blaine County, the ACLU filed a Complaint on behalf of several Native Americans and itself, alleging violations of the Voting Rights Act by Blaine County and its Commissioners. The case was assigned to Magistrate Judge Cebull, who a week later was appointed a District Court judge for the District of Montana. On July 16, 2001, Blaine County filed a motion for reassignment of the case to Judge Pro, the District of Nevada judge who is hearing United States v Blaine County.

On July 30, 2001, Blaine County filed a motion to dismiss or, alternatively, to stay proceedings pending determination of United States v Blaine County. On August 3, 2001, Blaine County filed its brief in support of the motion.

On July 31, 2001, the ACLU filed a motion to consolidate this case with U.S. v Blaine County. It also filed a response to Blaine County’s motion for reassignment of the case to Judge Pro. The ACLU had no objection to reassignment of the case, provided that the case is consolidated with U.S. v Blaine County, a consolidation that MSLF and Blaine County oppose.

On August 2, 2001, pursuant to the Clerk’s Order of July 25, 2001, requesting that the parties notify the court of their consent or objection to the assignment of the case to a Magistrate Judge, MSLF filed Blaine County’s objection to the assignment of the case to a Magistrate Judge. In the same pleading, MSLF reminded the Clerk of Blaine County’s pending motion for reassignment of the case to Judge Pro.

On August 31, 2001, the ACLU filed its response to Blaine County’s motion to dismiss or, alternatively, for a stay.

On September 7, 2001, District Court Judge Haddon denied the ACLU’s motion for consolidation, calling it no more than “an alternate attempt to achieve through consolidation that which could not be accomplished through intervention.” The Court stated that it would take no action that might encumber the progress of U.S. v Blaine County or delay trial of that action on the merits. In a separate order, Judge Haddon denied reassignment of the case to Judge Pro.

On September 25, 2001, on Blaine County’s motion to stay, the Court stayed all proceedings, including resolution of the issues raised in Blaine County’s motion to dismiss, pending final resolution of U.S. v Blaine County on the merits. (Scott Detamore) (Mentors Ruffatto, West) (01-4871)
McFARLAND v. UNITED STATES, et al.
(Private Property Rights, Limited and Ethical Government)
(Counsel for McFarland) (U.S. District Court, Montana, Case No. CV-00-20-M-DWM)

This case was approved by the Board of Directors on October 6, 2000. For several generations Jack McFarland's family has owned property within Glacier National Park in Montana. For many years McFarland's grandparents operated a dude ranch within Glacier Park but were forced to shut it in 1968 when the National Park Service (NPS) condemned the property. However, that same year McFarland's grandmother purchased a 2.75-acre parcel adjacent to the former ranch. The parcel is surrounded by NPS land and is accessible only via Glacier Route 7, constructed in 1901, nine years before establishment of Glacier Park.

The parcel had been patented in 1916 as part of a larger parcel, and it passed through a series of owners until it was purchased by McFarland's grandmother. McFarland and his sister purchased the parcel from their grandmother in 1984. McFarland has made improvements to the parcel, hauling out old ranch equipment, building several small structures, and replacing the original cabin.

In 1988, the NPS placed a gate across Glacier Route 7, in front of the Polebridge Ranger Station 3.2 miles south of the parcel. Between 1988 and the winter of 1999, the NPS either left the gate open during the winter months or provided keys to the inholders so that they could access their properties. In May 1999 McFarland moved his family to the parcel, intending to live there year-round. There are several other inholdings nearby, but no other inholders live in the Park during the winter.

McFarland's new living arrangements continued without incident until November 1999, when he requested a meeting with local NPS rangers to arrange for use of Glacier Route 7 during the winter. Specifically, he asked to be allowed to use a snowmobile to travel on Glacier Route 7 after heavy snows make it inaccessible by four-wheel drive vehicles. He was told that since 1975 snowmobiles have been prohibited within Glacier Park and that he could not plow the road. In December 1999, after several communications with NPS personnel, McFarland received an e-mail notifying him that "effective immediately" Glacier Park inholders would receive no special privileges and that the gate to Glacier Route 7 would be closed and locked after the first significant snowfall. McFarland contacted the NPS and asked for permission to plow Glacier Route 7 as necessary to access the cabin by four-wheel drive. This request was denied and he was told that he must store his vehicles at the Polebridge Ranger Station, beyond the locked gate. The NPS also refused to give him a key to the gate at the ranger station.

In early January 2000 McFarland's daughter needed urgent medical treatment. Realizing the potential danger of having no motorized access to his cabin, McFarland purchased a snowmobile and the NPS allowed him to leave it at the cabin, with the understanding that it be used only for medical emergencies. For several months McFarland used snowshoes and cross-country skis to travel the 3.2 miles to town and back along Glacier Route 7.
On January 6, 2000, McFarland applied for a special use permit to allow him and his family and their visitors to use vehicles to drive the 3.2 miles of Glacier Route 7 between the Polebridge Ranger Station and his property. He also asked that whenever heavy snows made it dangerous or impossible to reach the property by four-wheel drive, he and his family be allowed to use a snowmobile to access the property and be given a key to the gate. On January 24, 2000, his requests were denied.

On February 2, 2000, McFarland filed a Complaint in the U.S. District Court for the District of Montana alleging that the NPS (1) violated Glacier Park’s enabling legislation, (2) violated NPS regulations, (3) unlawfully interfered with McFarland’s easement and access rights, (4) impeded McFarland’s “implied license to use public lands”, and (5) took McFarland’s property for a portion of the year without due process or just compensation.

That same day, McFarland was granted a temporary restraining order and preliminary injunction preventing the NPS from interfering with his right to drive or snowmobile to the property. One week later, the District Court dissolved the TRO on the basis that McFarland had failed to prove that inholders had ever been allowed to access private property by snowmobile, that any inholder had plowed Glacier Route 7, or that any inholder had ever lived year-round within Glacier Park. The Court also discovered that Mr. McFarland had been told by the NPS in the fall of 1999 that he would not be allowed motorized access to the property during the winter months.

In April 2000, after deciding that he could not risk wintering at the property without motorized access, McFarland moved his family to Oregon. Nevertheless, the legal action is ongoing. On June 16, 2000, the District Court ordered the parties to file a status report and a list of stipulated facts by no later than October 16, 2000.

On October 6, 2000, the Board of Directors approved MSLF’s participation in the case as co-counsel with Mr. McFarland’s attorney, Steve Berg. MSLF sent motions for Mr. Thode and Mr. Pendley to appear pro hac vice to Mr. Berg, who filed the motions with the Court on November 21, 2000. On November 22, 2000, the list of stipulated facts was filed. On December 5, 2000, the court granted the motions to appear pro hac vice, and on January 5, 2001, MSLF filed its notice of intent to participate.

The government certified its administrative record on June 25, 2001. On October 1, 2001, the Court ordered that a Case Management Order be filed by November 16, 2001, which it was. The Case Management Order set discovery to take place until May 31, 2002, and the briefing of any dispositive motions filed to be completed by August 2, 2002. No trial date was set.

On about February 4, 2002, Suzanne Lewis, Glacier National Park Superintendent, contacted Mr. McFarland about trying to reach a settlement. Several days later, the Assistant U.S. Attorney advised Ms. Lewis that she was to have no contact with Mr. McFarland. On March 6, 2002, the Assistant U.S. Attorney sent a letter to MSLF in which he informed MSLF that he had filed a motion requesting that the court schedule a settlement conference at its earliest convenience, stating “Glacier National Park cannot allow the access requested by Mr. McFarland” [but] continues to believe that this case should be resolved without further litigation.” A copy of the motion.

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accompanied the letter MSLF filed a response to defendant's motion requesting that the court set a settlement conference

On March 13, 2002, the Court set a settlement conference for April 3, 2002, in Missoula, shortly thereafter, the conference was rescheduled for April 9, 2002. MSLF's settlement demand was given to the defendants on March 26, 2002, and a confidential settlement brochure was submitted to the Magistrate Judge in charge of the settlement proceedings on April 2, 2002. On April 9, 2002, the settlement conference was held.

On April 4, 2002, the National Parks and Conservation Association (NPCA) filed a motion to intervene and supporting memorandum and lodged its answer to plaintiff's first amended Complaint. At this time, discovery began in earnest. On April 19, 2002, the government filed its first amended answer. On May 28-31, 2002, 15 witnesses were deposed by the various parties in Missoula and Kalispell. The Park Service's witnesses testified that the Park Service never allowed inholders any special access rights, however, each of Plaintiff's witnesses testified as to specific incidents, going back more than 50 years, in which inholders exercised their right to access their properties using motorized vehicles.

On May 30, 2002, the parties filed a joint motion to modify the case management order, extending the discovery deadline to June 14, 2002, and extending the briefing schedule by 30 days. That motion and a second motion for extension of time were approved, and on August 7, 2002, MSLF filed a motion for summary judgment and supporting pleadings.

Also on August 7, 2002, the government, together with the defendant-intervenor, National Parks Conservation Association, filed a joint motion for summary judgment and supporting documents and a joint motion and supporting brief to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(B)(1).

Responses to the various dispositive motions were filed on August 30, 2002, and replies were filed on September 11, 2002. The parties are awaiting the scheduling of oral arguments. (William Thode) (Mentors Hill, Kimball) (00-4615)

(Access to Public Lands and Resources, Limited and Ethical Government)
(Counsel for Montana Shooting Sports Ass’n, et al )
(U S District Court, D C, Case No 1 01CV02011-EGS)

On February 4, 2000, the Board of Directors approved representation of the Montana Shooting Sports Association (MSSA) in a challenge to the authority of the Bureau of Land Management (BLM) to ban the discharge and use of firearms on approximately 20,000 acres of public land in Montana and the hunting of non-game species, such as prairie dog.

The MSSA is a non-profit political action group organized to protect the Second Amendment right to keep and bear arms for citizens of Montana. It has drafted several pieces of pro-gun legislation that are now Montana Statutes, and it regularly engages in successful lobbying for pro-gun legislation and against proposed anti-gun or anti-hunting.
bills. It disseminates information and materials on gun safety and hunter ethics. Its members engage in hunting and other uses of the public lands in Montana.

On October 18, 1999, the BLM published in the Federal Register a notice of an immediate and indefinite ban on “discharge or use of firearms” in an area of Phillips County, Montana, comprising nearly 20,000 acres of public land. The ban limits the use of firearms in the area to persons holding valid permits from the Montana Department of Fish, Wildlife and Parks (FWP) to hunt game and waterfowl and for law enforcement, animal damage control, and emergency services. It outlaws the hunting of non-game species, those for which take is not regulated by the state, and the discharge of firearms.

According to the BLM, this ban was imposed to protect the habitat of the black-footed ferret, an endangered species. The black-footed ferret habitat consists of black-tailed prairie dog colonies. Because the Phillips County area may be used for future reintroduction of black-footed ferrets, the BLM wants to reduce shooting-induced mortality of prairie dogs within the area. The prairie dogs in this area are not listed as either endangered or threatened under the Endangered Species Act (ESA). Montana law classifies these prairie dogs as a non-game species, a classification that provides no legal protection for the prairie dogs. In addition, the take of prairie dogs is not regulated by the State of Montana.

The BLM finds its legal authority to reduce the shooting-death mortality of prairie dogs in general language in Title III, Section 302, of the Federal Land Policy and Management Act (FLPMA), which gives the Secretary of the Interior authority to “manage the public lands” and to limit hunting or fishing on public lands “for reasons of public safety, administration, or compliance with provisions of applicable law.” The BLM also purports to find its authority to impose the firearm ban on these public lands in the ESA, despite the fact that at this time there are no endangered species on these lands. Section 7(a)(1) requires federal agencies to “carry[] out programs for the conservation of endangered and threatened species,” similarly, section 7(a)(2) requires an agency to insure that any actions taken by it will not likely jeopardize the continued existence of any endangered or threatened species or damage critical habitat for such a species. The BLM also points to the statutory definition of “conserve” in the context of the ESA, section 3(3), “conserve” means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary.”

On September 4, 2001, a 60-day notice of intent to sue was sent to the Secretary of the Interior, Director of the Bureau of Land Management, Montana State Director of the Bureau, Agent of the Malta Field Office of the Bureau, and the Acting Director of the U.S. Fish and Wildlife Service.

On September 24, 2001, MSLF filed a Complaint for declaratory and injunctive relief in the District Court for the District of Columbia asserting that the BLM’s actions were taken under the guise of protecting critical habitat for an endangered species that has not yet been introduced. The day the Complaint was filed MSLF received an order from the District Court stating that the case had been selected for filing in the Court’s new electronic case filing program.
On November 16, 2001, MSLF filed an amended complaint, to which the 60-day notice of intent to sue was attached, and on December 3, 2001, the government filed its answer.

On January 31, 2002, the government provided MSSA with documents that it has designated as the administrative record. After a review of those documents, MSSA provided the government with a list of concerns and objections on April 8, 2002. Although the attorney at the Regional Solicitor’s Office in charge of preparing the administrative record is on maternity leave, the government assured MSLF that its concerns would be addressed before the status hearing scheduled for May 8, 2002.

That status conference was held on May 8, 2002. On June 11, 2002, another status conference was held at which the case schedule was discussed.

On July 15, 2002, the government transmitted the Administrative Record to MSLF. On August 12, 2002, MSLF filed a motion for summary judgment and supporting documents, the government’s response and cross-motion for summary judgment were filed on September 11, 2002.

MSSA’s reply to the government’s response to MSSA’s motion for summary judgment and its response to the government’s cross-motion for summary judgment was filed on November 1, 2002. The government filed its reply to the response on November 19, 2002. The parties are awaiting the scheduling of oral arguments. (Tara Risman) (Mentor Cockrell) (00-4586)

**MONTANA WILDERNESS ASS’N v. FRY, BLM, AND MACUM ENERGY, INC.**

(Private Property Rights, Access To Federal Lands and Resources)

(Counsel for Macum Energy)

(U S District Court, Montana, Case No CV-00-039-GF-DWM/RFC)

On or about September 28, 1999, the Montana State Office of the Bureau of Land Management (BLM) made available more than 180 parcels of federal land in a competitive oil and gas lease sale. Macum Energy, Inc (Macum), a small natural gas company, purchased eight parcels. In November 1999, Macum requested and received rights-of-way to lay pipeline connecting the company’s existing natural gas wells. From December 1999 through March 2000, Macum connected the existing wells along existing trails and roads using pipeline buried 4 feet below the surface.

Macum also filed nine applications to drill new natural gas wells on the leases acquired from the BLM. According to Macum President Ralph Gailey, the BLM was ready to issue six of the licenses when, on March 30, 2000, the process was suspended by a lawsuit filed by the Montana Wilderness Association (MWA) in the Great Falls Division of the U S District Court against the BLM and Macum. The suit sought injunctive and declaratory relief, asking the court to enjoin the BLM from issuing new leases to Macum and to declare the sale of the leases and rights-of-way void.

In May 2000 Interior Secretary Babbitt visited the area of the gas leases to discuss the situation with the parties involved. He suggested that the parties settle the problem.
and avoid a court battle. It was apparent that he was considering the area for monument status.

This case was approved by the Board of Directors on June 2, 2000. On June 8, 2000, MWA filed its first amended Complaint. On June 23, 2000, the BLM and Macum filed answers. On June 27, 2000, the Court set a preliminary pretrial conference for August 1, 2000. Shortly thereafter, that conference was vacated due to the death of Judge Hatfield. On July 24 and 25, 2000, the parties filed pre-discovery disclosure and preliminary pretrial statements.

At a preliminary pretrial conference on October 26, 2000, a briefing schedule was set for review of the administrative agency decision. On November 1, 2001, MWA lodged its second amended Complaint. On November 27, 2001, Macum filed its answer to that Complaint. On November 30, 2001, the Court granted MWA’s motion to file the Complaint. On December 7, 2000, the BLM filed its answer.

On January 2, 2001, MWA moved to stay the briefing schedule, alleging that the Complaint might be obviated by the creation of a national monument. On January 12, 2001, the BLM responded that it did not oppose a stay so long as it was short, and it informed the Court that monument designation would most likely protect valid existing rights and moot neither the validity of the leases nor the pipeline rights-of-way issued before the designation took effect. On January 8, 2001, the Court granted the motion for a partial stay and vacated the briefing schedule.

On February 12, 2001, MWA filed a motion for summary judgment. On March 29, 2001, the BLM filed a motion for summary judgment and its opposition to MWA’s motion for summary judgment. On March 30, 2001, one day late, Macum filed its opposition to MWA’s motion for summary judgment and a motion for summary judgment. On April 2, 2001, MWA filed a motion to strike Macum’s motion for summary judgment, arguing that they were filed late without leave of court. Macum responded to that motion on April 12, 2001, however, on April 11, 2001, the Court had denied Macum’s motion to file late. On April 16, 2001, MWA filed its reply brief in support of its motion to strike.

On April 12, 2001, MWA filed its reply brief in support of its motion for summary judgment. Because the Court had not yet ruled on MWA’s motion to strike Macum’s opposition/memorandum in support of Macum’s motion for summary judgment, MWA replied only to the BLM’s response to MWA’s motion for summary judgment. A decision on the motions for summary judgment is pending. (Steven Lechner) (00-4650)

**MOUNT ROYAL JOINT VENTURE, et al. v. NORTON, et al.**

(Private Property Rights, Access To Federal Lands and Resources)

(Counsel for Mount Royal Joint Venture)

(U S District Court, D C , Case No 1 99cv02728)

In the mid-1980’s, Mount Royal Joint Venture (MRJV) acquired several patented and unpatented mining claims in Montana in what is commonly referred to as the “Sweet Grass Hills Area.” The Bureau of Land Management (BLM) designated the area as an
area of critical environmental concern but expressly provided that the area would remain open to location and entry under the mining laws. Subsequently, the BLM petitioned to withdraw the area from location and entry under the mining law for a period of two years. Before the two years expired, Representative Williams (MT) then introduced a bill entitled the “Sweetgrass (sic) Hills Protection Act of 1995,” which would withdraw all lands in the area from location and entry under the mining laws. Based on this bill, the BLM again filed a petition to withdraw the area for two years “in aid of legislation,” and the Assistant Secretary approved the petition. MRJV located six new mining claims within the area, after which the BLM issued a decision declaring the six new claims null and void *ab initio*. Pete and Maxine Woods also located the Chrome #1 claim, which the BLM declared null and void *ab initio*.

MRJV filed an IBLA appeal, which was denied, and in the summer of 1998 MRJV asked MSLF to file suit on its behalf in District Court. In the fall of 1998 Pete and Maxine Woods requested that MSLF also represent them in the case, to which it agreed.

The Complaint was filed October 15, 1999. An amended Complaint was filed December 10, 1999. On January 21, 2000, the federal government filed its answer.


**MOUNTAIN STATES LEGAL FOUNDATION v. BUSH, et al.**

**(UTAH ASSOCIATION OF COUNTIES v. BUSH, et al.)**

(ACCESS TO FEDERAL LANDS AND RESOURCES, LIMITED AND ETHICAL GOVERNMENT)  
(plaintiff) (U S District Court, Utah, Case No. 2 97-CV-0479B)

On October 31, 1996, MSLF filed suit against Clinton for proclaiming 1 7 million acres of Utah land as the Grand Staircase-Escalante National Monument. MSLF, together with the Western States Coalition, sued on behalf of its members, one of whom is a miner who is now not able to stake additional mining claims. Clinton made the proclamation under the 1906 Antiquities Act, which was created to preserve objects of antiquity and requires the President to confine a monument to the “smallest area compatible with the objects to be protected.” He acted beyond the purpose and meaning of the Act by setting aside an excessive area of land, and MSLF seeks either to revoke the 1 7 million acres from monument status or to reduce the monument’s size such that only true “objects of historic or scientific interest” are protected.

report addressing the issues to be raised. MSLF filed an amended Complaint on December 15, 1997. At the hearing, Judge Green held that the voluntary dismissal was valid and that MSLF could proceed with its new Complaint. Defendants answered MSLF's first amended Complaint on February 17, 1998.

Plaintiffs' initial disclosures were served March 6, 1998. Defendants' initial disclosures were made March 20, 1998, but were deemed deficient by plaintiffs. Plaintiff Utah Ass'n of Counties (UAC) sent a letter to defendants requesting that they fully comply with the requirements of FRCP 26 and stated that plaintiffs will request sanctions should defendants not fully comply. Plaintiff MSLF sent defendants a similar letter in an attempt to resolve the dispute. Defendants replied that they believed they had complied with the scheduling order with their initial disclosures made March 20, 1998.

On May 19, 1998, Mike Leavitt signed an agreement with Interior Secretary Babbitt wherein the parties urged the passage by Congress of HR 3830, which would effect the exchange of more than 375,000 acres of Utah school trust lands inside the monument area for other federal lands in Utah. This agreement would effectively remove Plaintiff State Institutional Lands Trust Administration (SITLA) from the lawsuit.

On June 9, 1998, defendants moved to stay all proceedings pending congressional disposition of the land exchange agreement. MSLF and UAC filed oppositions. At a hearing on July 14, 1998, Magistrate Judge Ronald Boyce denied the request to stay the entire proceedings and granted a stay of only SITLA's case.

On July 13, 1998, UAC filed a motion to compel defendants' compliance with the mandatory disclosure rules of FRCP 26, in which MSLF concurred. On July 31, 1998, defendants filed a motion for a protective order and opposition to the motion to compel, as well as a motion to dismiss or alternatively for summary judgment. On August 13, 1998, UAC filed its reply to defendants' opposition to the motion to compel. On August 18, 1998, MSLF and UAC filed oppositions to defendants' motion for a protective order, and on August 28, 1998, defendants filed their reply. A hearing on the matter was held September 1, 1998, after which Magistrate Boyce issued an order that plaintiffs file a motion under FRCP 56(f) for a continuance of the summary judgment proceedings pending discovery.

On September 16, 1998, MSLF and UAC filed Rule 56(f) motions. On September 30, 1998, defendants filed oppositions. On October 6, 1998, Magistrate Boyce signed and issued MSLF's and UAC's proposed orders, which continued the proceedings on summary judgment pending federal defendants' compliance with Rule 26 and responses to several discovery requests made by MSLF and UAC in their Rule 56(f) motions. Federal defendants filed a motion to reconsider and a motion to stay the Rule 56(f) orders and filed with the District Court objections to the magistrate's orders.

A hearing on the motion to stay and the motion to reconsider was held before the Magistrate Judge November 19, 1998. The Magistrate ruled that the motion to reconsider was untimely and therefore not properly before the Court. He stayed his prior discovery orders except for the order that defendants produce their initial disclosures, for which he set a date of December 21, 1998. On November 19, 1998, defendants filed another motion to dismiss due to congressional ratification of the Monument. The responses of MSLF and UAC to defendants' objections to the Rule 56 orders of the Magistrate were
filed on December 3, 1998, UAC filed its opposition to defendants' motion to dismiss on December 5, 1998, and MSLF filed its opposition on December 7, 1998. A hearing on the motion to dismiss was held on March 9, 1999, and on August 11, 1999, the court denied the motion.

On November 11, 1999, federal defendants filed a motion for certification, pursuant to 28 U.S.C. § 1292(b), requesting that District Court Judge Benson certify for immediate appeal to the Tenth Circuit his denial of the federal government's motion to dismiss due to Congressional ratification. On November 29 and 30, 1999, UAC and MSLF filed oppositions. At a hearing on January 20, 2000, Judge Benson refused to certify for immediate appeal his denial of the motion to dismiss. On July 7, 2000, two judges of the Tenth Circuit declined the Circuit unwilling to overturn the District Court's refusal to certify.

On March 21, 2000, the Southern Utah Wilderness Alliance (SUWA), The Wilderness Society, The Grand Canyon Trust, Escalante Canyon Outfitters, Inc., Escalante's Grand Staircase B&B/Inn, Inc., and Boulder Mountain Lodge filed a motion to intervene and lodged answers to UAC's Complaint and MSLF's first amended Complaint. On April 7, 2000, UAC filed its opposition to the motion to intervene, on April 10, 2000, MSLF filed its opposition, and on April 17, 2000, federal defendants filed their response. On April 17, 2000, The Wilderness Society, et al., filed their reply. After a hearing on May 25, 2000, the Court denied the motion to intervene on June 6, 2000.

On August 2, 2000, SUWA and The Wilderness Society, et al., filed a notice of appeal of the denial of their motion to intervene, and the appeal was docketed on August 14, 2000. On September 29, 2000, The Wilderness Society, et al., filed their opening brief and appendix. On November 1, 2000, UAC and MSLF filed a joint response in opposition, and on November 20, 2000, the Wilderness Society filed its reply. Oral arguments were held on March 15, 2001. On July 10, 2001, the Tenth Circuit reversed the District Court's denial of the motion to intervene and remanded the matter to the District Court with directions that the application to intervene as of right be granted. The Court noted that the government had taken no position on the motion to intervene and held that the intervenors had met the "minimal burden of showing that their interests may not be adequately represented by the existing parties." The Court also held that the application was timely in view of the "relatively early stage of the litigation." On August 3, 2001, SUWA and The Wilderness Society, et al., filed a renewed motion to intervene.

On September 6, 2001, the District Court granted the motion to intervene.

The previously ordered discovery was completed and a status/scheduling conference held on October 7, 2002, at which it was agreed that the case could be decided on motions for summary judgment. The federal defendants are standing by their brief in support of their motion to dismiss or, in the alternative, for summary judgment, which was filed on July 31, 1998. Briefing by the other parties will start with a motion for summary judgment or, in the alternative, to dismiss to be filed by SUWA by March 17, 2003. UAC and MSLF will then each file a consolidated opposition to the motions for summary judgment or to dismiss and a cross motion for summary judgment by April 29, 2003. Responses and replies follow and the final brief will be filed by July 31, 2003. Motions for enlargement of the page limits will be entertained by the Court, in that the
federal defendants' motion for summary judgment is 90 pages long \(^1\) (Amanda Koehler) (Co-Counsel Steve Christiansen) (96-3866)

**MOUNTAIN STATES LEGAL FOUNDATION v. NORTON, et al., and WALCHER, et al.**
(Private Property Rights, Limited and Ethical Government) (Plaintiff) (U.S. District Court, Colorado, Case No. 03-WY-0110(CB)(CBS))

On January 3, 2003, the Board of Directors approved, by mail, the filing of a complaint for declaratory and injunctive relief, under the National Environmental Policy Act (“NEPA”), in an attempt to delay the reintroduction, by the Colorado Division of Wildlife, of the Canadian lynx into southern Colorado.

Pursuant to Title 33 of the Colorado Revised Statutes, the Colorado Wildlife Commission (“the Commission”) and the Colorado Division of Wildlife (“CDOW”) have comprehensive authority to manage wildlife throughout the State of Colorado. This authority allowed the Commission to list the Canadian lynx (Lynx canadensis) as an endangered species in the state of Colorado in 1976. Also in 1976, the Colorado Department of Natural Resources and CDOW entered into a Cooperative Agreement pursuant to Section 6 of the Endangered Species Act (“ESA”) with the US Department of Interior and the US Fish and Wildlife Service (“FWS”), which confirms that the State of Colorado has an adequate and active program for the conservation of endangered and threatened species, entitling the State to federal funding.

In November 1998, the Commission approved a resolution that allowed CDOW to introduce the Canadian lynx into Colorado. On December 11, 1998, MSLF filed suit on behalf of the Colorado Farm Bureau Federation, Colorado Outfitters Association, Colorado Cattlemen’s Association and Colorado Wool Growers Association for declaratory and injunctive relief under NEPA. On January 15, 1999, the District Court denied MSLF’s request for a temporary restraining order and dismissed the case. MSLF appealed this order to the Tenth Circuit, which upheld the dismissal of the case for lack of final agency action.

On February 3, 1999, CDOW released the first lynx into the forests of the South San Juan Mountains west of the San Luis Valley. During the next two years, a total of 96 Canadian lynx were introduced. To date, CDOW reports 44 known mortalities, considers 18 lynx missing, and continues to monitor the 34 lynx remaining from the introduced Canadian population.

On March 24, 2000, the FWS listed the contiguous U.S. Distinct Population of the Canadian lynx as threatened under ESA § 4(c). This population segment includes the forested parts of the States of Colorado, Idaho, Maine, Michigan, Minnesota, Montana, New Hampshire, New York, Oregon, Utah, Vermont, Washington, and Wisconsin. This determination became effective on April 24, 2000.

On March 31, 2000, the FWS authorized Region 6 of the FWS and its subpermittees to “take” federally listed species for the “enhancement of propagation or survival for approved recovery activities.” CDOW was designated a subpermittee under subpermit 00-04 00, which allows any employee or agent of CDOW to conduct its

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augmentation program for the Canadian lynx. This permit marks the point in time when jurisdiction over the Canadian lynx shifted from the State of Colorado to the US Department of the Interior and the FWS.

On October 28, 2002, CDOW sent a request to the FWS for annual renewal and amendment of the Cooperative Agreement. Thereafter, the FWS prepared a Biological Opinion on the impact on Canadian lynx associated with amending the Cooperative Agreement. This Opinion granted incidental take authority to CDOW as member to the Cooperative Agreement.

During its meeting on November 14-15, 2002, the Commission approved a “Resolution Regarding Lynx Recovery in Colorado” that directed CDOW to proceed with augmentation of the introduced population of Canadian lynx. CDOW plans to introduce an additional 150-180 Canadian lynx into Colorado during the next five years in an attempt to give the original introduced Canadian lynx a better chance of succeeding. CDOW intends to release 50 lynx in the spring of 2003 and each spring thereafter for the next five years.

On January 16, 2003, MSLF filed a Complaint for declaratory and injunctive relief, suing Secretary Norton, Steven Williams, Director of FWS, and Ralph Morgenweck, Regional Director of FWS, and the DOI and FWS, as well as Greg Walcher, Executive Director of the Colorado Department of Natural Resources and Russell George, Director of the Colorado Division of Wildlife. (Jennifer Soice) (02-5172)

**MOUNTAIN STATES LEGAL FOUNDATION**
**AND THE BLUE RIBBON COALITION v. BUSH**

(Appellant and Counsel for Appellant Blue Ribbon Coalition)
(D.C. Circuit, Case No 01-5421)

On August 4, 2000, the Board of Directors approved, by mail, MSLF’s representation of individuals, public land-use groups, local government entities, and itself in a lawsuit against President Clinton for exceeding the bounds of his constitutional authority in the establishment of four national monuments. On June 9, 2000, President Clinton withdrew from entry, by Executive Proclamations 7317-7320, and pursuant to the alleged authority granted to him as President by the Antiquities Act of 1906, hundreds of thousands of acres of federal lands by creating four new national monuments in four Western States including the Canyons of the Ancients National Monument in southwestern Colorado, the Cascade-Siskiyou National Monument in south-central Oregon, the Hanford Reach National Monument in central Washington, and the Ironwood Forest National Monument in central Arizona. Each withdrawal restricts permissible economic and recreational activity on the lands to varying degrees.

The Canyons of the Ancients National Monument comprises 164,000 acres in the Four Corners area, about 45 miles west of Durango, Colorado, and 9 miles west of Mesa Verde National Park. The monument area contains the highest known density of archeological sites in the United States, in parts of the area there are more than 100 sites.
per square mile. Because of both the remoteness of the area and the protection efforts of the BLM and the local community, the archeological resources of this area do not need additional protection. However, when the monument was announced, the White House asserted that "The growth of population and tourism in the Four Corners area will increasingly threaten these resources with vandalism and other types of degradation, making additional protections necessary."

The Cascade-Siskiyou National Monument comprises 52,000 acres at the convergence of the Klamath and Cascade Mountains, 25 miles southeast of Medford, Oregon, along the California border. Only one feature can be described as of "historical interest," parts of the Oregon/California Trail used by Peter Skene Ogden in his 1827 exploration for the Hudson’s Bay Company, and only one feature can be described as of particular "scientific interest," a volcanic plug, Pilot Rock. The Cascade-Siskiyou Monument area contains a "spectacular variety of rare and beautiful species of plants and animals, whose survival in this region depends upon its continued ecological integrity."

According to the proclamation, the area contains "one of the highest diversities of butterfly species in the United States" and, in the Jenny Creek area, a significant center of diverse freshwater snails and three endemic fish species, including a long-isolated stock of redband trout. The area "also contains old growth habitat crucial to the threatened Northern spotted owl and numerous other bird species such as the western meadowlark, the pileated woodpecker, the flammulated owl, and the pygmy nuthatch."

The Cascade-Siskiyou Monument is to be managed similarly to the Canyons of the Ancients. In addition, subject to valid existing rights, "a quantity of water sufficient to fulfill the purposes for which this monument is established" is to be reserved. The commercial harvest of timber or other vegetative material from the monument area is prohibited, and the impacts of livestock grazing on the area is to be studied, "with specific attention to sustaining the natural ecosystem dynamics." Grazing allotments are to be retired where "grazing is incompatible with protecting the objects of biological interest."

The Hanford Reach National Monument comprises 195,000 acres along the Columbia River in south-central Washington, within the borders of the Department of Energy’s (DOE) Hanford Nuclear Reservation. One part of the Hanford Monument area contains "hundreds of prehistoric archeological sites including the remains of pithouses, graves, spirit quest monuments, hunting camps, game drive complexes, quarries, and hunting and kill sites." The only other feature of the area "of historic or scientific interest" is a mammalian fossil assemblage within the White Bluffs cliffs on the eastern bank of the Columbia.

The proclamation states that "[t]he Hanford Reach National Monument is a unique and biologically diverse landscape, encompassing an array of scientific and historic objects" and that "[t]he monument is equally rich in geologic history, with dramatic landscapes that reveal the creative forces of tectonic, volcanic, and erosive power." The proclamation seeks to protect a wide array of plant and animal life by listing myriad species and explaining the importance of the area as habitat. The U.S. Fish and Wildlife Service (FWS), under existing agreements with the DOE and together with the DOE, is to manage the monument lands. The DOE is to gradually turn over to the FWS lands that the DOE manages that were formerly part of the Hanford Nuclear.
Reservation, as those lands become suitable for management by the FWS. Subject to
valid existing rights, the proclamation withdraws all federal lands within the monument
boundaries from entry, location, selection, sale or other disposition under the public land
laws, including the mining laws and laws relating to mineral and geothermal leasing, and
it prohibits all livestock grazing and all motorized and mechanized off-road vehicle use.
The proclamation reserves a quantity of water in the Columbia River sufficient to fulfill
the purposes for which the monument is established.

The Ironwood Forest National Monument comprises some 129,000 acres about
25 miles northwest of Tucson, Arizona. More than 200 sites from the prehistoric
Hohokam period (600-1450 A.D.) in the area feature "rock art sites and other
archeological objects of scientific interest." The monument area also contains three areas
of historical interest.

The purpose of the Ironwood Monument is similar to that of the other monuments
in that its purpose is something other than the preservation of true antiquities as intended
by the Antiquities Act. "With the continuing urban expansion of southern Arizona,
protecting critical wildlife habitat and preserving these rich stands of ironwood are of
paramount importance. Within the Sonoran Desert, Ragged Top Mountain contains
the greatest richness of species. The monument is home to species federally listed as
threatened or endangered, including the Nichols turk's head cactus and the lesser long-
nosed bat, and contains historic and potential habitat for the cactus ferruginous pygmy-
owl." The archeological sites and areas of scientific and historic interest are discussed in
the proclamation after a detailed summary of the ecology and geology.

During preparation of the Complaint, the Grand Canyon-Parashant National
Monument in northwestern Arizona was created by Proclamation 7265 on January 11,
2000.

On August 29, 2000, MSLF filed a Complaint on behalf of itself and the Blue
Ribbon Coalition, alleging that the withdrawals of public land to create these monuments
exceed any authority specifically granted to the President by either the Constitution or the
Congress to dispose of public lands. Because the President's actions were ultra vires, the
suit is not barred by the doctrine of sovereign immunity. MSLF and the Blue Ribbon
Coalition meet the requirements for standing of Article III of the U.S. Constitution. In
addition, because the President is not an agency and clearly has made a final decision,
ripeness is not a relevant consideration.

On October 24, 2000, The Wilderness Society, Natural Resources Defense
Council, Sierra Club, Soda Mountain Wilderness Council, and National Wildlife
Federation) (referred to jointly as The Wilderness Society) filed a motion to intervene
and lodged an answer. MSLF responded on November 7, 2000, and The Wilderness
Society replied on November 16, 2000.

On November 17, 2000, the government filed a motion to dismiss.

On December 5, 2000, the Court granted the motion of The Wilderness Society, et
al., to intervene pursuant to FRCP 24(b)(2) and ordered that all filings by intervenors be
joint filings and that any motion to dismiss be filed by December 29, 2000.
On December 27, 2000, The Wilderness Society filed a motion to dismiss. On January 16, 2001, President Clinton announced the creation of six additional monuments. So that MSLF would have time to evaluate this newest group of monuments and perhaps amend its Complaint, on January 19, 2001, the parties filed a joint motion for extension of time until January 26, 2001, for MSLF to file either its response to the motions to dismiss or a motion to amend its Complaint. On January 25, 2001, MSLF amended its Complaint, primarily to add the Sonora Desert Monument.

On March 23, 2001, the National Trust for Historic Preservation, Society for American Archaeology, and Defenders of Wildlife filed an unopposed motion to intervene and submit joint briefs and arguments with The Wilderness Society. On March 30, 2001, the motion to intervene was granted.

On March 23, 2001, The Wilderness Society filed a motion to dismiss the case in its entirety, and on March 26, 2001, the federal appellee filed a motion to dismiss. On April 16, 2001, MSLF filed its opposition to both motions. On May 4, 2001, The Wilderness Society replied, and on May 7, 2001, the federal appellee replied. Oral arguments on the motions to dismiss were held November 15, 2001, at which time the judge dismissed the case and issued an opinion from the bench.

MSLF filed a notice of appeal on November 26, 2001, and the docketing statement and other preliminary materials on December 27, 2001. Its opening brief and appendix were filed on May 6, 2002, and on July 3, 2002, the federal appellee’s brief and the joint brief of the remaining appellees were filed. MSLF’s reply was filed on July 17, 2002. Oral arguments were held on September 3, 2002, and on October 18, 2002, the Court affirmed the lower court’s ruling. On November 27, 2002, MSLF filed a petition for rehearing en banc with the D.C. Circuit and a decision is still pending. (Amanda Koehler) (00-4679)

**NATURAL ARCH AND BRIDGE SOC., et al. v. NATIONAL PARK SERVICE, et al.**

(Access To and Use of Federal Lands, Constitutional Rights and Liberties)

(Counsel for Natural Arch and Bridge Society, et al.)

(Tenth Circuit, Utah, Case No. 02-4099)

This case was approved by the Board of Directors on February 5, 1999. In 1995 the National Park Service (NPS) erected signs at the Rainbow Bridge National Monument (Rainbow Bridge) discouraging visitors from walking under or near the world’s largest natural arch. Next, the NPS blockaded the old trail leading under the arch because walking under the arch is offensive to various native American groups. In addition, the NPS distributes at the Monument a pamphlet that discourages approaching the arch. This pamphlet describes the Rainbow Arch as “a sacred religious site.”

The NPS provides “interpreters” at the Monument for crowd control and “to inform visitors that the monument is special, one held sacred by the Navajo. The interpretive program attempts to convey reverence for the uniqueness of Rainbow Bridge, help set it apart from the recreation area, and promote respect for it among visitors.”

The signs and policies at Rainbow Bridge are a result of the large number of visitors that annually visit the Monument, estimated at 250,000-300,000. Controlling the
number of visitors is the main thrust of the NPS plan. The Monument is surrounded on three sides by the Navajo reservation. For most visitors the only access to the Monument is by Lake Powell. The NPS maintains a trail leading to the Monument from the Navajo reservation and grants unlimited access to the Monument for Navajos who use the trail. The General Management Plan of the Monument goes so far as to state “[v]isitor use beyond the second viewing area will be discouraged, except for hikers coming down from Navajo Mountain (i.e., the Navajos).”

On two separate occasions the Park Service threatened to cite NABS members who had ventured off the unofficial path that approaches the Rainbow Bridge. On March 3, 2000, MSLF filed suit on behalf of NABS and several individual members of NABS in U.S. District Court for the District of Utah asserting that the NPS policy of protecting the Rainbow Bridge as a “sacred” site violates the Establishment Clause.

On May 15, 2000, the NPS filed its answer. Between October 24 and November 20, 2000, the NPS deposed Plaintiffs DeWaal and Johnson and MSLF deposed an NPS ranger and a senior NPS ranger. Discovery was completed on November 30, 2000.


On April 30, 2001, the Court heard arguments on the motions to dismiss and for summary judgment. On April 5, 2002, the Court issued a Memorandum Opinion and Order in which it granted the government’s motion to dismiss as to plaintiffs Moore, Brandt-Ercson, Leake, Johnson, and NABS for lack of standing and as to DeWaal’s equal protection claim for failure to state a claim. The government’s motion to dismiss was denied as to plaintiff DeWaal. DeWaal’s motion for summary judgment was denied as to his challenge to the 1993 GMP and Interpretive Prospectus under the APA and his claim dismissed on the merits and his motion for summary judgment was denied as to his claim involving alleged violation of the First Amendment by employees of the NPS for failure to join the proper parties as defendants. On April 9, 2002, judgment was entered in favor of the United States.

On June 5, 2002, MSLF filed a notice of appeal with the Tenth Circuit on behalf of the plaintiffs. The docketing statement was filed on June 14, 2002, and the entry of appearance and transcript order were filed on June 17, 2002. On August 27, 2002, the Conference Administrator for the Tenth Circuit held an unsuccessful telephone mediation conference.

MSLF files NABS’s opening brief on November 14, 2002. The government’s brief was filed on January 16, 2003. On January 23, 2003, the Association on American Indian Affairs, the Medicine Wheel Coalition on Sacred Sites of North American, and the National Trust for Historic Preservation filed an amicus curiae brief in support of the appellees. NABS’s reply is due on February 3, 2003 (William Thode) (96-3871) (Mentor Scott) (Co-Counsel Pos).
Note *Park Lake I* is not an active case. It is included to provide historical perspective on litigation involving the two plaintiffs in the Hoosier Ridge Research Natural Area (Hoosier Ridge RNA).

In November 1991 the United States Forest Service (Forest Service) issued a decision notice establishing the Hoosier Ridge RNA. Park County Mining Ass'n filed an administrative appeal with the Chief of the Forest Service (Chief) on March 15, 1992. On June 9, 1992, the Chief withdrew his decision, dismissed the appeal, and directed the Rocky Mountain Regional Forester (Regional Forester) to reevaluate the area for designation as an RNA.

During May 1995 the Forest Service finalized an Environmental Assessment (EA) that recommended establishment and designation of the Hoosier Ridge RNA. On December 5, 1995, Elizabeth Estill, Regional Forester, issued a Decision Notice/Designation Order and Finding of No Significant Impact. Designation of the RNA would require a public land withdrawal for mining and proof of discovery to maintain existing claims within the Hoosier Ridge RNA.

On January 31, 1996, MSLF, on behalf of Park Lake Resources, LLC, and the Park County Mining Ass'n, filed an administrative appeal with the Chief requesting that the decision be set aside. On March 28, 1996, the Chief upheld the Regional Forester's decision.

On August 1, 1996, a Complaint was filed. On October 16, 1996, at a pre-briefing conference, the Forest Service stated that it would contest the claims and seek input from plaintiffs in developing the sampling procedure to be utilized on the claims.

At a conference held November 21, 1996, the Forest Service stated that it had approval to settle with plaintiffs by adjusting the RNA boundaries to exclude the mining claims. The parties agreed to a third pre-briefing conference on August 21, 1997, and on March 11, 1997, met to discuss boundary adjustments to exclude the mining claims. The meeting produced no results, and a joint status report to that effect was filed on March 31, 1997. On April 9, 1997, the court ordered the Forest Service to file the administrative record. Following briefing, a hearing was held on July 18, 1997, and on November 18, 1997, the court ruled in favor of defendants.

Park Lake filed a notice of appeal on January 14, 1998. At a mandatory mediation conference on March 10, 1998, the Forest Service rejected plaintiffs' settlement offer. Briefing was completed on November 4, 1998, and oral arguments were held on September 21, 1999. On November 19, 1999, the Tenth Circuit dismissed the appeal, vacated the decision of the District Court, and remanded the case with instructions to dismiss the Complaint as not ripe (92-3170).
(Park Lake II)
(Access To Federal Lands and Resources) (Counsel for Park Lake Resources, et al)
(Tenth Circuit, Colorado, Case No 02-1429)

Park Lake II is a continuation, under that case’s approval authority, of Park Lake Resources and Park County Mining Ass’n v U.S. Forest Service, et al (Park Lake I) On March 5, 2001, MSLF filed a Complaint on behalf of Park Lake Resources, LLC, and Park County Mining Association On May 7, 2001, the federal government filed a motion to dismiss

On May 15, 2001, the case was transferred from the AP docket and Judge Kane to the regular docket and Senior Judge Zita Weinshenk, who had presided over Park Lake I On May 17, 2001, Park Lake filed an unopposed motion for leave to respond to the motion to dismiss On May 22, 2001, the court granted the motion and ordered the response to be filed by June 8, 2001, and not exceed 10 pages The government was given the option of filing a reply brief, not to exceed 5 pages, by June 22, 2001 A hearing on the motion was set for July 17, 2001

On June 4, 2001, Judge Weinshenk vacated, on Park Lake’s unopposed motion, the briefing schedule and hearing, granted Park Lake’s unopposed motion to file an amended Complaint, and ordered the Clerk to file-stamp the tendered amended Complaint

Park Lake’s first amended Complaint was served on counsel for the parties on June 1, 2001 The government’s answer was due July 31, 2001, however, on June 19, 2001, the Magistrate Judge granted the government’s motion for extension of time until August 6, 2001

On June 12, 2001, Magistrate Judge Watanabe issued an order in which he referred to the hearing on the government’s motion to dismiss (filed prior to the amended Complaint) as set for July 17, 2001, despite Judge Weinshenk’s order vacating that hearing Based on that schedule for the hearing, and disregarding the existence of a newer, amended Complaint, which required a new answer and/or motion to dismiss, he vacated the scheduling conference set for June 14, 2001, reset the conference for August 23, 2001, and ordered that a proposed scheduling order be submitted to five business days prior to the conference, by August 16, 2001

On August 6, 2001, the government filed a motion to dismiss in response to Park Lake’s amended Complaint in which it argued that the Forest Service was an improper defendant for a number of reasons On August 9, 2001, Park Lake filed a motion to vacate Judge Watanabe’s scheduling order of June 12, 2001, and for leave to file a response to the government’s motion to dismiss by August 30, 2001 On August 9, 2001, Judge Weinshenk issued a minute order granting Park Lake’s request to file a response to the government’s motion to dismiss and allowing the government until September 14, 2001, to file a reply On August 10, 2001, Judge Watanabe issued a minute order denying Park Lake’s motion to vacate the scheduling order A proposed scheduling order
was to be submitted to the Magistrate Judge by August 16, 2001, and the scheduling conference was set for August 23, 2001, but, before that date, was vacated.

On August 31, 2001, Park Lake filed its response to the motion to dismiss in which it argued that the Forest Service was a proper defendant because its actions, though not the last link in the chain of events, were a determinative factor in the Department of the Interior's actions. On September 17, 2001, the government filed its reply to Park Lake's response, arguing that the actions of the Forest Service were not determinative in the DOI's actions and submitting a declaration by Doris Chelius, a Forest Service employee, in support of its argument.

On September 21, 2001, Park Lake moved to strike the declaration of Doris Chelius, and on September 28, 2001, the government filed a motion for leave to file, by October 5, 2001, a response to Park Lake's motion to strike. Park Lake had no objection to the motion, and on October 5, 2001, the response was filed.


Park Lake's opening brief was served on December 19, 2002. The government's response brief is due on February 4, 2003, and Park Lake's reply is due on or about February 21, 2003. (Tara Rismami) (01-4796)

(Access to Public Lands)
(U.S. District Court, Wyoming, Case No. 02-CV-116)

This case was approved by the Board of Directors on September 16, 2002. In February 2000 the Bureau of Land Management ("BLM") conducted a competitive oil and gas lease sale of 49 parcels in Wyoming. At this sale, Pennaco Energy, Inc. ("Pennaco"), purchased Parcels 82, 92, and 93, primarily for coalbed methane production. The Wyoming Outdoor Council and the Powder River Basin Resource Council ("Councils") and 46 others challenged the sale of the 49 parcels. The BLM upheld its decision to offer the parcels for sale based on its belief that (1) the production of coalbed methane is not significantly different from the production of gas from other formations and depths and (2) sufficient regulatory protections were in place to deal with the produced water.

The Councils appealed the BLM's decision to the Interior Board of Land Appeals ("IBLA"). On October 6, 2000, the IBLA issued a decision dismissing the appeal as to all but three of the sale parcels for lack of standing, granting the request for a stay of the BLM decision as to only those three parcels, and ordering the Councils and the BLM to serve all previously filed documents on the purchasers of those three parcels. Wyoming Outdoor Council, 153 IBLA 379 (2000). On November 14, 2000, the IBLA granted Pennaco's motion to intervene. On April 26, 2002, despite arguments from the BLM and Pennaco in favor of the sale, the IBLA ruled in favor of the Wyoming Outdoor Council, holding that the BLM did not properly follow the National Environmental Policy Act.

Lease Parcels, 82, 92, and 93 are within an area managed by the BLM Buffalo Field Office ("Buffalo Area"). In the Buffalo Area there has been substantial oil and gas leasing, exploration, and development. Oil and gas produced from sandstone, limestone, and shale varies from pure methane to gas containing liquids and gas containing non-hydrocarbon substances. Some oil and gas fields in the Buffalo Area have produced millions of gallons of water per day, water discharged primarily into streams and drainages pursuant to National Pollution Elimination Discharge System permits issued by the Wyoming Department of Environmental Quality. A sworn affidavit of the Assistant Field Manager for the Buffalo Area ("Zander Affidavit") states that significantly more water is produced in conjunction with oil and gas from non-coalbed formations than is projected to be produced from coalbed methane wells.

The potential environmental impacts of these disparate oil and gas activities are analyzed in the Buffalo Area Resource Management Plan ("Buffalo RMP") and environmental impact statement ("Buffalo RMP EIS"), released on October 4, 1985. The Buffalo RMP and the Buffalo RMP EIS considered, inter alia, the possible water quality and quantity effects arising from oil and gas activities. Although the Buffalo RMP does not provide a limit on the number of oil and gas leases the BLM could issue or on the number of wells that could be drilled, it does state that 360,000 acres "could not be occupied by oil and gas activities" in order to protect water and other resources. According to the Zander Affidavit, the Buffalo RMP also imposes seasonal and other restrictions on 2,210,000 acres to protect water and other resources. Further, the Affidavit provides that the BLM impose additional restrictions to protect water resources within the Buffalo Area, including a lease provision to "[p]rohibit surface disturbance within 500 feet of any spring, reservoir, water well, or perennial stream unless the prohibition is waived by the authorized officer."

According to the Zander Affidavit, the techniques used to drill and complete wells, to produce the gas, and to transport the gas to market via pipelines and compressors are virtually the same for coalbed methane and other gas wells, and the potential environmental impacts associated with coalbed methane wells are within the range of impacts associated with other oil and gas wells. As a consequence, BLM regulates coalbed methane and other oil and gas wells under the same regulatory authorities.

Prior to the February 2000 lease sale, the BLM took several steps in order to comply with NEPA's "hard look" requirement for these parcels and assembled an interdisciplinary team of experienced natural resource specialists. Based on this team's analysis, on September 28, 1999, the Acting Field Manager of the Buffalo Area Office issued separate but identical "Interim Documentation of Land Use Conformance and
NEPA Adequacy” worksheets for each of the three parcels. These worksheets assessed whether the oil and gas lease sale conformed to the Buffalo RMP and Buffalo RMP EIS and analyzed whether the sale conformed to the May 4, 1999, Wyodak Draft environmental impact statement (“Wyodak DEIS”). As a result of all the studies the BLM determined that offering Parcels 82, 92, and 93 for competitive oil and gas leasing would not significantly impact the quality of the human environment.

In deciding whether the sale conformed with these documents, the Acting Field Manager relied upon the Tenth Circuit’s decision in Park County Resource Council, Inc. v. U.S. Department of Agriculture, 817 F.2d 609 (10th Cir. 1987), which holds that preleasing NEPA requirements are satisfied if the BLM generally considers potential environmental impacts prior to lease issuance and reserves a more detailed environmental analysis until a drilling proposal is made. The BLM determined that its reliance on the Buffalo RMP, Buffalo RMP EIS, and Wyodak DEIS was the only preliminary analysis required by Park County because site-specific NEPA documentation would be prepared when the lease holders filed applications for drilling permits.

In February 2002, the BLM posted notice of a competitive oil and gas lease sale scheduled for April 2002. Approximately 142 parcels were offered for sale and environmental groups immediately protested 105 of them. MSLF believes that the grounds of the protests are that the BLM failed to comply with NEPA, similar to the Pennaco case. The BLM announced that it would still offer the protested parcels for sale. At the April sale, Nance Petroleum Corporation successfully bid on parcels 34–38, 41, and 45–48, all within the Buffalo Area and all of which were protested. As of September 6, 2002, the protests regarding these parcels were still pending before the Wyoming State Director, BLM.

On October 3, 2002, MSLF filed a motion to intervene on behalf of Nance and a brief in support of the motion. On October 28, 2002, the federal government filed its opposition to Nance’s motion to intervene. At the request of the Court, on November 7, 2002, five days before it was due, MSLF filed Nance’s reply to the federal government’s opposition to Nance’s motion to intervene.

At the initial pretrial conference on November 13, 2002, the Magistrate Court granted Nance’s motion to intervene, set the briefing schedule, and scheduled a hearing on the briefs for March 13, 2003, before District Court Judge Brimmer. On December 23, 2003, the plaintiff, Pennaco, and the various plaintiff-intervenors, including Nance Petroleum, filed opening briefs. The government’s response brief is due on February 3, 2003, and replies are due on February 17, 2003. (Chris Massey) (02-5045)

**ROTH v. UNITED STATES**

(Private Property Rights, Access to Federal Lands)
(Counsel for Roth) (U.S. District Court, Montana, CV 02-44-M-LBE)

On October 5, 2001, the Board of Directors approved the filing of a quiet title action on behalf of Mr. Stephen Roth arguing that he has a congressionally granted right-of-way for the Tamarack Lake Dam located in the Bitterroot National Forest and Selway-Bitterroot Wilderness Area pursuant to the Acts of 1866 and 1891.
The Forest Service has refused to renew a special use permit that Mr. Roth has had for many years. It issued an ultimatum to Mr. Roth demanding that he sign either a new special use permit that requires the payment of annual fees or a ditch bill easement, under which he relinquishes his claim to a right of way under the Acts of 1866 and 1891. It also issued a legal memorandum, devoid of any legal authority, finding that (1) because there is insufficient evidence to prove that the dam was constructed in the early 1890's, Mr. Roth has no right-of-way under the Act of 1866, and (2) the Tamarack Lake Dam does not have pre-FLPMA easement status. In order for Roth to maintain a right-of-way pursuant to either the Act of 1866 or the Act of 1891, he must proceed with a quiet title action.

MSLF completed its review of the materials sent by Roth's previous attorney. On March 7, 2002, the Complaint and related materials were sent to local counsel, who filed the Complaint on March 11, 2001. On March 12, 2002, the Court issued a scheduling order for preliminary matters including the Case Management Plan.


On November 26, 2002, Chief Judge Molloy, to whom the case had been assigned, reassigned the case, for all proceedings, to Magistrate Judge Leif B. Erickson. Discovery closes on February 7, 2003, and Roth's opening brief is due on March 10, 2003. (Amanda Koehler) (Local Counsel Ward Shanahan) (01-4845)

**SOUTH DAKOTA COUNTY v. U.S. FOREST SERVICE, et al.**

(Access To Public Lands and Resources, Limited and Ethical Government)

(Counsel for Plaintiff County(s)) (U.S. District Court, South Dakota)

On October 4, 2002, the Board of Directors approved this case. The devastating forest fires of the spring and summer of 2002 demonstrated to the Nation that the United States Forest Service has failed to maintain healthy forests. This failure is due in part to the many appeals and lawsuits filed by environmental groups and in part to the decision by the Clinton Administration that fire is an effective management tool. Arizona, Oregon, and Colorado were most hard hit, however, forest fires also caused devastation and destruction in South Dakota. Just days after President George W. Bush visited Mount Rushmore, flames leaped a state highway and came within 5 miles of the Memorial.

For years, the Forest Service has been reducing the amount of timber that can be harvested on National Forest lands. As a result, the Black Hills National Forest, as well as many other Forests, has unprecedented levels of lodge pole pine growth and trees grow in close proximity to each other. Thus, when a mountain pine beetle swarm arrives and moves from tree to tree, more beetles are able to attack each tree. Healthy trees that
might otherwise survive if the trees were further apart are unable to withstand the number of beetles attacking from nearby trees. The Forest Service asserts that its current forest management plan provides mechanisms for dealing with the epidemic, but local residents and the experts with whom they have discussed the matter, including Forest Service scientists, disagree. These experts know what they are talking about because most studies of the mountain pine beetle and lodge pole pine forests have been done in the Black Hills National Forest.

The county in South Dakota hardest hit by the mountain pine beetle is Lawrence County, wherein lie Spearfish, Lead, and Deadwood. In addition, the Black Hills National Forest has the largest percentage of privately held land of any National Forest in the country. The presence of many small landowners, the proximity of small towns, and the prominence of the Black Hills in the Nation’s psyche provide an excellent setting in which to demand that the Forest Service manage for forest health in an effort to avoid the disasters that have befallen National Forests in other Western states.

Those South Dakota counties that receive a share of the revenue produced from harvesting timber in the Black Hills National Forest have standing to challenge violation of federal law by the U.S. Forest Service. MSLF will argue that those counties’ revenues from timber harvesting have decreased, that the decrease is the result of the Forest Service’s failure to harvest timber, and that a court order requiring the Forest Service to manage for forest health would redress the counties’ injuries. In *Mountain States Legal Foundation v. Glickman*, 92 F.2d 1228, 1234-1235 (D.C. Cir. 1996), the D.C. Circuit held that local residents suffer both economically and environmentally from and have standing to challenge harmful Forest Service decisions.

MSLF will sue the Forest Service on behalf of one or more South Dakota counties and will assert that the Forest Service has a duty to manage for forest health by controlling the mountain pine beetle epidemic and has breached that duty. (Amanda Koehler) (02-5130)

**SOUTHERN UTAH WILDERNESS ALLIANCE v. NATIONAL PARK SERVICE, et al., and UTAH SHARED ACCESS ALLIANCE, et al.**

(Access To Public Lands and Resources)

(Counsel for Defendant-Intervenors Utah Shared Access Alliance, et al.)

(U.S. District Court, Utah, Case No. 2:95-cv-0559K)

On June 22, 1995, the Southern Utah Wilderness Alliance (SUWA) filed suit against the National Park Service (NPS) seeking to close almost all motorized access in the areas covered by a Backcountry Management Plan issued for Canyonlands National Park and the Orange Cliffs Unit of Glen Canyon National Recreation Area. The Utah Trail Machine Association, et al. (UTMA), wish to keep the public roads open. On December 7, 1995, MSLF filed a motion to intervene on behalf of the UTMA, and on April 4, 1996, the Court granted the motion. SUWA and the NPS filed motions for summary judgment. The UTMA filed memoranda in support of the NPS’s motion. Oral arguments were held on February 12, 1998. In a memorandum decision and order issued on June 19, 1998, intervenors prevailed on all issues except one, Judge Kimball ruled that
vehicle use on Salt Creek Canyon Road beyond Peekaboo Sprng violated the National Park Service Organic Act, in that continued use would permanently impair that part of the Park. Judge Kimball gave SUWA until August 5, 1998, to advise the Court as to the remedy that should be granted. This deadline that was extended three times.

On September 22, 1998, SUWA and the federal defendants filed a purported stipulation and joint motion regarding a form of judgment. On September 23, 1998, Judge Kimball signed the judgment, which granted defendants summary judgment on all but one of plaintiff's causes of action. Regarding plaintiff's fourth cause of action, plaintiff was granted summary judgment and defendants were enjoined from allowing vehicular traffic on the road known as the Salt Creek Jeep Trail between Peekaboo Spring and Angel Arch.

MSLF filed a notice of appeal on November 23, 1998, appealing the injunction against vehicular traffic on the Salt Creek Jeep Trail issued by the District Court. MSLF's opening brief on behalf of the Utah Shared Access Alliance, et al (USA-ALL), previously UTMA, was filed March 15, 1999, federal appellees' response was filed on May 24, 1999, SUWA's response was filed on June 9, 1999, and USA-ALL's reply was filed on June 10, 1999. Oral arguments were held on January 19, 2000. On August 15, 2000, the Tenth Circuit reversed the decision of the District Court and remanded the case to the District Court for rehearing consistent with the Circuit Court's ruling. On October 23, 2000, the NPS, in total defiance of the Tenth Circuit, issued a decision closing Salt Creek Road beyond Peekaboo Campsite to motorized vehicles.

At a status conference in the District Court on November 17, 2000, the Court ordered both sides to brief, by December 19, 2000, the intent of the Tenth Circuit regarding proceedings on remand. On December 18, 2000, MSLF filed its brief, and on December 19, 2000, the NPS filed its brief. On December 19, 2000, SUWA filed a brief regarding the continued closure of Salt Creek to motorized use.

On December 18, 2000, SUWA filed a motion for leave to file a first amended Complaint, and lodged a first amended Complaint. On January 4, 2001, the NPS responded to SUWA's motion for leave to file a first amended Complaint. A status conference and hearing on SUWA's motion for leave to file a first amended Complaint was held on January 30, 2001, after which, on February 1, 2001, the Court stayed the case except for the RS 2477 issue. This stay was to allow the NPS to complete its environmental assessment of the Salt Creek Road, apply its new Management Policies to the information gathered and analyzed, and make a decision as to the appropriateness of vehicle travel in the Canyon and how such travel, if appropriate, should be managed.

Relative to the RS 2477 dispute, the Court agreed that San Juan County and the State of Utah should be added as defendants. It granted SUWA's motion to file a first amended Complaint and ordered that the Complaint be filed no later than February 8, 2001, which it was. The NPS filed its answer on February 21, 2001, and on March 5, 2001, USA-ALL filed its answer, which included a cross-claim against defendants NPS, et al., challenging the legality of the NPS closure to motorized vehicles of Salt Creek Road beyond Peekaboo Campsite. On March 12, 2001, the State filed its answer to SUWA's first amended Complaint, and on April 17, 2001, the County filed its answer.
On March 28, 2001, a supplemental attorneys’ planning meeting was held regarding the main case and the report filed on April 9, 2001. A schedule was proposed under which discovery would end on October 8, 2001, expert reports and depositions would be completed by March 2002, dispositive and potentially dispositive motions would be filed by June 3, 2002, and trial (~8 days) would be held in October 2002.

On April 19, 2001, SUWA filed a motion for preliminary injunction. On April 26, 2001, USA-ALL filed its opposition to the motion and the NPS filed a notice regarding the government’s position. At a hearing held April 27, 2001, the court stayed indefinitely proceedings on the motion.

The NPS filed its answer to USA-ALL’s cross-claim on May 4, 2001.

On July 13, 2001, the NPS served the administrative record relating to what it calls the temporary prohibition of motorized vehicles in Salt Creek Canyon. On August 2, 2001, SUWA deposed NPS employee(s) having knowledge and duties relating to RS 2477 as it relates to Salt Creek Canyon.

On November 15, 2001, SUWA filed a motion to intervene in USA-ALL’s cross-claim against the NPS. On November 30, 2001, USA-ALL filed a notice informing the Court that it did not object to SUWA’s motion to intervene.

On December 18, 2001, SUWA filed its answer to USA-ALL’s cross-claim against the NPS. Upon motion by SUWA, a status conference was held on May 9, 2002, at which the Court set a status conference for October 7, 2002.

On August 19, 2002, the County filed a motion for partial summary judgment arguing that Salt Creek Road from Peekaboo Spring to Angel Arch/Upper Jump is a valid RS 2477 and that the gate at Peekaboo Spring interferes with the public’s right of access. On August 21, 2003, the State filed a similar motion for partial summary judgment. On September 23, 2002, the NPS filed its opposition to the two motions, and on October 7, 2002, SUWA filed its opposition. Both the NPS and SUWA argued that the Court lacked jurisdiction to decide the RS 2477 issue. On November 7, 2002, the County and the State filed replies in which they argued that if the Court lacked jurisdiction to decide the RS 2477 issue then they should be dismissed from the case.

A hearing on the state and county motions was held on December 18, 2002. On January 15, 2003, the Court ruled that it lacked jurisdiction to decide the RS 2477 issue and dismissed the County and the State from the case. (Steven Lechner) (Mentor/Local Counsel Pos) (95-3707)

**THRALL v. U.S. FOREST SERVICE**

*(Thrall I)*

Note *Thrall I* is not an active case but is included to provide historical perspective on the complex litigation in the Crooked Lake area.

Kathy and Ben Thrall own a cabin on Crooked Lake in Michigan. Although the majority of the lake is within the Sylvania Wilderness Area, the Thralls, as riparian landowners, are entitled to use the entire lake for fishing, boating, and other recreational purposes. On May 28, 1991, the U.S. Forest Service severely restricted the ability of...
riparian landowners to exercise their riparian rights due to the proximity of a wilderness area. The Thralls filed an administrative appeal of the plan that was denied by the Forest Service.

On March 8, 1993, the Thralls and nearby neighbors filed suit in U.S. District Court. MSLF, acting as lead counsel for the Thralls, filed a cross-motion for summary judgment on October 15, 1993. The government filed its cross-motion for summary judgment on October 27, 1993, to which MSLF replied on November 19, 1993. Oral argument was held on January 12, 1994. On January 23, 1994, the court granted the government’s motion for summary judgment and denied that of the Thralls. In its decision the court recognized that the Thralls’ riparian rights were valid existing rights but that the restrictions placed on those rights by the Forest Service were reasonable. On June 2, 1994, at the request of the parties, the District Court dismissed the takings claims without prejudice.

A notice of appeal was filed on July 27, 1994. MSLF filed its opening brief on December 5, 1994, the government filed its response on February 8, 1995, and MSLF filed its reply on February 27, 1995.

On May 31, 1995, the Forest Service issued Amendment No. 5 to the forest plan, restricting motorboat use on Crooked Lake beginning on April 1, 1996. Because two of MSLF’s clients in the suit filed earlier, Michael and Bodil Gajewski, would be bankrupted by this amendment and other notices being distributed by the Forest Service, MSLF filed a request for stay with the District Court, which was denied on August 21, 1995. MSLF then filed a request with the Sixth Circuit asking that the restrictions of Amendment No. 5 be stayed until the Sixth Circuit ruled. MSLF also requested an expedited schedule.

Oral argument was held on October 19, 1995. On November 29, 1995, the Sixth Circuit upheld the District Court decision. MSLF filed a motion for rehearing en banc. On February 2, 1996, the Sixth Circuit ordered the government to respond to the motion, which it did on March 8, 1996. On April 11, 1996, the Sixth Circuit granted the request for rehearing and vacated the panel’s decision. Supplemental briefs were filed, and oral argument was held on June 12, 1996.

On June 24, 1996, the Sixth Circuit upheld the original District Court decision in an evenly split decision. MSLF filed a petition for writ of certiorari with the U.S. Supreme Court on September 23, 1996. On November 25, 1996, the government filed its response. MSLF filed its reply on January 6, 1997. The petition for writ of certiorari was denied on January 21, 1997.

(Thrall II)
(Private Property Rights)
(Counsel for Appellees Kathy and Ben Thrall, et al.)
(Sixth Circuit, W D Michigan, Case No. 98-1204)

On March 13, 1996, MSLF filed a Complaint involving the use of Crooked Lake by various riparians. On March 24, 1997, MSLF amended the Complaint, and on March
31, 1997, filed a motion for summary judgment. Oral arguments were held on May 27, 1997, and on December 16, 1997, Judge Bell held that the U.S. Forest Service did not have authority to restrict motorboat use on Crooked Lake by either the plaintiffs or their guests. He set the date by which MSLF must file its requests for costs and attorneys’ fees as 30 days after the exhaustion of all appeals.

On February 17, 1998, the Forest Service filed a notice of appeal. The briefing schedule was delayed numerous times, in the hope that the map survey appeal (Thrall III) would be completed. On September 24, 1998, the Court stayed the briefing schedule for “settlement negotiations,” the term used by the Court to explain the greatly delayed decision in the map survey appeal (Steven Lechner) (91-3022)

*(Thrall III)*
*(Private Property Rights)*
*(Counsel for Appellants Kathy and Ben Thrall, et al.)*
*(Sixth Circuit, Western District of Michigan, Case No. 99-1666)*

During its litigation of the various Thrall cases, MSLF discovered that the U.S. Forest Service had never finalized the “official” map and legal description for the Sylvania Wilderness Area despite its assertions as to the location of that boundary in Thrall I and Thrall II. On May 13, 1998, MSLF filed an action to enjoin the Forest Service from including in the “official” map any portion of Crooked Lake within the boundaries of the wilderness area. The government filed a motion for summary judgment on February 1, 1999. On February 16, 1999, MSLF obtained a “legal description” of the Sylvania Wilderness that the government had previously failed to disclose. In light of this new information MSLF filed a motion for an extension of time in which to file its response. On March 12, 1999, MSLF filed its response to the government’s motion for summary judgment and a cross-motion for summary judgment. Oral arguments were held on March 29, 1999, and on April 2, 1999, the District Court denied the plaintiffs’ cross motion for summary judgment and granted defendants’ cross motion.

MSLF filed a notice of appeal on May 28, 1999. MSLF then filed a motion to stay proceedings until completion of The Wilderness Society’s appeal (Thrall IV) of the District Court’s denial of its motion to intervene. The motion to stay all proceedings was granted on August 30, 1999.

On September 1, 2000, the Sixth Circuit denied the appeal of the denial of intervention (Thrall IV) and on September 21, 2000, issued a new briefing schedule in the map survey case. MSLF filed the proof copy of its opening brief and its designation of the joint appendix on November 17, 2000, and the federal government filed the proof copy of its response brief on December 21, 2000. On December 27, 2000, the Wilderness Society, et al., filed a motion for permission to file an amicus brief and the brief. MSLF filed the proof copy of its reply brief on January 9, 2001, and it filed the joint appendix on January 23, 2001. Final versions of all briefs were filed on February 13, 2001.
Oral arguments were held on August 10, 2001, and a decision is pending (Steven Lechner) (91-3022)

UNITED STATES v. ALAMOSA COUNTY, COLORADO, et al.
(Equal Protection Constitutional Rights and Liberties)
(Counsel for Alamosa County, et al)
(U S District Court, Colorado, Civil Action No 01-MK-2275)

This case was approved by the Board of Directors on February 5, 2001, by mail ballot. Alamosa County is located in the San Luis Valley of southern Colorado, between the San Juan Range and the Sangre de Cristo Range. It is a rural county, with agriculture the chief industry, and has an area of 713 square miles. It was first incorporated in 1913. According to the 2000 Census its population is 14,966, Hispanics comprise 41.4 percent of the population and non-Hispanics 54 percent. The voting age population is 37.6 percent Hispanic and 57.9 percent non-Hispanic. Approximately half the population of the County lives in the City of Alamosa, the majority of Hispanics in Alamosa live on the “south side.” Hispanics throughout the remainder of the County are dispersed.

Each of the County’s three County Commissioners resides in a separate residential district but is voted for at large, by the entire County, as required by Colorado law. The Commissioners have four-year staggered terms and the primary and general election are held at the same time as primary and general elections for national and State offices. Because of the staggered terms, every other two-year period two Commissioners are elected and in the other two-year period only one Commissioner is elected. The two districts that stand election together are rotated among the three districts. Bullet voting is not allowed in those elections in which two Commissioners are being elected.

On November 27, 2001, the U S Department of Justice, under the signature of Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, without prior discussion or negotiation with Alamosa County, filed suit under Section 2 of the Voting Rights Act in U S District Court for the District of Colorado against Alamosa County and its Commissioners and Clerk and Recorder, in their official capacities, seeking a determination that Alamosa County’s State-mandated at-large system of electing county commissioners violates Section 2 of the Voting Rights Act and demanding that single-member districts be created such that one of those districts contains a sufficient number of Hispanics to ensure the ability of Hispanics to elect their candidate of choice to the County Commission. The United States demanded that the case be tried and resolved no later than the final qualification for the primary election ballot, which they allege is in July 2002.

Alamosa County, using private counsel, filed its answer in late January. MSLF filed an entry of appearance after the Board approved the case in early February. On March 15, 2002, the parties exchanged initial disclosures. A Rule 16 initial scheduling and planning conference was held March 19, 2002, before Judge Marcia Kreiger. The schedule for discovery and dispositive motions was set, and a 7-day trial has been scheduled to begin May 6, 2003.
Discovery began in early April and is continuing. Depositions by the parties began in June 2002 and must be completed by February 7, 2003.

On January 16, 2003, Alamosa County filed a motion for summary judgment on the constitutional issues of the case. The response to that motion is due on February 5, 2003. A seven-day trial is scheduled to begin on May 6, 2003, in Denver. (Scott Detamore) (01-4939)

**UNITED STATES v. BLAINE COUNTY, MONTANA, et al.**
(Equal Protection Constitutional Rights and Liberties)
(Counsel for Defendants-Appellants Blaine County, et al.)
(Ninth Circuit, Case Nos. 02-35506 and 02-35691)

This case was approved by the Board of Directors on October 8, 1999. Blaine County is a sparsely populated county located in north-central Montana and bordering Canada. It has a population of about 7,000, about 40 percent of whom are Native Americans, most of whom live on the Fort Belknap Indian Reservation in the southeastern quarter of the county. The reservation comprises about one-fourth of the land area of the county and flows into neighboring Phillips County. Fort Belknap is a “closed” reservation, that is, the county has no jurisdiction over it. The nearest city of any size is Great Falls, approximately 200 miles southwest of the county seat, Chinook.

Blaine County is divided into three residential commissioner districts. Montana state law requires that a county’s commissioners must each reside in a different district. It also requires that the commissioners be elected at large, for six-year terms, in elections every other year so that only one commissioner is elected in a given election.

Blaine County elects predominantly Democratic Party candidates in county, state, and national elections, and the Native American population registers overwhelmingly as Democrats. All three commissioners and most other elected county officers are Democrats, elected in partisan elections. To be put on the primary ballot one merely signs a paper announcing that desire. The primaries are at-large elections in which only registered party members may vote.

Bill Lann Lee, Acting Assistant Attorney General for Civil Rights for President Clinton, wrote a letter to Blaine County, threatening to sue the County under Section 2 of the Voting Rights Act, alleging that a Native American has never been elected to the County Commission in the 87-year history of Blaine County, that Native Americans in Blaine County are politically cohesive, that Native American voting has been diluted by the racial block voting of the white majority, and that single-member districts, including at least one majority-minority district, must be created so that Native Americans can elect their candidates of choice. Mr. Lee proposed that the current residential districts be maintained as single-member commissioner districts and that adjustments be made to the boundaries of District One such that it becomes a majority-minority district.

Mr. Lee alleged that Native Americans in Blaine County are affected by the legacy of historical discrimination, as evidenced by the substantial socioeconomic and educational disparities between white and Native American citizens of Blaine County. As a result of this discrimination, Native Americans cannot participate effectively in an
at-large voting scheme and thus are discouraged from running for office. Mr. Lee stated that if, by September 15, 1999, Blaine County did not create single-member districts and one majority-minority district, the Justice Department would ask the federal district court to draw a new district according to the districting plan proposed by Mr. Lee.

Blaine County asked MSLF to assist in its defense in the event that it was sued by the U.S. Department of Justice. On November 16, 1999, the United States served a Complaint on the County’s attorney, and the County formally requested MSLF’s assistance. MSLF filed Blaine County’s answer on December 30, 1999. At a pretrial conference on January 20, 2000, a two-week trial was set to begin on April 30, 2001.

MSLF propounded initial discovery concerning evidence of voting discrimination against Indians that was before Congress as a predicate in passing the Voting Rights Act. The response to this initial discovery was received on March 20, 2000, and analyzed for possible summary judgment. The United States propounded written discovery on May 12, 2000. On June 28, 2000, responses were filed, and federal attorneys inspected documents in Blaine County.

Depositions were taken on September 19-21, 2000, and October 17-19, 2000, and discovery completed on November 30, 2000. The final pretrial order and proposed findings of fact and conclusions of law originally were due on April 12, 2001, but on December 4, 2000, the parties filed a joint motion for an extension of time in which to file motions for summary judgment. On January 24, 2001, the court granted the motion and set Blaine County’s motion for summary judgment due on January 31, 2001. The bench trial originally scheduled to begin on April 30, 2001, in Great Falls, was rescheduled to begin on June 18, 2001, in Missoula, and last only one week.


On February 27, 2001, the ACLU filed a motion for leave to intervene as plaintiffs on behalf of several individuals and the Fort Belknap Community Council (“Applicants”) and lodged a brief in support of the motion, a Complaint in intervention, and a brief in opposition to defendants’ motion for summary judgment. On March 26, 2001, the government filed its response to the motion to intervene. Because the government believes it appropriate to allow Indians who vote and reside in Blaine County to intervene as parties in the case and because the intervention was proposed to be “as is,” with no new discovery, the government did not oppose the motion. On March 27, 2001, Blaine County filed its response to the ACLU’s motion to intervene.

On April 9, 2001, the ACLU filed its reply to Blaine County’s response. The ACLU alleged, for the first time, that the “adequacy of protection of their interests was called into further question following the presidential elections and the confirmation of new cabinet members” including Gall Norton, a former staff attorney of Mountain States Legal Foundation. It included the name of James Watt, a former “head of Mountain States Legal Foundation,” by citing to *Sagebrush Rebellion, Inc. v. Watt*. On April 27, 2001, Blaine County filed a motion to strike parts of the ACLU’s reply. On May 8, 2001, in its response to Blaine County’s motion to strike, the ACLU asserted that the motion should be denied.
On May 17, 2001, Judge Molloy removed himself from the case and assigned District of Nevada Judge Phillip M. Pro to the case. At a telephonic status and scheduling conference on May 22, 2001, a new schedule was set: a hearing on summary judgment motions for July 6, 2001, in Las Vegas, and an 8- to 9-day trial to begin on October 1, 2001, and take place in Great Falls.

On June 1, 2001, Judge Pro issued an order dealing with the ACLU’s motion to intervene. He concluded that the ACLU failed to show either that their request for intervention was timely or that their interests would be inadequately represented by the United States. Judge Pro stated that if intervention were granted, even though the ACLU had moved to enter the suit as is, Blaine County would be entitled to depose the ACLU and conduct discovery in reference to the ACLU, a process that would further delay the trial and thus prejudice the parties. He denied both permissive and of-right intervention but said that the ACLU was not foreclosed from seeking intervention post-judgment. In his order, he denied Blaine County’s motion to strike portions of the ACLU’s reply. He stated, however, that Secretary Norton was not a named party to this dispute, that this case and Sagebrush Rebellion were factually inapposite, and that nothing indicates the United States is now inadequate to represent the ACLU’s interests.

On June 14, 2001, the ACLU filed a notice of appeal from the District Court’s final order denying their intervention. On June 26, 2001, the Ninth Circuit issued the case schedule (Case No. 01-35611), and on July 3, 2001, the ACLU filed a motion to expedite its appeal. On July 16, 2001, Blaine County filed a motion for extension of time to respond to that motion. On July 20, 2001, the Ninth Circuit denied the ACLU’s motion to expedite. The ACLU filed its opening brief and excerpts of record on October 1, 2001, and Blaine County filed its response brief and supplemental excerpts of record on November 13, 2001. The ACLU filed its reply brief late, with permission of the Court.

On July 9, 2001, the ACLU filed a Complaint against Blaine County on behalf of several Native Americans and itself. The case was assigned to Magistrate Judge Cebull, who a week later was appointed a District Court judge for the District of Montana. This case is reported separately in this update under the heading, McConnell v. Blaine County.

On August 1, 2001, Judge Pro denied Blaine County’s motion for summary judgment, holding that Section 2 of the Voting Rights Act is constitutional and that “Congress did not exceed its authority under the Civil War Amendments in crafting the Voting Rights Act which is designed to remedy the very harm of voting discrimination that the Amendments were adopted to prevent.” He also held that the Act “requires that [minorities] be given an equal chance at electing minority representatives only after they have shown that discriminatory results are present as a result of suspect voting procedures” and that the Act “satisfies the congruence and proportionality requirements.”

On August 30, 2001, Blaine County filed a motion to compel discovery. On September 11, 2001, the government filed its response to Blaine County’s motion, and on September 13, 2001, Judge Pro ordered the government to give Blaine County all materials in its possession regarding alcoholism among American Indians that the County was seeking. He also ordered the parties to exchange final witness lists, exhibits lists,
and exhibits by October 2, 2001, and to confer regarding objections to exhibits by
October 4, 2001 Objections to exhibits were to be filed, in writing, at the start of trial.

On September 27, 2001, both the United States and Blaine County filed trial
briefs, findings of fact and conclusions of law, and witness lists Trial was held October
9-11 and 15-18, 2001, in Great Falls, Montana Following Judge Pro’s instructions, post-
trial briefs were exchanged by the parties and sent to the Court and to Judge Pro on
January 9, 2002

On March 21, 2002, Judge Pro issued a very disappointing Findings of Fact and
Conclusions of Law and Order He ruled that Blaine County’s at-large system of electing
County Commissioners violates section 2 of the Voting Rights Act and enjoined Blaine
County from conducting future elections for County Commissioner under that system
He ordered Blaine County to develop and file with the Court, by April 26, 2002, an
election plan for the Board of Commissioners that remedies the violation He ordered
Blaine County to confer with Counsel for the United States in developing the election
plan A notice of appeal of this decision would have to be filed with the District Court by
May 20, 2002

On April 2, 2002, the ACLU, on behalf of itself and several Native Americans,
filed a motion to intervene in the remedy (redistricting) phase of the case, and on April
16, 2002, during a telephone hearing, Judge Pro granted the motion

On April 4, 2002, the Ninth Circuit Court of Appeals (Seattle) heard arguments
from Blaine County and the ACLU on the ACLU appeal of Judge Pro’s denial of its
motion to intervene in the first (merits) part of the case

After the hearing of April 16, 2002, attorneys for the parties and some of the
parties met in Chinook, Montana, to develop the redistricting/election plan as ordered by
Judge Pro That plan was submitted to the Court on about May 9, 2002

On May 10, 2002, MSLF filed a precautionary notice of appeal on behalf of
Blaine County, despite its belief that the time to appeal would run from the date that
Judge Pro approved the redistricting plan for Blaine County On May 21, 2002, the Ninth
Circuit docketed that appeal and, apparently not noticing that the notice of appeal was
only precautionary, issued a full briefing schedule

On June 4, 2002, a telephonic hearing was held concerning the redistricting and
election plan devised by Blaine County at the Court’s order Over objections by the
government and the intervenors, Judge Pro approved the plan The plan creates a
majority-minority American Indian district and sets a special election for that district
only Both the government and the intervenors had strongly argued for a special election
for all three districts such that the Commissioner terms would no longer be staggered
The time for appeal of this final order runs from the date of approval of the redistricting
plan, and any notice of appeal would have to be filed by August 5, 2002

On June 6, 2002, the Ninth Circuit affirmed the District Court’s denial of the
ACLU’s motion to intervene in the main part of the case as of right and dismissed for
lack of jurisdiction the ACLU’s motion for permissive intervention

On July 10, 2002, during a telephone conference of the judge and the parties, it
was agreed that on July 16, 2002, Blaine County would file a motion to stay the

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commissioner elections set for September 19, 2002, which it did. Responses to the motion were filed on July 23, 2002, and at a telephone hearing held on July 25, 2002, Judge Pro denied the motion to stay.

On July 12, 2002, Blaine County filed its a notice of appeal of the case as a whole (final appeal), including the District Court's approval of a redistricting plan. The appeal was docketed by the Ninth Circuit on July 23, 2002, and a briefing schedule was set.

On August 1, 2002, Blaine County filed with the Circuit Mediator an uncontested motion to dismiss its first (precautionary) notice of appeal without prejudice to reinstatement. The Mediator granted the motion, noting that the appeal could be reinstated if the Ninth Circuit were to dismiss the later (final) appeal for lack of appellate jurisdiction, whether for untimeliness or otherwise. Notice of reinstatement would have to be filed with the Court and served on all parties within 28 days of the entry of the order dismissing the first appeal. If no notice was filed, the appeal would be deemed dismissed with prejudice.

On August 2, 2002, MSLF filed with the Ninth Circuit an urgent motion for stay of the commissioner elections set for September 19, 2002. On August 12, 2002, the government filed its opposition to the motion, and on August 22, 2002, Blaine County filed its reply. On September 3, 2002, the Court denied Blaine County's motion for stay and stated that the briefing schedule remained in effect. The special election was held on September 19, 2002, and Delores Plumage, an American Indian, was elected to represent the newly created commissioner district.

On November 27, 2002, MSLF filed one copy of Blaine County's opening brief, together with a motion for leave to file an overlarge brief. The brief, as filed, was about 23,500 words, 9,500 words over the allowed length. The Court filed Blaine County's motion and brief on December 2, 2002, and on December 26, 2002, it issued an order allowing the filing of opening and response briefs no longer than 21,000 words. Blaine County's shortened brief was to be filed by January 14, 2003, together with five copies of its six-volume excerpts of record.

On January 14, 2003, Blaine County filed its shortened opening brief and its excerpts of record. On January 21, 2002, MSLF was notified that the Ninth Circuit Clerk had ruled the excerpts deficient, in that two of the six volumes were 30 pages over the 300-page volume limit. (The volumes had been divided such that a full day's trial transcript was in a single volume.) The Clerk ordered MSLF to refile the excerpts and ruled that the time for filing of the government response brief would toll from the refiling date of the excerpts. The excerpts were Federal Expressed to the Court on January 27, 2003 (Scott Detamore) (Mentors Ruffatto, West) (99-4534)

*UNITED STATES v. BURTON, et al.*

(Private Property Rights, Access To Federal Lands and Resources)

(Counsel for Contestee Donald Eno)

(DOI, Office of Hearings and Appeals, Hearings Division, Case CAMC 269556)

This case was approved by the Board of Directors on June 8, 2001, with the caveat that MSLF would not represent Mr. Eno in any claims contest. In 1927, the
Federal Government issued a power site withdrawal in the Plumas National Forest (Calif.) in accordance with the 1910 Pickett Act (repealed 1976), which allows for a temporary withdrawal of public land from settlement, location, sale, or entry for consideration of the land as a power site. The Mining Claims Rights Restoration Act, passed in 1955, allows entry to lands these reserved lands for the location and patent of mining claims and for mining, development, and utilization of those mineral resources. Pursuant to the Act, the locator of a placer claim may not conduct mining operations for 60 days following the filing of a notice of location. Within this time, the Secretary of the Interior must notify the locator of the government's intent to hold a public hearing before an administrative law judge (P.L. 359 hearing). Mining operations then are suspended until the hearing is held and an appropriate order issued.

The Federal Land Policy Management Act of 1976 (FLPMA) subsequently authorized the Secretary of the Interior to make, modify, extend, or revoke withdrawals. FLPMA provides that within 15 years of October 21, 1976, the Secretary shall review withdrawals existing at that time in 11 States, including California. The Secretary "shall determine whether, and for how long, the continuation of the existing withdrawal of the lands would be consistent with the statutory objectives of the programs for which the lands were dedicated." The Secretary then "shall report [her] recommendations to the President, together with statements of concurrence or nonconcurrence submitted by the heads of the departments or agencies that administer the lands." To date, the Secretary has failed to adhere to this prescribed review process under FLPMA regarding the 1927 power withdrawal on which Donald Eno's mining claim rests.

In 1996 Mr. Eno located the "Hound Dog" placer mining claim in the Plumas National Forest. He properly filed a copy of the location notice, gold and travertine were sought as locatable minerals on the claim. The claim was filed pursuant to the Mining Claims Rights Restoration Act of 1955 because of the 1927 power site withdrawal. The Act provides that within 60 days from the filing of the notice of location the Secretary of the Interior must notify the locator of the claim of the government's intention to hold a public hearing to determine if placer operations will substantially interfere with other uses of the land included within the claim. Until the hearing has been held and the order issued, mining operations must be suspended. The order provides for either a complete prohibition of placer mining, permission to placer mine on the condition that after placer mining operations have ended the surface is restored to its condition preceding the mining, or general permission to engage in placer mining.

By letter dated September 12, 1996, the California State Office of the BLM notified Mr. Eno that the Secretaries of the Interior and Agriculture intended to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land within the claim, but no hearing date was set.

On August 5, 1997, the U.S. Forest Service filed an application to withdraw an area of 40 acres in the Plumas National Forest from location and entry under the Mining Laws, subject to valid existing rights, so as to protect the Soda Rock area. The area overlaps exactly the Hound Dog placer mining claim. Notice of application and requests for comments and/or public meeting were published on September 16, 1997, in the Federal Register. On August 31, 1999, the BLM issued a Withdrawal of National Forest System Land for the Soda Rock Special Interest Area from location and entry. The area
withdrawn contains the 40 acres in the Plumas National Forest. The order was issued pursuant to Section 204 of FLPMA and subject to valid existing rights.

On December 7, 2000, Mr. Eno was notified that his case had been referred to the Sacramento Field Office of Hearings and Appeals for hearing and decision, but no hearing date was set. On January 11, 2001, the Sacramento Office requested status reports within 30 days from both Mr. Eno and the attorney for the United States to address (1) whether any event had occurred that would render the case moot, such as judicial or administrative decisions or failure to comply with annual requirements, (2) the potential for settlement and whether mediation or alternate dispute resolution would be helpful, and (3) any other matter that should be brought to the attention of the Office of Hearings and Appeals before further action was taken.

Mr. Eno noted in his report of January 22, 2001, that he had complied with all annual requirements and was willing to participate in any other form of alternative dispute resolution. He indicated his intention to retain legal representation. In its report of January 30, 2001, the United States stated that there was no potential for settlement because the site is a "unique Native American cultural resource and unique geological area" that would be destroyed by the proposed mining activities. The United States said that the Maidu Indian Tribe claim part of the area as a segment of an ancient trail related to the Soda Rock Myth, but no cultural or archeological artifacts linked to the Maidu have been discovered within this area.

Prior to MSLF taking on this case no P.L. 359 hearing had been set, although since location of his claim in 1996 Mr. Eno has complied with all necessary annual assessments and paid all required fees.

MSLF has Board approval (1) to pursue expediting the public hearing in the Sacramento Office of Hearings and Appeals and represent Mr. Eno at the hearing, and (2) to attempt to remove the legal impediments to Mr. Eno's use of his claim and preserve his valid existing rights under that claim, presenting evidence that mining of the claim will not substantially interfere with other uses of the land.

On July 19, 2001, the Administrative Law Judge (ALJ) of the DOI Office of Hearings and Appeals ordered the parties to file proposed schedules by August 2, 2001. Mr. Eno's response, together with MSLF's entry of appearance in the case, was faxed to the ALJ on August 1, 2001, and to the Clerk on August 2, 2001. On August 1, 2001, the United States served its report on scheduling.

Subsequently, the ALJ issued a schedule under which discovery will be completed by May 24, 2002, with any joint stipulations due on that date, and a P.L. 359 hearing will be held in Sacramento, California, on June 3-7, 2002.

On April 1-3, 2002, MSLF attorney Lechner visited the site with Mr. Eno and did some research in the Sacramento area. On April 3, 2002, Mr. Eno began reviewing and copying materials at the Mt. Hough District Ranger's Office. Discovery continued throughout April and May.

On June 3-7, 2002, a hearing was held before the Administrative Law Judge in Sacramento. The government's post-hearing opening brief was filed on August 27, 2002, and Eno's post-hearing opening brief was filed on November 26, 2002. On January 13,
2003, the government filed its post-hearing reply brief, and Eno's post-hearing reply brief is due on February 18, 2003 (Steve Lechner) (Mentors Ruffatto, James) (01-4807)

UNITED STATES AIR TOUR ASSOCIATION, et al. v. FEDERAL AVIATION ADMINISTRATION, et al.
(Access to Federal Lands, Limited and Ethical Government) (Counsel for Petitioners U S Air Tour Association, et al ) (D C Circuit, Case No 00-1201)

This case was approved by the Board of Directors on October 8, 1999. For more than seventy years, small businesses like the Air Tour Providers have offered air tours of Grand Canyon National Park ("Grand Canyon") Of more than 5 million people who visit the Grand Canyon annually, approximately 750,000 visit by air tour. Recreational air tours are safe and environmentally friendly. Unlike backcountry hikers, air tour visitors are incapable of leaving fires, waste, or trash, of disturbing plant or animal life, of introducing alien species, or of removing or defacing any natural resources or cultural artifacts. Moreover, Air tour visitors outnumber backcountry hikers at Grand Canyon five-to-one. Additionally, for many elderly, disabled, or otherwise mobility-impaired individuals, recreational air tours provide the only meaningful way to access the vast reaches of the Grand Canyon.

In June 1987 the Federal Aviation Administration (FAA) issued Special Federal Aviation Regulation (SFAR) No 50-1, which imposed minimum altitudes and routes and created no-fly zones around noise-sensitive areas in the Park. On August 19, 1987, Congress enacted the Overflights Act, 16 USC §1a-1, which required the FAA, inter alia, to "manage increased air traffic" over Grand Canyon," to effectuate "substantial restoration of the natural quiet," and to "encourage or require the use of quiet aircraft technology by commercial air tour operators" at the Grand Canyon. On May 27, 1988, in order to comply with the Overflights Act, the FAA adopted SFAR 50-2, which (1) established a Special Flight Rules Area extending from Page, Arizona, to Lake Mead, Nevada, (2) prohibited flights below specifically defined altitudes, (3) established flight-free zones, and (4) providing highly restricted flight routes for recreational air tours SFAR 50-2 virtually eliminated Complaints about aircraft sound. In 1993, for example, the NPS reported that, of more than 5 million visitors to the Grand Canyon, only 56, or one one-thousandth of one percent (0.001), complained of noise related to air traffic.

On September 24, 1998, the Subcommittee on National Parks and Public Lands conducted an oversight hearing to analyze the validity of NPS data on air overflight sound at the Park. Testimony presented at the hearing substantially discredited the NPS findings as to noise levels in the Park. Nevertheless, in July 1999 the FAA published a proposal to modify the dimensions of the Park and create several new flight routes, including at least one "incentive" route only available to aircraft utilizing "quiet technology." The proposed regulation subsequently was modified and had a release date of January 2000 and an implementation date of April 2000. The FAA argued that effects of the new regulation on air tour companies' operating costs would be "small," although it conceded that expansion of one flight-free zone would cost air tour operators over a million dollars each year.

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In September 1994, four years past due, the NPS submitted a report to Congress stating that "substantial restoration of the natural quiet" had not yet been achieved and concluding that under the Overflights Act the NPS was required to seek "further restoration of natural quiet."

In April 1996, on Earth Day, President Clinton issued a Memorandum ordering the NPS to immediately reduce noise around the Park and to make further substantial progress toward restoring natural quiet in accordance with the Overflights Act. On December 31, 1996, in response to Clinton’s directive, the FAA issued a Final Rule (1996 Final Rule) that extended the area covered by the existing regulations, expanded the flight-free zones, established new flight corridors and modified existing flight corridors, instituted flight curfews, set caps on the number of aircraft that could fly in the park, established reporting requirements, and required the use of quieter aircraft. On the same day, the FAA also published notice of a proposed "Quiet Technology Rule" that would create quiet technology incentive routes at the Grand Canyon. The FAA admitted that the use of quieter aircraft "is the most important ingredient" in restoring natural quiet and that only through a quiet technology rule "was achievement of a substantial restoration [of natural quiet] possible." The Quiet Technology Rule took effect on January 31, 1999.

The 1996 Final Rule was the subject of Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455 (D.C. Cir. 1998). After reviewing petitioners’ claims, the Court held that most of the claims were unreviewable for mootness or lack of ripeness, however, the Court upheld the NPS definition of "natural quiet" because that definition was (1) set above an appropriate ambient sound level for the Grand Canyon, and (2) based on how sound affected "visitors’ experience" of the Grand Canyon, rather than merely ensuring "silence for silence’s sake."

After consultations between the major air-tour operators and MSLF, it was decided that after the new regulations were made public MSLF would file suit on behalf of the U.S. Air Tour Association and a number of individual air tour operators (referred to collectively as the "Air Tour Providers") in February 2000 MSLF filed a FOIA request related to the proposed regulations and in the spring of 2000 collected materials in preparation for filing suit.

On April 4, 2000, the FAA, in conjunction with the NPS issued two final rules FAA-99-5926, "Modification of the Dimensions of the Grand Canyon National Park Special Flight Rules Area and Flight Free Zones" (the "Airspace Rule"), 65 Fed. Reg. 17707-33, and the final rule challenged in this action, FAA-99-5927, "Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area" (the "Flight Caps Rule"), 65 Fed. Reg. 17735-43. The Flight Caps Rule, which took effect on May 4, 2000, imposed severe restrictions, in the form of flight caps, on the number of recreational air tours that may be flown within the Grand Canyon regulated airspace. The Flight Caps Rule adopts an unrepresentative "base year" for determining the number of flight allocations each recreational air tour provider would receive. The FAA claims that the Rule merely prevents additional growth in the Grand Canyon air tour industry when, in fact, it measurably reduces the total number of recreational air tours that may be flown in the Grand Canyon. The Rule also incorporates a new methodology, termed "detectability," for measuring the "natural quiet" in two-thirds of the Grand Canyon.
Rather than measuring natural quiet based on what sounds a person would notice, the new methodology supposedly measures any aircraft sound "just detectable to a vigilant aircraft observer whose sole task is to listen for the presence of aircraft." However, the FAA admits that for several reasons its computer noise model cannot measure the "detectability" sound metric, let alone accurately estimate aircraft sound levels at the Grand Canyon. The Flight Caps Rule also prohibits use of an existing quiet technology "incentive" route by any recreational air tour provider, excludes commercial, private, military, and NPS aircraft from the Rule, and exempts all flights to the Hualapai Reservation from the rule in order to protect the economic interests of members of the Hualapai Tribe.

On April 5, 2000, Congress passed the National Parks Air Tour Management Act of 2000. Section 804 of the Act requires that Agencies develop and implement, by no later than April 4, 2001, reasonably achievable standards for fixed-wing and helicopter aircraft necessary for such aircraft to be considered as employing quiet aircraft technology. Section 804 also requires Agencies to establish, "by rule," several routes and corridors exclusively for use by air tour operators utilizing quiet aircraft technology that "shall not be subject to the operational [Flight Caps] that apply to other commercial air tour operations of the Grand Canyon." The Air Tour Management Act reaffirmed the mandate of Congress in the 1987 Overflights Act that the Agencies implement a "quiet aircraft technology" rule. Based on that mandate, the Air Tour Providers have designed, developed, and invested tens of millions of dollars in state-of-the-art quiet aircraft technology, investments that cannot be recouped due to the Agencies' longstanding refusal to authorize use of quiet aircraft technology "incentive" routes.

On May 9, 2000, the Air Tour Providers filed a petition for review challenging the Final Rule. On May 30, 2000, the Air Tour Providers filed a motion for stay and emergency relief pending that review on the grounds that the Final Rule violates the Administrative Procedures Act (APA), 5 U.S.C. § 551, et seq., the Regulatory Flexibility Act, 5 U.S.C. § 601-12, and the equal protection component of the Due Process Clause. Both the Grand Canyon Trust, et al. (the "Trust"), an environmental group, and the Hualapai Indian Tribe (the "Hualapai") moved to intervene. On June 7, 2000, the FAA filed a motion for summary denial of the motion for stay on the grounds that the Air Tour Providers had not first sought an administrative stay from the FAA.

On July 17, 2000, after briefing on the issue was complete, the Court granted intervention status to the Trust and the Hualapai and denied the motion for stay because the Air Tour Providers had not first sought an administrative stay from the FAA. On July 31, 2000, the Air Tour Providers submitted a request for stay to the FAA, asking for a decision within 14 days. More than 60 days later, on October 3, 2000, the FAA denied the request.

On October 26, 2000, the Air Tour Providers filed another motion for stay with the Court on the grounds that the new flight routes associated with the Airspace Rule created significant safety risks. In response, on November 3, 2000, the FAA administratively stayed the new flight routes pending an investigation into the safety concerns voiced by the Air Tour Providers. On November 9, 2000, the Court ordered the FAA to file a report on its safety investigation no later than November 28, 2000. On that date the FAA issued its report in which it admitted to several potentially serious safety

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problems and stayed indefinitely implementation of the challenged flight routes. On December 6, 2000, the Air Tour Providers filed a reply to the FAA report and, again, requested a stay of the Final Rule. On December 26, 2000, the Court denied the second motion for stay but authorized the Air Tour Providers to renew their motion for stay as it applied to the Airspace Rule should the FAA attempt to implement that rule before completion of the Court’s review of the merits. In addition, the Court ordered the parties to show cause why the Airspace Rule should not be held in abeyance pending the FAA’s safety investigation.

On January 25, 2001, the parties submitted their responses to the Court’s order to show cause, and the FAA indicated that it might immediately implement a portion of the Airspace Rule in the west end of the Grand Canyon. In response, on February 8, 2001, the Air Tour Providers filed a motion for temporary injunction, which, on February 23, 2001, it withdrew after receiving confirmation that the FAA would not immediately implement the Airspace Rule.

On March 26, 2001, the FAA published a notice in the Federal Register stating that it intended to implement a portion of the Airspace Rule in less than 30 days (‘West-End Airspace Rule’). In response, on April 2, 2001, the Air Tour Providers filed a second motion for stay and emergency relief and, on April 9, 2001, an emergency motion seeking expedited review of the second motion for stay. On April 18, 2001, the Court denied the motions and ordered the parties to submit comments on a prior proposed briefing format and schedule.

On May 10, 2001, the Air Tour Providers filed a third motion for stay pending review on the grounds that under the proposed briefing schedule several of the petitioners would be out of business before the Court could review the merits of their claims. On May 25, 2001, the Air Tour Providers filed a petition for review of the West-End Airspace Rule and moved to consolidate that review with the case at bar. The Trust had filed a similar petition and motion one day earlier. On July 9, 2001, the FAA filed a motion to dismiss both petitions for review of the West-End Airspace Rule on the grounds that they were not filed timely. After briefing was completed on the third motion for stay, on July 23, 2001, the Court denied the Air Tour Providers’ motion on the grounds that petitioners failed to demonstrate that a stay was warranted.

On October 17, 2001, the Court ordered (1) severance of the challenges to the Flight Caps Rule from those of the Airspace Rule, (2) consolidation of the Airspace Rule with the petitions for review of the West-End Airspace Rule, (3) stay of any further action relating to the consolidated Airspace Rule case pending ongoing FAA administrative proceedings, and (4) adoption of the proposed briefing schedule on the merits of the Flight Caps Rule. On October 24, 2001, the Air Tour Providers filed a motion requesting a modification to the briefing schedule, which motion was granted on October 26, 2001.


On March 18, 2002, the USATA and the Grand Canyon Trust, et al, filed reply briefs and the Grand Canyon Trust, et al, filed the deferred joint appendix. Final versions of all briefs were filed on March 21, 2002.

Oral arguments were held on May 9, 2002, William Thode and Joseph Becker appearing for USATA. On August 16, 2002, the D.C. Circuit issued its decision on the Flight Caps Rule. It denied USATA's petition for review and granted the Grand Canyon Trust's petition, remanding the case to the FAA for further proceedings consistent with the decision.

On October 4, 2002, the Board of Directors, after a briefing by MSLF attorneys, determined that MSLF could not file a petition for writ of certiorari because only one of its clients, AirStar Helicopters, wished to do so and not all of the other clients would sign a waiver agreeing to MSLF filing a petition on behalf of AirStar. On October 11, 2002, MSLF notified AirStar and its other clients that it was unable to file a petition for writ of certiorari for AirStar. [Subsequently, Pacific Legal Foundation filed a petition for writ of certiorari on behalf of AirStar.] MSLF will continue to represent all of the clients in regard to the second part of the case, the Airspace Rule, which is stayed pending issuance of a new rule by the FAA. (William Thode) (Mentors Sullivan, Wilson) (98-4373)

U.S. FISH AND WILDLIFE SERVICE v. DRAKE
(Private Property Rights, Endangered Species Act)
(Counsel for Appellant Lin Drake)
(Office of Hearings and Appeals, Ad Hoc Appeals Board, Docket No. D 2002-13)

This case was approved by the Board of Directors on November 8, 1996. Lin Drake wanted to develop his property in Cedar City by building homes. In October 1995, he contacted Gary Young, U.S. Fish and Wildlife Service (FWS), regarding the possibility of prairie dogs on his property and ramifications of such on development. After being advised by letter that he could proceed with farming operations, he began constructing roads and trenching for sewer and water lines. He then received a notice that charged him with a take of Utah prairie dogs and levied a fine of $15,000. In response, he contacted the Solicitor of the Department of the Interior in Denver and suggested a meeting in an effort to work out an agreement. He received no notices or correspondence from the FWS from the middle of 1996 until June 1997, in that period he built 13 single-family homes on the property.

On June 4, 1997, the FWS issued a notice of violation to Drake and assessed a penalty of $15,000. Settlement talks failed and the FWS indicated that it would issue a notice of assessment. Drake filed a petition for relief on December 19, 1997. One year later, on December 16, 1998, the FWS denied the petition for relief and issued a notice of assessment for the $15,000 fine.
On January 27, 1999, MSLF filed a request for hearing on the matter before an Administrative Law Judge. An evidentiary hearing was held before Administrative Law Judge Patricia McDonald on July 26-28, 1999, in Las Vegas, Nevada. The government's brief-in-chief was filed on November 1, 1999, Drake's brief was filed on December 17, 1999, and the government's reply was filed on January 14, 2000. On December 21, 2001, the ALJ ruled against Drake and levied a fine. The notice of appeal to the Ad Hoc Appeals Board was filed on January 20, 2002.


**U.S. Fish and Wildlife Service v. Sundles**
(Environmental Law, Endangered Species Act)
(Counsel for Defendant Tim Sundles)
(Hearings Division, Office of Hearings and Appeals)

This case was approved by the Board of Directors on June 7, 2002. The U.S. Fish and Wildlife Service (FWS) is threatening to charge Tim Sundles with violations of the Endangered Species Act (ESA), 16 USC §§ 1531-1534, and FWS regulations, 50 CFR Parts 11 and 17, for killing an introduced Canadian gray wolf that was attacking him and his wife. On July 27, 2001, Tim Sundles and his wife Diana went on a pack-trip vacation near Salmon, Idaho. They rode their horses and mules to Middle Fork, near the Salmon River. When they arrived, they set up camp for the evening. In the early hours of the morning, they awoke to what sounded like howling. Mr. Sundles ran outside with a flashlight and revolver and noticed a pack of wolves among their horses. He screamed and hollered in an effort to scare the pack away, but his attempt was futile. In another attempt to protect his property from the immediate harm of the wolves, he fired several shots in the air and the wolves fled.

Later that same afternoon, the couple decided to go fishing. As they prepared to walk out of camp, Mr. Sundles turned his horses and mules loose to graze and grabbed his rifle. They were about 100 yards from camp when they noticed a gray wolf sneaking up on their animals. When Mr. Sundles first noticed the wolf, it was about 15-20 feet from his animals. In an attempt to scare the wolf and run it off, Mr. Sundles fired a warning shot over the wolf. This time, the wolf did not flee but instead turned on Mr. and Mrs. Sundles and began to charge them. As the wolf got closer, Mr. Sundles fired two rounds at the wolf in an attempt to protect himself and his wife. Unfortunately, he missed. The wolf continued to charge. As the wolf got closer to Mr. Sundles, it suddenly veered off and headed straight for Mrs. Sundles. Mr. Sundles struggled to shoot the wolf as it approached his wife. Fortunately, he was able to get off one perfect shot that hit and killed the wolf before it injured or killed his wife.

After the wolf had been shot, the couple noticed that the wolf had a radio collar and an ear tag. Realizing that the wolf had been a "protected" species, they cut their trip short and headed for home. It took them about 48 hours to get home from the Bitterroot Mountains. As soon as they arrived home, Mr. Sundles tried unsuccessfully to find an attorney familiar with the ESA. Because he was unable to find legal representation, he...
decided to take his story to the media. He decided to come forward because he believes that he has a right to defend himself, his family, and his property.

After the story became public, FWS agents contacted Mr. Sundles and asked him if he would show them the wolf so that they could determine if the wolf had been shot in self-defense. Mr. Sundles willingly complied with their request and took them to where the wolf had been shot. The agents tried to convince Mr. Sundles to take a lie detector test and insisted that they videotape his testimony, but Mr. Sundles refused. The body of the wolf was sent to a forensics laboratory.

Neither a civil nor a criminal proceeding has been initiated against Mr. Sundles, but MSLF anticipates that FWS will initiate a civil penalty proceeding against Mr. Sundles for “taking” a Canadian Gray Wolf. FWS might also charge Mr. Sundles criminally under 16 U.S.C. § 1540(b) for “taking” a gray wolf. Any person who knowingly violates any provision of the ESA upon conviction can be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both. (Tara Risman) (Mentors, Runfl, Smith) (01-4887)

(Counsel for Plaintiffs Wheatland Irrigation District, et al)
(U.S. District Court, Wyoming)

This case was approved by the Board of Directors on June 7, 2002. In 1998, the U.S. Fish and Wildlife Service (FWS) listed the Preble’s Jumping Mouse as a threatened species pursuant to the Endangered Species Act (ESA). The affected area is along the Front Range of Wyoming and Colorado, running from south of Douglas, Wyoming, to north of Colorado Springs, Colorado. Use of land in this area is now restricted by the FWS, and, as a result, farmers, ranchers, and other private property owners suffer.

The Preble’s should not have been listed, primarily because the species, *Zapus hudsonius preblei*, is almost indistinguishable from its nearest relative, *Zapus princeps princeps*. The FWS uses several different methods to distinguish the two species, including DNA analysis, microscopic examination of skulls, and observation of fur color, none of which produces consistent results. Because the mouse cannot reliably be identified, it cannot be counted with any kind of precision and thus should not have been listed as threatened by virtue of its supposedly low population count. In fact, the Preble’s population most likely is much larger than estimated by the FWS.

If a species is threatened, then anyone who “takes” that species is subject to civil and criminal penalties 16 U.S.C. §§ 1538(a)(1)(B), 1540. “Taking” includes not only killing or injuring the animal, but also harassing the animal or altering its habitat. Alteration of habitat includes, for example, changing the agricultural activities conducted on the land such as changing from cattle grazing to horse grazing or from grazing 10 head to grazing 20. A protected species does not have to live on a given piece of land. As
long as the FWS designates the land “critical habitat,” use of that land is restricted and alteration of that habitat can subject the landowner to severe penalties.

Contemporaneous with the listing of a species, the FWS is supposed to develop a 4(d) plan, which allows “ongoing agricultural practices” to continue for three years. In the case of the Preble’s, the FWS never provided a final 4(d) plan, only a 1998 draft plan exists. If the draft is considered legally operative, the 4(d) protections have expired, if it is not legally operative, then the protections never existed. Regardless, farmers, ranchers, and other land users in the Preble’s critical habitat area are at risk.

The various restrictions of the ESA remain in effect until the species “recovers.” The FWS is supposed to put a recovery plan in place as soon as practicable after a species is listed. The plan should include a determination as to the optimum population in specific geographic areas and a protocol to measure the growth of that population. After the desired population is achieved, the plan and its protections remain in effect for another 10 years to ensure that the recovery is permanent. The FWS has never provided a recovery plan for the Preble’s, and, even if it had, there is no accurate method for determining Preble’s populations.

The FWS is also supposed to designate “critical habitat,” areas in which the species is protected, and it has three options in this regard. 50 C.F.R. § 424.12. First, when the species is listed, the FWS may describe the geographic area that is designated critical habitat. Second, the FWS may admit that it does not know what or where the critical habitat is. Third, the FWS may declare that naming the geographic area of critical habitat would subject the species to greater threat of extinction as a result of harassment or vandalism. In the case of the Preble’s, the FWS chose the third option. Subsequently, Biodiversity Associates sued the FWS to force the designation of critical habitat for the Preble’s. That suit resulted in a consent decree by which the FWS agreed to publish, on or before June 4, 2002, a Notice of Proposed Rule Making designating the proposed critical habitat. The FWS also agreed to finalize the rule within a year of its publication. 50 C.F.R. § 424.17.

The habitat will probably include the 100-year floodplain, and 100 meters beyond the floodplain, for numerous creeks and rivers in Colorado and Wyoming, including Chugwater Creek, 70 miles long, and Horse Creek, 43 miles long. Such a designation will affect huge tracts of private property.

An attempt to de-list the species is underway because of the lack of good science underlying the listing. Scientific inquiries have been conducted to refute the FWS data. For example, True Companies hired wildlife biologist Renee Taylor to trap mice throughout Wyoming. The FWS is aware of Ms. Taylor’s activities because she obtained an FWS permit to conduct her trapping (Without that permit her activities could have been considered harassment of the species, a “take” subjecting her to severe legal jeopardy.) Her research shows that the Preble’s Jumping Mouse range and population are substantially greater than indicated by FWS data. She has submitted her experimental plan, data, and conclusions to the FWS, as required by her permit, but to no effect.

As early as July 1999 Congressman Barbara Cubin (WY-R) submitted a petition to FWS seeking de-listing of the species. Her petition lacks data proving the population is large enough not be threatened and merely points out that the methodology of the FWS...
was so flawed that its data prove nothing. Later, a private Colorado citizen, Robert Hoff, submitted a petition to de-list His petition includes the data of Ms. Taylor and others and also questions the methods of the FWS.

Thus far, the FWS has refused to revisit its listing decision. Ms. Taylor inquired by letter to the FWS dated March 2002 as to the future plans of the FWS. She received a dismissive response dated April 26, 2002, stating only that the FWS would review the petitions “as expeditiously as possible.” Because the first petition was filed almost three years ago, FWS cannot reasonably claim to be acting “expeditiously.” As a matter of law, FWS regulations require that the Secretary make some determination with regard to a de-listing petition, “to the maximum extent possible, within 90 days of receiving” the petition. 50 C.F.R. § 424.14(b)(1)

On July 30, 2002, MSLF filed a 60-day letter of intent to sue under the ESA. In the fall of 2002, the FWS reopened the comment period. After completion of this comment cycle, probably in the spring of 2003, and when it is satisfied that its clients have a strong basis for standing, MSLF will file a Complaint seeking to compel the FWS to rule on the de-listing petitions that have been submitted and to de-list the species (Chris Massey) (Mentor Smith) (02-5059)

(Access To Federal Lands and Resources, Constitutional Rights and Liberties)
(Counsel for Appellant Wyoming Sawmills)
(Tenth Circuit, Wyoming, Case No. 02-8009)

This case was approved by the Board of Directors on February 6, 1998. Wyoming Sawmills, Inc., depends on timber from the Bighorn National Forest to maintain operations. It has operated in northern Wyoming for more than 30 years and is the largest manufacturing employer in Sheridan County with 100 direct employees and more than 50 supporting employees. For efficient operation of its mill, it must harvest and utilize 20 million board feet of timber a year. From its inception through the late 1980’s, Wyoming Sawmills received 80-100 percent of its timber from the Bighorn National Forest. In the early 1990’s the United States Forest Service (Forest Service) began issuing directives and mandates outside the forest plan that adversely affect Wyoming Sawmills by greatly reducing the Forest Plan Allowable Sale Quantity (ASQ). The current ASQ is 14.8 MMBF, but the Bighorn Forest has sold an average of only 2.4 MMBF per year since 1990.

In September 1996 the Forest Service issued an “Historic Preservation Plan for the Medicine Wheel National Historic Landmark and Vicinity” (HPP), which seriously affects the Bighorn National Forest’s timber output. The HPP mandates a preservation plan that affects roughly 30,000 acres on the north end of the Bighorn Mountains, an area previously designated for wood fiber production and vegetative management. During development of the HPP the Medicine Wheel area was increased from the National Historic Landmark Site itself, less than 5 acres, to an area of more than 18,000 acres called the “Area of Consultation.” The HPP established the “Consulting Parties,” consisting of the Bighorn National Forest, Advisory Council on Historic Preservation, Wyoming State Historic Preservation Officer, Medicine Wheel Alliance, Medicine
Wheel Coalition for Sacred Sites of North America, Big Horn County Commissioners of Wyoming, and Federal Aviation Administration (FAA) The Consulting Parties must approve any multiple use activity within the Area of Consultation

Wyoming Sawmills has been affected adversely by Forest Service actions carried out under the auspices of the HPP (1) prohibition of log hauling on a multiple-use forest system road that accesses timber from lands designated for wood fiber production, (2) cancellation of a timber sale because harvesting of the timber required the use of a road inside the eastern border of the Area of Consultation and trucks on that road might be visible from the Medicine Wheel, and (3) de facto termination of forest management practices on about 30,000 acres by prohibiting hauling and road use on FDR 11, the aorta of the transportation system that supplies access to all forest lands north of the Medicine Wheel For decades, this graveled road has provided access for timber management, livestock grazing, and recreation activity

The HPP not only abrogates the Forest Service's authority to special interest groups but also applies religious debate to biological management of the forest The decision implementing the HPP is a reversal of the earlier plan designed to protect the landmark site in harmony with management of surrounding areas

Wyoming Sawmills' appeal to the Forest Service of the decision implementing the HPP was denied On February 17, 1999, MSLF filed a Complaint on behalf of Wyoming Sawmills challenging the provisions of the HPP that restrict timber harvesting activities near the Medicine Wheel, arguing that the HPP represents an unconstitutional establishment of religion, that the consultation process used to formulate the HPP violated the Federal Advisory Committee Act, and that other federal law have been violated The government filed its answer on April 22, 1999 On May 12, 1999, at the initial scheduling conference, a briefing schedule was set

The administrative record was delivered on August 6, 1999 On September 2, 1999, the government filed a motion to dismiss On September 3, 1999, Wyoming Sawmills filed its opening brief On September 24, 1999, the government and the intervenor Medicine Wheel Coalition filed responses to that opening brief Wyoming Sawmills filed a response to the motion to dismiss on September 27, 1999 Additional briefs were filed by both sides on October 12, 1999, and Wyoming Sawmills also filed an amended Complaint, together with a motion to amend the Complaint

A hearing was held on the various motions on October 18, 1999 At the hearing, Wyoming Sawmills' motion to amend its Complaint was denied and the case ordered to proceed On October 26, 1999, Wyoming Sawmills filed a response concerning issues raised during oral argument

On March 2, 2001, Wyoming Sawmills contacted MSLF about the Forest Service's continuing efforts to expand the boundaries of the Medicine Wheel If the government submits a recommendation to the Keeper for such expansion, MSLF will consider filing a motion for a stay pending review

On December 6, 2001, more than 2 years after the hearing on the motion, the Court granted the government's motion to dismiss MSLF filed Wyoming Sawmills' notice of appeal on January 30, 2002, and the appeal was docketed on February 6, 2002

Case Update
January 2003
A telephone mediation conference was held on April 2, 2002. MSLF sent Wyoming Sawmills' settlement demand to the Forest Service through the mediator. Settlement discussions continued throughout April but were ultimately unsuccessful because the Forest Service would not agree to offer any timber sales within the HPP or within any surrounding areas that could only be accessed via roads in the HPP.

Wyoming Sawmills' opening brief before the Tenth Circuit initially was due on June 27, 2002. On June 24, 2002, the Circuit Mediator granted a 22-day extension of time, until July 22, 2002, to file the brief, and on July 22, 2002, the opening brief was filed.

On October 25, 2002, intervenor-appellees Medicine Wheel Coalition, et al., filed their response brief. That same date federal appellees filed their response brief and a supplemental appendix.

On November 1, 2002, the National Congress of American Indians and the National Trust for Historic Preservation filed an *amicus* brief in support of federal appellees and intervenor-appellees. Also on November 1, 2002, the Becket Fund for Religious Liberty and "various Christian, Jewish and Muslim organizations" filed an *amicus* brief in support of the federal appellees and the intervenors.

The Court granted MSLF's request for an extension of time to December 19, 2002, in which to file Wyoming Sawmills' reply brief, and the brief was timely filed (William Thode) (Mentors Runft, Day) (97-4019).
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