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)

The organization may have to use a copy of this return to satisfy state reporting requirements

A For the 2003 calendar year, or tax year beginning and ending

B Check if applicable
Address change
Name change
Initial return
Final return
Amended return

C Name of organization

MOUNTAIN STATES LEGAL FOUNDATION

2596 SOUTH LEWIS WAY

LAKEWOOD, CO 80227

D Employer identification number

84-0736725

E Telephone number

303-292-2021

F Accounting method

Cash

G Website

N/A

H and I are not applicable to section 527 organizations.

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

[ ] Yes [X] No

H(b) If "Yes," enter number of affiliates

[ ]

H(c) Are all affiliates included?

[ ] N/A [X] Yes [ ] No

H(d) Is this a separate return filed by an organization covered by a group ruling?

[ ] Yes [X] No

I Group Exemption Number

M Check [ ] if the organization is not required to attach
Sch B (Form 990, 990-EZ, or 990-PF)

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

2,514,352.

Part I Revenue, Expenses, and Changes in Net Assets or Fund Balances

1 Contributions, gifts, grants, and similar amounts received

a Direct public support

[ ] 2,146,534.

1a 2,146,534.

b Indirect public support

[ ]

1b

1c

d Total (add lines 1a through 1c) (cash $2,072,300, noncash $74,234) 1d 2,146,534.

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

2 225,000.

3 Membership dues and assessments

3

4 Interest on savings and temporary cash investments

4 10,514.

5 Dividends and interest from securities

5

6 Gross rents

6a

6b

6c

7 Other investment income (describe )

7

8 Gross amount from sales of assets other than inventory

8a

8b

8c

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

STMT 1

STMT 2

8d 527.

9 Special events and activities (attach schedule) If any amount is from gaming, check here [ ]

9a

9b

9c

10 Gross sales of inventory, less returns and allowances

10a

10b

10c

11 Other revenue (from Part VII, line 103)

11 74,204.

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

12 2,455,725.

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

13 1,017,140.

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

14 559,426.

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

15 357,351.

16 Payments to affiliates (attach schedule)

16

17 Total expenses (add lines 16 and 44, column (A))

17 1,933,917.

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

18 521,808.

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

19 2,211,126.

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

20 112,451.

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

21 2,845,385.
Part II | Statement of Functional Expenses

<table>
<thead>
<tr>
<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 Grants and allocations (attach schedule)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>cash $</td>
<td>noncash $</td>
<td></td>
<td></td>
</tr>
<tr>
<td>23 Specific assistance to individuals (attach schedule)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24 Benefits paid to or for members (attach schedule)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>25 Compensation of officers, directors, etc</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>26 Other salaries and wages</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>27 Pension plan contributions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>28 Other employee benefits</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>29 Payroll taxes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>30 Professional fundraising fees</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>31 Accounting fees</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>32 Legal fees</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33 Supplies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>34 Telephone</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>35 Postage and shipping</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>36 Occupancy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>37 Equipment rental and maintenance</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>38 Printing and publications</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39 Travel</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40 Conferences, conventions, and meetings</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>41 Interest</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>42 Depreciation, depletion, etc (attach schedule)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43 Other expenses not covered above (itemize)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e SEE STATEMENT 4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43a</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43b</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43c</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43d</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>44 Total functional expenses (see lines 22 through 43)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>44.1 1,933,917.</td>
<td>1,017,140.</td>
<td>559,426.</td>
<td>357,351.</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

Program Service Expenses
(Required for 501(c)(3) and 4947(a)(1) nonexempt charitable trusts but optional for others)

a LEGAL ACTIVITIES—PUBLIC INTEREST LAW FIRM. SEE SCHEDULE 1

(Grants and allocations $) 1,017,140.

b

(Grants and allocations $)

c

(Grants and allocations $)

d

(Grants and allocations $)

e Other program services (attach schedule)

(Grants and allocations $) 1,017,140.

f Total of Program Service Expenses (should equal line 44, column (B), Program services)
### Part IV Balance Sheets

**Note:** Where required, attached schedules and amounts within the description column should be for end-of-year amounts only.

<table>
<thead>
<tr>
<th></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>26,117</td>
</tr>
<tr>
<td>46</td>
<td>Savings and temporary cash investments</td>
<td>381,601</td>
</tr>
<tr>
<td>47</td>
<td>Accounts receivable</td>
<td>47a</td>
</tr>
<tr>
<td>b</td>
<td>Less allowance for doubtful accounts</td>
<td>47b</td>
</tr>
<tr>
<td>48</td>
<td>Pledges receivable</td>
<td>48a</td>
</tr>
<tr>
<td>b</td>
<td>Less allowance for doubtful accounts</td>
<td>48b</td>
</tr>
<tr>
<td>49</td>
<td>Grants receivable</td>
<td>49</td>
</tr>
<tr>
<td>50</td>
<td>Receivables from officers, directors, trustees, and key employees</td>
<td>50</td>
</tr>
<tr>
<td>51</td>
<td>Other notes and loans receivable</td>
<td>51a</td>
</tr>
<tr>
<td>b</td>
<td>Less allowance for doubtful accounts</td>
<td>51b</td>
</tr>
<tr>
<td>52</td>
<td>Inventories for sale or use</td>
<td>52</td>
</tr>
<tr>
<td>53</td>
<td>Prepaid expenses and deferred charges</td>
<td>53</td>
</tr>
<tr>
<td>54</td>
<td>Investments - securities STMT 5</td>
<td>54</td>
</tr>
<tr>
<td>55</td>
<td>Investments - land, buildings, and equipment basis</td>
<td>55a</td>
</tr>
<tr>
<td>b</td>
<td>Less accumulated depreciation</td>
<td>55b</td>
</tr>
<tr>
<td>56</td>
<td>Investments - other</td>
<td>56</td>
</tr>
<tr>
<td>57</td>
<td>Land, buildings, and equipment basis</td>
<td>57a</td>
</tr>
<tr>
<td>b</td>
<td>Less accumulated depreciation STMT 6</td>
<td>57b</td>
</tr>
<tr>
<td>58</td>
<td>Other assets (describe ▶) SEE STATEMENT 7</td>
<td>605,150</td>
</tr>
<tr>
<td>59</td>
<td>Total assets (add lines 45 through 58) (must equal line 74)</td>
<td>2,942,007</td>
</tr>
<tr>
<td>60</td>
<td>Accounts payable and accrued expenses</td>
<td>195,672</td>
</tr>
<tr>
<td>61</td>
<td>Grants payable</td>
<td>61</td>
</tr>
<tr>
<td>62</td>
<td>Deferred revenue</td>
<td>62</td>
</tr>
<tr>
<td>63</td>
<td>Loans from officers, directors, trustees, and key employees</td>
<td>63</td>
</tr>
<tr>
<td>64</td>
<td>Tax-exempt bond liabilities</td>
<td>64a</td>
</tr>
<tr>
<td>b</td>
<td>Mortgages and other notes payable</td>
<td>64b</td>
</tr>
<tr>
<td>65</td>
<td>Other liabilities (describe ▶) SEE STATEMENT 8</td>
<td>32,177</td>
</tr>
<tr>
<td>66</td>
<td>Total liabilities (add lines 60 through 65)</td>
<td>730,881</td>
</tr>
</tbody>
</table>

#### Organizations that follow SFAS 117, check here ▶ and complete lines 67 through 69 and lines 73 and 74

<table>
<thead>
<tr>
<th></th>
<th>67 Unrestricted</th>
<th>68 Temporarily restricted</th>
<th>69 Permanently restricted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1,764,588</td>
<td>67</td>
<td>2,382,285</td>
</tr>
<tr>
<td></td>
<td>446,538</td>
<td>69</td>
<td>463,100</td>
</tr>
</tbody>
</table>

#### Organizations that do not follow SFAS 117, check here ▶ and complete lines 70 through 74

| 70 | Capital stock, trust principal, or current funds | 70 |
| 71 | Paid-in or capital surplus, or land, building, and equipment fund | 71 |
| 72 | 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) | 2,211,126 | 2,845,385 |
| 74 | Total liabilities and net assets / fund balances (add lines 66 and 73) | 2,942,007 | 3,440,290 |
**Part IV-A**  
Reconciliation of Revenue per Audited Financial Statements with Revenue per Return

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Total revenue, gains, and other support per audited financial statements</td>
<td>▶</td>
</tr>
<tr>
<td>b</td>
<td>Amounts included on line a but not on line 12, Form 990</td>
<td></td>
</tr>
<tr>
<td>(2)</td>
<td>Donated services and use of facilities</td>
<td></td>
</tr>
<tr>
<td>(3)</td>
<td>Recoveries of prior year grants</td>
<td></td>
</tr>
<tr>
<td>(4)</td>
<td>Other (specify)</td>
<td></td>
</tr>
<tr>
<td>c</td>
<td>Line a minus line b</td>
<td>▶</td>
</tr>
<tr>
<td>d</td>
<td>Amounts included on line 12, Form 990 but not on line a</td>
<td>▶</td>
</tr>
<tr>
<td>(1)</td>
<td>Investment expenses not included on line 6b, Form 990</td>
<td>$</td>
</tr>
<tr>
<td>(2)</td>
<td>Other (specify)</td>
<td></td>
</tr>
<tr>
<td>e</td>
<td>Total revenue per line 12, Form 990 (line c plus line d)</td>
<td>▶</td>
</tr>
</tbody>
</table>

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

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

**Part V**  
List of Officers, Directors, Trustees, and Key Employees

<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 $-)</th>
<th>(D) Contributions to employee benefit plans &amp; deferred compensation</th>
<th>(E) Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>L. JERALD SHEFFELS</td>
<td>CHAIRMAN</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9523 DOUGLAS RD E</td>
<td>WILBUR, WA 99185</td>
<td>15</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>W. PERRY PENDLEY</td>
<td>PRESIDENT</td>
<td></td>
<td>210,000</td>
<td>20,286.</td>
</tr>
<tr>
<td>2596 S LEWIS WAY</td>
<td>LAKEWOOD, CO 80227</td>
<td>40</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JOHN F. KANE</td>
<td>TREASURER</td>
<td></td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>P.O. BOX 729</td>
<td>BARTLESVILLE, OK 74005</td>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SEE ATTACHED LISTING</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? If "Yes," attach schedule ▶ | Yes [X] No |
### Part VI | Other Information

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>76 Did the organization engage in any activity not previously reported to the IRS? If &quot;Yes,&quot; attach a detailed description of each activity</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>77 Were any changes made in the organizing or governing documents but not reported to the IRS?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>If &quot;Yes,&quot; attach a conformed copy of the changes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>78a Did the organization have unrelated business income of $1,000 or more during the year covered by this return?</td>
<td>N/A</td>
<td>X</td>
</tr>
<tr>
<td>78b If &quot;Yes,&quot; has it filed a tax return on Form 990-T for this year?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>79 Was there a liquidation, dissolution, termination, or substantial contraction during the year?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>If &quot;Yes,&quot; attach a statement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>b If &quot;Yes,&quot; enter the name of the organization and check whether it is</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>exempt or nonexempt</td>
<td></td>
<td></td>
</tr>
<tr>
<td>81a Enter direct or indirect political expenditures See line 81 instructions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b Did the organization file Form 1120-POL for this year?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>b If &quot;Yes,&quot; you may indicate the value of these items here. Do not include this amount as revenue in Part I or as an expense in Part II (See instructions in Part III)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>82b N/A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>83a Did the organization comply with the public inspection requirements for returns and exemption applications?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>b Did the organization comply with the disclosure requirements relating to the organization's functions, contributions, and expenditures?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>84a Did the organization solicit any contributions or gifts that were not tax deductible?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>b If &quot;Yes,&quot; did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>85a 501(c)(4), (5), or (6) organizations: a Were substantially all dues nondeductible by members?</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>b Did the organization make only in-house lobbying expenditures of $2,000 or less?</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>If &quot;Yes&quot; 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</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c Dues, assessments, and similar amounts from members</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>d Section 162(e) lobbying and political expenditures</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>e Aggregate non deductible amount of section 6033(e)(1)(A) dues notices</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>f Taxable amount of lobbying and political expenditures (line 85d less 85e)</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>g Does the organization elect to pay the section 6033(e) tax on the amount on line 85f?</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>h If section 6033(e)(1)(A) dues notices were sent, does the organization agree to add the amount on line 85f to its reasonable estimate of dues allocable to non deductible lobbying and political expenditures for the following tax year?</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>86 501(c)(7) organizations: Enter: a Initiation fees and capital contributions included on line 12</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>b Gross receipts, included on line 12, for public use of club facilities</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>87 501(c)(12) organizations: Enter: a Gross income from members or shareholders</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>b Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them)</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>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?</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>90a 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</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

Located at: 2596 SOUTH LEWIS WAY LAKEWOOD CO  ZIP + 4: 80227

Telephone no: 303-292-2021

The books are in care of: THE FOUNDATION

Form 990 (2003)
### Part VII  Analysis of Income-Producing Activities

Note: Enter gross amounts unless otherwise indicated.

<table>
<thead>
<tr>
<th>(A) Business code</th>
<th>(B) Amount</th>
<th>(C) Exclusion code</th>
<th>(D) Amount</th>
<th>(E) Related or exempt function income</th>
</tr>
</thead>
<tbody>
<tr>
<td>93 Program service revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a EAJA ATTORNEY FEE AWARD</td>
<td>225,000.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>94 Membership dues and assessments</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>95 Interest on savings and temporary cash investments</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>96 Dividends and interest from securities</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>97 Net rental income or (loss) from real estate</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a debt-financed property</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b not debt-financed property</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>98 Net rental income or (loss) from personal property</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>99 Other investment income</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>100 Gain or (loss) from sales of assets other than inventory</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-527.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>101 Net income or (loss) from special events</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>102 Gross profit or (loss) from sales of inventory</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>103 Other revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a PROP TAX REFUND</td>
<td>824.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b INSURANCE CLAIM</td>
<td>9,646.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c MISCELLANEOUS</td>
<td>168.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d MAILING LIST INCOME</td>
<td>63,566.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>104 Subtotal (add columns (B), (D), and (E))</td>
<td>74,080.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>105 Total (add line 104, columns (B), (D), and (E))</td>
<td>235,111.</td>
<td></td>
<td></td>
<td></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

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)

<table>
<thead>
<tr>
<th>Line No.</th>
<th>Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>103</td>
<td>MISC INCOME PROVIDED FUNDS TO MEET EXEMPT PURPOSE</td>
</tr>
</tbody>
</table>

### Part IX  Information Regarding Taxable Subsidiaries and Disregarded Entities

Name, address, and EIN of corporation, partnership, or disregarded entity | Percentage of ownership interest | Nature of activities | Total income | End-of-year assets |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></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 [X] No

(b) Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract? [X] Yes [ ] No

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

Please Sign: [Signature of officer]

Preparer's SSN or PTIN: [000-8837]

Preparer's signature: [Signature of preparer]

Date: 4/19/04

Paid Preparer's Use Only

Firm's name (or yours if self-employed), address, and ZIP + 4:

BROCK AND COMPANY, CPAS, P.C.

26 WEST DRY CREEK CIRCLE, SUITE 710

LITTLETON, CO 80120

Phone no: 303-794-5661
### Part I  Compensation of the Five Highest Paid Employees Other Than Officers, Directors, and Trustees

(See page 1 of the instructions. List each one. If there are none, enter "None".)

<table>
<thead>
<tr>
<th>Name and address of each employee paid more than $50,000</th>
<th>Title and average hours per week devoted to position</th>
<th>Compensation</th>
<th>Contributions to employee benefit plans &amp; deferred compensation</th>
<th>Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>STEVEN J. LECHNER, 2596 S. LEWIS WAY</td>
<td>STAFF ATTORNE</td>
<td>100,000</td>
<td>7,000.</td>
<td></td>
</tr>
<tr>
<td>J. SCOTT DETAMORE, 2596 S. LEWIS WAY</td>
<td>STAFF ATTORNE</td>
<td>67,292</td>
<td>4,710.</td>
<td></td>
</tr>
<tr>
<td>SUSAN AMANDA KOEHLER, 2596 S. LEWIS WAY</td>
<td>STAFF ATTORNE</td>
<td>50,817</td>
<td>3,557.</td>
<td></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

(See page 2 of the instructions. List one whether individuals or firms. If there are none, enter "None".)

<table>
<thead>
<tr>
<th>Name and address of each independent contractor paid more than $50,000</th>
<th>Type of service</th>
<th>Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>EBERLE AND ASSOCIATES, 1420 SPRING HIL ROAD SUITE 490 MCLEAN, VA</td>
<td>FUNDRAISING</td>
<td>91,345</td>
</tr>
</tbody>
</table>

Total number of others receiving over $50,000 for professional services: 0
**Part III  Statements About Activities** (See page 2 of the instructions)

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>2a</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>2b</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>2c</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>2d</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>2e</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>3a</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>3b</td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

**Part IV  Reason for Non-Private Foundation Status** (See pages 3 through 6 of the instructions)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>A church, convention of churches, or association of churches Section 170(b)(1)(A)(i)</td>
</tr>
<tr>
<td>6</td>
<td>A school Section 170(b)(1)(A)(i) (Also complete Part V)</td>
</tr>
<tr>
<td>7</td>
<td>A hospital or a cooperative hospital service organization Section 170(b)(1)(A)(ii)</td>
</tr>
<tr>
<td>8</td>
<td>A Federal, state, or local government or governmental unit Section 170(b)(1)(A)(iv)</td>
</tr>
<tr>
<td>9</td>
<td>A medical research organization operated in conjunction with a hospital Section 170(b)(1)(A)(ii) Enter the hospital's name, city, and state</td>
</tr>
<tr>
<td>10</td>
<td>An organization operated for the benefit of a college or university owned or operated by a governmental unit Section 170(b)(1)(A)(iv) (Also complete the Support Schedule in Part IV-A)</td>
</tr>
<tr>
<td>11a</td>
<td>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)(iv) (Also complete the Support Schedule in Part IV-A)</td>
</tr>
<tr>
<td>11b</td>
<td>A community trust Section 170(b)(1)(A)(iv) (Also complete the Support Schedule in Part IV-A)</td>
</tr>
<tr>
<td>12</td>
<td>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)</td>
</tr>
<tr>
<td>13</td>
<td>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 page 5 of the instructions)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(a) Name(s) of supported organization(s)</th>
<th>(b) Line number from above</th>
</tr>
</thead>
</table>

<p>| 14 | An organization organized and operated to test for public safety Section 509(a)(4) (See page 6 of the instructions) |</p>
<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>15 Gifts, grants, and contributions</td>
<td>1,998,697</td>
<td>2,509,649</td>
<td>3,323,559</td>
<td>2,360,682</td>
<td>10,192,587</td>
</tr>
<tr>
<td>received (Do not include unusual grants</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See line 28)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16 Membership fees received</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>17 Gross receipts from admissions,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>merchandise sold or services performed,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>or furnishing of facilities in any activity</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>that is related to the organization's</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>charitable, etc., purpose</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18 Gross income from interest, dividends,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>amounts received from payments on</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>securities loans (section 512(a)(5), rents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>royalties, and unrelated business taxable</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>income (less section 511 taxes) from</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>businesses acquired by the</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>organization after June 30, 1975</td>
<td>15,527</td>
<td>43,533</td>
<td>42,191</td>
<td>21,487</td>
<td>122,738</td>
</tr>
<tr>
<td>19 Net income from unrelated business</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>activities not included in line 18</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20 Tax revenues levied for the</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>organization's benefit and either</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>paid to it or expended on its behalf</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>21 The value of services or facilities</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>furnished to the organization by a</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>governmental unit without charge</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do not include the value of services or</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>facilities generally furnished to the</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>public without charge</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 Other income</td>
<td>8,821</td>
<td>576</td>
<td>243</td>
<td>1,206</td>
<td>10,846</td>
</tr>
<tr>
<td>SEE STATEMENT 9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>23 Total of lines 15 through 22</td>
<td>2,023,045</td>
<td>2,553,758</td>
<td>3,365,993</td>
<td>2,383,375</td>
<td>10,326,171</td>
</tr>
<tr>
<td>24 Line 23 minus line 17</td>
<td>2,023,045</td>
<td>2,553,758</td>
<td>3,365,993</td>
<td>2,383,375</td>
<td>10,326,171</td>
</tr>
<tr>
<td>25 Enter 1% of line 23</td>
<td>20,230</td>
<td>25,538</td>
<td>33,660</td>
<td>23,834</td>
<td></td>
</tr>
</tbody>
</table>

26 Organizations described on lines 10 or 11: a. Enter 2% of amount in column (e), line 24

b. Prepare a list for your records to show the name of and amount contributed by each person (other than a governmental unit or publicly supported organization) whose total gifts for 1999 through 2002 exceeded the amount shown in line 26a.

Do not file this list with your return. Enter the total of all these excess amounts.

c. Total support for section 509(a)(1) test. Enter line 24, column (e).

d. Add Amounts from column (e) for lines

| Line 22 | 10,846 |
| 19 | 93,477 |
| 26 | 227,061 |
| 26f | 97.8011% |

27 Organizations described on line 12: a. For amounts included in lines 15, 16, and 17 that were received from a "disqualified person," prepare a list for your records to show the name of, and total amounts received in each year, each "disqualified person." Do not file this list with your return. Enter the sum of such amounts for each year

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

b. For any amount included in line 17 that was received from each person (other than "disqualified persons"), prepare a list for your records to show the name of, and amount received for each year, that was more than the larger of (1) the amount on line 25 for the year or (2) $5,000 (include in the list organizations described in lines 5 through 11, as well as individuals). Do not file this list with your return. After computing the difference between the amount received and the larger amount described in (1) or (2), enter the sum of these differences (the excess amounts) for each year

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

c. Add Amounts from column (e) for lines

| Line 17 | 16 |
| 20 | 21 |
| 27c | N/A |

d. Add Line 27a total

| and line 27b total |
| 27d | N/A |

e. Public support (line 27c total minus line 27d total)

| 27e | N/A |
f. Total support for section 509(a)(2) test. Enter amount on line 23, column (e)

| 27f | N/A |
g. Public support percentage (line 27e (numerator) divided by line 27f (denominator))

| 27g | N/A |
h. Investment income percentage (line 28a (numerator) divided by line 27f (denominator))

| 27h | N/A |

28 Unusual Grants: For an organization described in line 10, 11, or 12 that received any unusual grants during 1999 through 2002, 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

NONE
<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td></td>
<td>29</td>
</tr>
<tr>
<td>30</td>
<td></td>
<td>30</td>
</tr>
<tr>
<td>31</td>
<td></td>
<td>31</td>
</tr>
<tr>
<td>32</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33</td>
<td></td>
<td></td>
</tr>
<tr>
<td>34</td>
<td></td>
<td></td>
</tr>
<tr>
<td>35</td>
<td></td>
<td>35</td>
</tr>
</tbody>
</table>
### Part VI-A | Lobbying Expenditures by Electing Public Charities

(To be completed ONLY by an eligible organization that filed Form 5768)

#### Limits on Lobbying Expenditures

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

| 36 | Total lobbying expenditures to influence public opinion (grassroots lobbying) | N/A |
| 37 | Total lobbying expenditures to influence a legislative body (direct lobbying) | 37 |
| 38 | Total lobbying expenditures (add lines 36 and 37) | 38 |
| 39 | Other exempt purpose expenditures | 39 |
| 40 | Total exempt purpose expenditures (add lines 38 and 39) | 40 |
| 41 | Lobbying nontaxable amount | 41 |

If the amount on line 40 is:

- Not over $500,000, 20% of the amount on line 40
- Over $500,000 but not over $1,000,000, $100,000 plus 15% of the excess over $500,000
- Over $1,000,000 but not over $1,500,000, $175,000 plus 10% of the excess over $1,000,000
- Over $1,500,000 but not over $17,000,000, $225,000 plus 5% of the excess over $1,500,000
- Over $17,000,000, $1,000,000

Grassroots nontaxable amount (enter 25% of line 41) | 42 |

Subtract line 42 from line 36 Enter -0- if line 42 is more than line 36 | 43 |

Subtract line 41 from line 38 Enter -0- if line 41 is more than line 38 | 44 |

**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 on page 11 of the instructions)

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2003</th>
<th>(b) 2002</th>
<th>(c) 2001</th>
<th>(d) 2000</th>
<th>(e) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>45</td>
<td>Lobbying nontaxable amount</td>
<td>0.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>Lobbying ceiling amount (150% of line 45(e))</td>
<td>0.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47</td>
<td>Total lobbying expenditures</td>
<td>0.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>48</td>
<td>Grassroots nontaxable amount</td>
<td>0.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>49</td>
<td>Grassroots ceiling amount (150% of line 48(e))</td>
<td>0.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>50</td>
<td>Grassroots lobbying expenditures</td>
<td>0.</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 page 12 of the instructions)

During the year, did the organization attempt to influence national, state or local legislation, including any attempt to influence public opinion on a legislative matter or referendum, through the use of

- Volunteers
- Paid staff or management (Include compensation in expenses reported on lines c through h.)
- Media advertisements
- Mailings to members, legislators, or the public
- Publications, or published or broadcast statements
- Grants to other organizations for lobbying purposes
- Direct contact with legislators, their staffs, government officials, or a legislative body
- Rallies, demonstrations, seminars, conventions, speeches, lectures, or any other means
- Total lobbying expenditures (Add lines c through h.)

If "Yes" to any of the above, also attach a statement giving a detailed description of the lobbying activities

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0.</td>
</tr>
</tbody>
</table>

**Schedule A (Form 990 or 990-EZ) 2003**
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></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Transfers from the reporting organization to a noncharitable exempt organization of</td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(ii)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>b</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other transactions</td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(ii)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(iii)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(iv)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(v)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(vi)</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>c</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sharing of facilities, equipment, mailing lists, other assets, or paid employees</td>
<td></td>
</tr>
<tr>
<td>d</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>If the answer to any of the above is &quot;Yes,&quot; complete the following schedule Column (b) should always show the fair market value of the goods, other assets, or services received or given by the reporting organization. If the organization received less than fair market value in any transaction or sharing arrangement, show in column (d) the value of the goods, other assets, or services received</td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>(a)</td>
<td>Line no</td>
<td>(b)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

52. 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?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>If &quot;Yes,&quot; complete the following schedule</td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>(a)</td>
<td>Name of organization</td>
<td>(b)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

323151
12-09-03
Schedule A (Form 990 or 990-EZ) 2003
### Part I - Election To Expense Certain Tangible Property Under Section 179

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

<table>
<thead>
<tr>
<th></th>
<th>Description of property</th>
<th>Cost (business use only)</th>
<th>Elected cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Maximum amount. See instructions for a higher limit for certain businesses</td>
<td>$100,000.</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Total cost of section 179 property placed in service (see instructions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Threshold cost of section 179 property before reduction in limitation</td>
<td>$400,000.</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Reduction in limitation. Subtract line 3 from line 2. If zero or less, enter 0-.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Dollar limitation for tax year. Subtract line 4 from line 1. If zero or less, enter 0-. If named thing separately, see instructions</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Part II - Special Depreciation Allowance and Other Depreciation

- **Note:** Do not include listed property.

<table>
<thead>
<tr>
<th></th>
<th>Special depreciation allowance for qualified property (other than listed property) placed in service during the tax year (see instructions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Property subject to section 168(f)(1) election (see instructions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Other depreciation (including ACRS) (see instructions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>16</td>
<td>$51,879.</td>
</tr>
</tbody>
</table>

#### Part III - MACRS Depreciation

**(Do not include listed property.)(See instructions)**

- **Section A**

<table>
<thead>
<tr>
<th></th>
<th>MACRS deductions for assets placed in service in tax years beginning before 2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>17</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>If you are electing under section 168(h)(4) to group any assets placed in service during the tax year into the general asset accounts, check here</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td></td>
</tr>
</tbody>
</table>

#### Section B - Assets Placed in Service During 2003 Tax Year Using the General Depreciation System

- **(a) Classification of property**
- **(b) Month and year placed in service**
- **(c) Basis for depreciation (business/investment use only - see instructions)**
- **(d) Recovery period**
- **(e) Convention**
- **(f) Method**
- **(g) Depreciation deduction**

<table>
<thead>
<tr>
<th></th>
<th>3-year property</th>
<th>5-year property</th>
<th>7-year property</th>
<th>10-year property</th>
<th>15-year property</th>
<th>20-year property</th>
<th>25-year property</th>
<th>Residential rental property</th>
<th>Nonresidential real property</th>
</tr>
</thead>
<tbody>
<tr>
<td>19a</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>25 yrs.</td>
<td>27.5 yrs.</td>
<td>39 yrs.</td>
</tr>
</tbody>
</table>

#### Section C - Assets Placed in Service During 2003 Tax Year Using the Alternative Depreciation System

- **(a) Classification of property**
- **(b) Month and year placed in service**
- **(c) Basis for depreciation (business/investment use only - see instructions)**
- **(d) Recovery period**
- **(e) Convention**
- **(f) Method**
- **(g) Depreciation deduction**

<table>
<thead>
<tr>
<th></th>
<th>Class life</th>
<th>12-year</th>
<th>40-year</th>
</tr>
</thead>
<tbody>
<tr>
<td>20a</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Part IV - Summary

- **Note:** See instructions.

<table>
<thead>
<tr>
<th></th>
<th>Listed property. Enter amount from line 28</th>
</tr>
</thead>
<tbody>
<tr>
<td>21</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>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 instr.</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>$51,879.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>23</td>
<td></td>
</tr>
</tbody>
</table>

**Form 4562 (2003)**

**LHA For Paperwork Reduction Act Notice, see separate instructions.**
### Part V

**Listed Property** (Include automobiles, certain other vehicles, cellular telephones, certain computers, and property used for entertainment, recreation, or amusement.)

**Note:** For any vehicle for which you are using the standard mileage rate or deducting lease expense, complete only 24a, 24b, columns (a) through (c) of Section A, all of Section B, and Section C if applicable.

#### Section A - Depreciation and Other Information

(Caution: See instructions for limits for passenger automobiles)

<table>
<thead>
<tr>
<th>(a) Type of property (list vehicles first)</th>
<th>(b) Date placed in service</th>
<th>(c) Business/investment use percentage</th>
<th>(d) Cost or other basis</th>
<th>(e) Basis for depreciation (business/investment use only)</th>
<th>(f) Recovery period</th>
<th>(g) Method/Convention</th>
<th>(h) Depreciation deduction</th>
<th>(i) Elected section 179 cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>24a Do you have evidence to support the business/investment use claimed?</td>
<td>Yes</td>
<td>No</td>
<td>24b If &quot;Yes,&quot; is the evidence written?</td>
<td>Yes</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

25 Special depreciation allowance for qualified listed property placed in service during the tax year and used more than 50% in a qualified business use

26 Property used more than 50% in a qualified business use:

<table>
<thead>
<tr>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>---</td>
</tr>
</tbody>
</table>

27 Property used 50% or less in a qualified business use:

<table>
<thead>
<tr>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>S/L -</td>
</tr>
</tbody>
</table>

28 Add amounts in column (h), lines 25 through 27. Enter here and on line 21, page 1

29 Add amounts in column (l), line 26. Enter here and on line 7, page 1

#### Section B - Information on Use of Vehicles

Complete this section for vehicles used by a sole proprietor, partner, or other *more than 5% owner,* or related person. If you provided vehicles to your employees, first answer the questions in Section C to see if you meet an exception to completing this section for those vehicles.

30 Total business/investment miles driven during the year (do not include commuting miles)

31 Total commuting miles driven during the year

32 Total other personal (noncommuting) miles driven

33 Total miles driven during the year. Add lines 30 through 32

34 Was the vehicle available for personal use during off-duty hours?

35 Was the vehicle used primarily by a more than 5% owner or related person?

36 Is another vehicle available for personal use?

#### Section C - Questions for Employers Who Provide Vehicles for Use by Their Employees

Answer these questions to determine if you meet an exception to completing Section B for vehicles used by employees who are not more than 5% owners or related persons.

37 Do you maintain a written policy statement that prohibits all personal use of vehicles, including commuting, by your employees?

38 Do you maintain a written policy statement that prohibits personal use of vehicles, except commuting, by your employees? See instructions for vehicles used by corporate officers, directors, or 1% or more owners

39 Do you treat all use of vehicles by employees as personal use?

40 Do you provide more than five vehicles to your employees, obtain information from your employees about the use of the vehicles, and retain the information received?

41 Do you meet the requirements concerning qualified automobile demonstration use?

**Note:** If your answer to 37, 38, 39, 40, or 41 is "Yes," do not complete Section B for the covered vehicles.

#### Part VI | Amortization

<table>
<thead>
<tr>
<th>(a) Description of costs</th>
<th>(b) Date amortization begins</th>
<th>(c) Amortizable amount</th>
<th>(d) Code section</th>
<th>(e) Amortization period or percentage</th>
<th>(f) Amortization for this year</th>
</tr>
</thead>
<tbody>
<tr>
<td>42 Amortization of costs that begins during your 2003 tax year:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

43 Amortization of costs that began before your 2003 tax year

44 Total. Add amounts in column (f). See instructions for where to report

318252/10-21-03
<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>GROSS SALES PRICE</th>
<th>COST OR OTHER BASIS</th>
<th>EXPENSE OF SALE</th>
<th>NET GAIN OR (LOSS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>MERRILL LYNCH, ACQ</td>
<td>3,132.</td>
<td>3,272.</td>
<td>0.</td>
<td>-140.</td>
</tr>
<tr>
<td>MERRILL LYNCH, ACQ</td>
<td>9,922.</td>
<td>10,155.</td>
<td>0.</td>
<td>-233.</td>
</tr>
<tr>
<td>MICROSOFT 200 SH</td>
<td>5,256.</td>
<td>5,286.</td>
<td>0.</td>
<td>-30.</td>
</tr>
<tr>
<td>TO FORM 990, PART I, LINE 8</td>
<td>18,310.</td>
<td>18,713.</td>
<td>0.</td>
<td>-403.</td>
</tr>
</tbody>
</table>
## FORM 990
### GAIN (LOSS) FROM SALE OF OTHER ASSETS

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>DATE ACQUIRED</th>
<th>DATE SOLD</th>
<th>METHOD ACQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHASE NOTE</td>
<td>VARIOUS</td>
<td>02/24/03</td>
<td>PURCHASED</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NAME OF BUYER</th>
<th>GROSS SALES PRICE</th>
<th>COST OR OTHER BASIS</th>
<th>EXPENSE OF SALE</th>
<th>DEPREC</th>
<th>NET GAIN OR (LOSS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10,000.</td>
<td>10,100.</td>
<td>0.</td>
<td>0.</td>
<td>-100.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>DATE ACQUIRED</th>
<th>DATE SOLD</th>
<th>METHOD ACQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>CORNING NOTE</td>
<td>VARIOUS</td>
<td>05/19/03</td>
<td>PURCHASED</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NAME OF BUYER</th>
<th>GROSS SALES PRICE</th>
<th>COST OR OTHER BASIS</th>
<th>EXPENSE OF SALE</th>
<th>DEPREC</th>
<th>NET GAIN OR (LOSS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>TO FM 990, PART I, LN 8</td>
<td>39,790.</td>
<td>39,914.</td>
<td>0.</td>
<td>0.</td>
<td>-124.</td>
</tr>
</tbody>
</table>

### OTHER CHANGES IN NET ASSETS OR FUND BALANCES

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNREALIZED GAIN</td>
<td>112,451.</td>
</tr>
</tbody>
</table>

TOTAL TO FORM 990, PART I, LINE 20 | 112,451.

### OTHER EXPENSES

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>TOTAL</th>
<th>(B) PROGRAM SERVICES</th>
<th>(C) MANAGEMENT AND GENERAL</th>
<th>(D) FUNDRAISING</th>
</tr>
</thead>
<tbody>
<tr>
<td>REPAIRS AND MAINTENANCE</td>
<td>6,202.</td>
<td>4,652.</td>
<td>1,053.</td>
<td>497.</td>
</tr>
<tr>
<td>PROFESSIONAL SERVICE</td>
<td>66,474.</td>
<td>46,698.</td>
<td>19,776.</td>
<td></td>
</tr>
<tr>
<td>INSURANCE</td>
<td>19,073.</td>
<td>17,569.</td>
<td>1,504.</td>
<td></td>
</tr>
<tr>
<td>CONTRACT LABOR</td>
<td>18,255.</td>
<td>14,366.</td>
<td>1,552.</td>
<td>2,337.</td>
</tr>
<tr>
<td>OFFICE EXPENSES NET OF REIMBURSEMENT</td>
<td>-6,987.</td>
<td>-16,282.</td>
<td>8,002.</td>
<td>1,293.</td>
</tr>
</tbody>
</table>

TOTAL TO FM 990, LN 43 | 131,736. | 95,291. | 32,097. | 4,348. |

STATEMENT(S) 2, 3, 4
### FORM 990 NON-GOVERNMENT SECURITIES

<table>
<thead>
<tr>
<th>SECURITY DESCRIPTION</th>
<th>CORPORATE STOCKS</th>
<th>CORPORATE BONDS</th>
<th>OTHER PUBLICLY TRADED SECURITIES</th>
<th>OTHER SECURITIES</th>
<th>TOTAL NON-GOV'T SECURITIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>STOCKS</td>
<td>55,521.</td>
<td></td>
<td></td>
<td></td>
<td>55,521.</td>
</tr>
<tr>
<td>BONDS</td>
<td></td>
<td>144,459.</td>
<td></td>
<td></td>
<td>144,459.</td>
</tr>
<tr>
<td>TO 990, LN 54 COL B</td>
<td>55,521.</td>
<td>144,459.</td>
<td></td>
<td></td>
<td>199,980.</td>
</tr>
</tbody>
</table>

### FORM 990 DEPRECIATION OF ASSETS NOT HELD FOR INVESTMENT

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>COST OR OTHER BASIS</th>
<th>ACCUMULATED DEPRECIATION</th>
<th>BOOK VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>BUILDINGS</td>
<td>1,397,718.</td>
<td>65,483.</td>
<td>1,332,235.</td>
</tr>
<tr>
<td>FURNITURE &amp; FIXTURES</td>
<td>139,146.</td>
<td>73,299.</td>
<td>65,847.</td>
</tr>
<tr>
<td>LAND</td>
<td>154,705.</td>
<td>0.</td>
<td>154,705.</td>
</tr>
<tr>
<td>MACHINERY &amp; OTHER EQUIPMENT</td>
<td>184,654.</td>
<td>73,414.</td>
<td>111,240.</td>
</tr>
<tr>
<td>OTHER</td>
<td>41,900.</td>
<td>36,102.</td>
<td>5,798.</td>
</tr>
<tr>
<td><strong>TOTAL TO FORM 990, PART IV, LN 57</strong></td>
<td><strong>1,918,123.</strong></td>
<td><strong>248,298.</strong></td>
<td><strong>1,669,825.</strong></td>
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### FORM 990 OTHER ASSETS

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### FORM 990 OTHER LIABILITIES

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<td>PENSION FUND PAYABLE</td>
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STATEMENT(S) 5, 6, 7, 8
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<th>2000 AMOUNT</th>
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<td>0.</td>
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<tr>
<td>OTHER</td>
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<td>576.</td>
<td>243.</td>
<td>1,206.</td>
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<td>TOTAL TO SCHEDULE A, LINE 22</td>
<td>8,821.</td>
<td>576.</td>
<td>243.</td>
<td>1,206.</td>
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This case was approved by the Board of Directors on June 7, 2002. Sean McEniry 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. McEniry 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. McEniry 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 McEniry 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. (Joe Becker) (02-4990)

This case was approved by the Board of Directors on October 3, 2003. On February 24, 1967, Delta Bement purchased two adjacent parcels of land: Parcel A, 2.57 acres; and Parcel B, 9.45 acres. On March 31, 1967, Ms. Bement purchased a third parcel, Parcel C, 1.24 acres, adjacent to Parcel B. These three parcels were purchased for the purpose of having three building sites to bestow, at some future date, to her three
children. At the time of purchase the parcels were zoned estate residential, requiring a
minimum of 2 acres for building lot approval, and it was Ms. Bement’s intention to
reduce the size of Parcel B and increase the size of adjoining Parcel C to the extent
necessary to comply with Boulder County’s minimum acreage requirement. Of course,
Parcel A already met the minimum acreage requirement.

In 1994, Boulder County amended its land use code such that “Any subdivided lot
which does not contain a developed principal use will be considered to be combined into
a single building lot with any contiguous subdivided lot (whether developed or
undeveloped)” in any case when the lots are combined on a single deed; the lots are in a
subdivision recorded prior to March 22, 1978, that has less than 25 percent of the lots
developed as of May 15, 1996; and at least one of the following criteria are met: (a) the
lots have been combined due to shared physical improvements other than roads, drives,
and fences; or (b) the lots were combined on or after January 1, 1997 on county records
for property tax purposes; or (c) the lots cannot be built upon without significant scarring
or erosion, or without significant damage to environmental resources identified in the
Boulder County Comprehensive Plan. The amended code allows, however, the Board of
County Commissioners to approve exemption plats and boundary line adjustment.

MSLF will file suit in U.S. District Court on behalf of Ms. Bement against the
Boulder County Board of County Commissioners, individually and in their official
capacities, asking that the Court overturn that part of the Boulder County Land Use Code
that merges same-owner contiguous lots. It will assert that the code violates substantive
due process and equal protection under the United States Constitution and constitutes a
regulatory taking under the Colorado and United States Constitutions. (Joe Becker) (03-
5273)

Benson, et al. v. State of South Dakota
(Private Property Rights; Limited Government)
(Counsel for Robert and Judith Benson and Jeff and Tricia Messmer)
(South Dakota Sixth Judicial District, Tripp County Court, Civ. 03-121)

This case was approved by the Board of Directors on June 6, 2003. The South
Dakota Farm Bureau requested the assistance of MSLF in challenging South Dakota
House Bill 1163, which the Governor of South Dakota signed into law on March 22,
2003. HB 1163 amended state law to provide that hunting on highways or other public
rights-of-way includes “The shooting at or taking by legal methods of small game, except
mourning dove, that are in flight over private land if the small game has either originated
from or has taken flight from the highway or public right-of-way or if the small game is
in the process of flying over the highway or public right-of-way.” South Dakota Codified
Laws § 41-9-1.1 (as amended). This amendment also provided that if the above
provision is “declared by an advisory opinion or adjudication of the South Dakota
Supreme Court to be a taking of private property requiring compensation,” this provision
is void. Id.

In South Dakota, hunting of small game is generally permitted within highways
and all other public rights-of-way, including section lines. Therefore, all South Dakota
property owners adjoining any public roadway or section line are affected by the passage

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of this bill. The bill is scheduled to take effect in July 2003. Public debate in South Dakota before the passage of this bill was intense, pitting private property owners against hunters. Property owners are concerned about the safety issues, fearing the danger to individuals and livestock posed by random and unexpected gunfire onto their property.

On October 22, 2003, MSLF filed suit in South Dakota Circuit Court, Sixth Judicial District, on behalf of Robert and Judith Benson and Jeff and Tricia Messmer, four individuals directly and immediately affected by HB 1163, for compensation for the taking of their property.

On November 18, 2003, the State Attorney General served the State’s answer. MSLF filed Benson’s motion for summary judgment on January 6, 2004. The State filed its response on February 27, 2004. Benson’s reply is due on March 12, 2004. Discovery ends on March 26, 2004, and the parties are to confer in mid-April regarding a hearing date for Benson’s motion for summary judgment. Any additional dispositive motions must be filed by April 30, 2004. Trial, if necessary, will be held in early May. (Amanda Koehler) (Mentor: Davis) (03-5257)

BIG CREEK LAKES RESERVOIR ASS’N v. UNITED STATES
(Private Property Rights; Access to Public Lands)
(Counsel for Big Creek Lakes Reservoir Ass’n) (U.S. District Court, Montana)

This case was approved by the Board of Directors on October 3, 2003. Big Creek Lakes Reservoir Association (BCLRA) is the owner of the South Fork Reservoir, located within the boundaries of the Bitterroot National Forest and Selway-Bitterroot Wilderness in western Montana. The South Fork Reservoir stores about 200 acre-feet of water and is small in comparison to the primary reservoir owned by BCLRA, which stores about 2,500 acre-feet. Although the federal government has acknowledged that BCLRA owns pre-FLPMA rights-of-way for the large reservoir under the Act of 1866 and the Act of 1891, the Forest Service denies that BCLRA owns a right-of-way for the South Fork Reservoir under either Act because the facility was not constructed prior to the reservation of the Bitterroot National Forest in 1897.

A Water Right Location for the South Fork Reservoir dated August 23, 1897, states that the surplus waters of the South Fork Lake have been “claim[ed]” and “appropriated [] by means of placing a dam across the mouth of said lake and placing a head gate in said dam” for irrigation purposes. Although the Bitterroot Forest Reserve was created by presidential proclamation on February 22, 1897, such proclamation was suspended by Act of Congress on June 4, 1897. As a result, the lands described in the proclamation were restored to the public domain until March 1, 1898. Therefore, a right-of-way for the South Fork Reservoir was acquired, pursuant to the Act of 1866, during this period when the lands comprising the Bitterroot Forest Reserve were temporarily restored to the public domain.

Because the Forest Service denies that BCLRA owns a right-of-way and refuses to grant a ditch bill easement for the South Fork Reservoir, MSLF, on behalf of BCLRA, will pursue a quiet title action and will assert that: (1) BCLRA has a statutorily granted right-of-way under the Act of 1866; (2) BCLRA has a statutorily granted right-of-way on

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reserved unsurveyed land under the Act of 1891; and (3) BCLRA has not abandoned its statutorily granted rights-of-way under the Act of 1866 and/or the Act of 1891.

On January 9, 2004, BCLRA informed MSLF that it intends to proceed with MSLF representation; on January 20, 2004, a signed representation letter was returned to MSLF. (Amanda Koehler) (Mentor: Ruffatto) (03-5273)

**CHOLLA READY MIX, INC. v. FEDERAL HIGHWAY ADMINISTRATION, et al.**
( Establishment Clause; Private Property Rights) (Counsel for Cholla Ready Mix)
(Ninth Circuit, Arizona, Case No. 03-15423)

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 Carroll 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 McKinnons’ 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, and on January 17, 2003, the Court dismissed the State of Arizona from the case.

On February 3, 2003, Cholla filed an amended complaint to add the BLM as a defendant. It also filed a motion for reconsideration of the order dismissing the State of Arizona from the suit and a memorandum in support of the motion. Under Arizona local rules, unless ordered by the Court defendants cannot respond to a motion for reconsideration. On February 11, 2003, the federal government filed its answer to Cholla’s amended complaint.

On February 25, 2003, the Court denied Cholla’s motion for reconsideration and entered final judgment, as to the State defendants, dismissing the case. On March 7, 2003, Cholla filed a notice of appeal of the dismissal of the State defendants and the civil docketing statement with the Ninth Circuit. The transcript order form was submitted on March 14, 2003. Cholla’s opening brief and excerpts of record were filed in the Court on July 8, 2003. The State was granted an extension until August 20, 2003, in which to file its response, and the response was timely filed. Cholla’s reply was filed on September 9, 2003.

A Rule 16 scheduling conference, as regards Cholla and the federal defendants, was set for October 3, 2003. On August 13, 2003, Cholla and the federal defendants filed a joint stipulation to dismissal without prejudice. On August 18, 2003, Judge Martone dismissed the case without prejudice and the dismissal was filed on August 20, 2003.

MSLF shortly will file a petition for delisting of the Butte as a National Historic Site. (Chris Massey) (Mentor: Wilson; Local Counsel, James) (01-4919)

(CGNW II)  
(Access To Federal Lands; Limited and Ethical Government)  
(Counsel for CGNW, et al.) (U.S. District Court, D.C., Civil Action No. 1:00cv01394)

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.”

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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 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, Civil Action No. CV-01-10-N-EJL), which, purportedly, was 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.

On December 12, 2002, in Kootenai Tribe, the Ninth Circuit held that the Idaho Federal District Court had abused its discretion when it granted Plaintiffs’ motion for a preliminary injunction to prevent implementation of the Roadless Rule. On December 24, 2002, the Plaintiffs filed a petition for rehearing en banc to review the panel’s opinion. If the Ninth Circuit does not grant en banc review or if it affirms the panel’s decision, MSLF will file a motion to reopen Communities.

MSLF intends to file an amicus brief on behalf of itself and Communities for a Great Northwest in a related roadless case, State of Wyoming v. U.S. Department of Agriculture and The Wilderness Society, et al. (10th Cir., Case No. 03-8058), supporting the appellee, the State of Wyoming. Defendant-intervenors, The Wilderness Society, Sierra Club, Biodiversity Associates, Pacific Rivers Council, and Natural Resources Defense Council, are appealing Judge Brimmer’s decision overturning Clinton’s roadless rules. (See State of Wyoming entry in this Update.) (Kelly Hall) (Mentor: Pos) (99-4571)

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

(Free Enterprise; Equal Protection Constitutional Rights and Liberties)

(Counsel for Petitioner Concrete Works) (Supreme Court, Colorado, Case No. 02-1673)

Following the U.S. Supreme Court’s decision in *J.A. Croson, Inc. v. City of Richmond*, the City and County of Denver initiated efforts to bring its affirmative action program into compliance with 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 MSLF’s assistance in challenging these policies.

Concrete Works of Colorado, Inc., lost several contracts on which it was low bidder. On January 6, 1992, Concrete Works filed suit against Denver and then requested MSLF’s assistance. In February 1992 MSLF’s Board of Directors approved representation of Concrete Works. 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 Concrete Works responded on October 20, 1992. Oral arguments on summary judgment were held on December 8, 1992, and on February 26, 1993, the District Court granted Denver’s motion.

On March 23, 1993, Concrete Works filed a notice of appeal with the Tenth Circuit. On April 9, 1993, Denver cross appealed, challenging the decision of the District Court on the grounds that Concrete Works had standing to bring the action and the ordinance at issue created a racial classification. On May 4, 1993, the Tenth Circuit
notified the 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 for voluntary dismissal of its cross-appeal, and on June 1, 1993, the Tenth Circuit dismissed the cross-appeal.

On July 12, 1993, Concrete Works filed its opening brief. Denver filed its response on September 13, 1993, and Concrete Works filed its 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, and on March 6, 1995, the Supreme Court denied the petition.

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

At a hearing on the motions, held March 26, 1998, Concrete Works fared well. Its longstanding motion to bifurcate the trial into liability and damages was granted, with trial on liability taking place first. Concrete Works's motions to depose City Council members were denied for 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 or denied. Concrete Works, however, 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. Judge Matsch said that he could not rule until the evidence was before him and that Denver would have a heavy burden. He also withheld ruling on Concrete Works' motions to exclude evidence regarding minority business formation rates, indicating instead that Denver would have to make a strong showing before this evidence could be allowed.

In a major procedural victory for Concrete Works, Judge Matsch ruled that Denver's ordinance was, on its face, race conscious and thus the burden of production was on Denver, which would go first at trial. Denver would produce its expert reports first and Concrete Works would then rebut. Judge Matsch's ruling reversed that of the Magistrate Judge, which Concrete Works had strongly protested. Judge Matsch did not reach those issues concerning Concrete Works' motions requiring that Denver pick and choose from among its 135 anecdotal witnesses and giving Concrete Works an opportunity to do discovery with respect to those witnesses. He did, however, set a scheduling conference for April 24, 1998, at which time a new scheduling order would be issued. Finally, he indicated that from this point forward the case was on the "front burner" and matters would proceed expeditiously.
MSLF’s efforts produced results! Denver soon announced that it would introduce an amendment to its affirmative action ordinance that would prevent prime contractors from utilizing their own status and their own work to satisfy minority participation requirements. The program thus would become strictly a subcontractor program. Denver also proposed to reduce its minority participation goal from 16 to 10 percent and its women participation goal from 12 to 10 percent. Denver indicated that it would challenge Concrete Works’ standing as a contractor, but two cases, from the Ninth and Federal Circuits, would grant Concrete Works standing as a principal contractor. Moreover, because Concrete Works had bid as a subcontractor, it had standing on that basis.

At the April scheduling conference, Judge Matsch again indicated that Denver’s ordinance was facially discriminatory and that Denver had the burden of production and would go first at trial. He invited Concrete Works to renew its motion to exclude evidence of minority business formation rates, which it did. He stated that he wanted no motions for summary judgment and instead wanted to “get wet all at once in a bath, not progressively through a series of showers.” A pretrial conference was set for December 18, 1998, and the trial for two weeks beginning February 8, 1999.

Concrete Works 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. Concrete Works filed motions seeking that two of Denver’s experts be stricken due to their failure to provide the underlying data to their expert reports; motions to restrict evidence of minority business formation rates; and 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 Concrete Works, together with summaries of the testimony of Denver’s 87 proposed anecdotal witnesses, and he ordered that the evidence Concrete Works sought to exclude be admitted.

Concrete Works filed its expert reports on September 15, 1998. Denver completed deposing CWC’s experts, Lunn and LaNoue, in October 1998. Denver’s expert rebuttal reports were filed on December 15, 1998, and the pretrial report on December 11, 1998. The pretrial conference was held on December 18, 1998.

On February 8-15, 1999, the expert testimony was presented, and on June 21-29, 1999, the non-expert testimony was presented. Written closing arguments were filed on July 30, 1999, and on March 7, 2000, in an 80-page opinion, Judge Matsch ruled in favor of CWC.

On March 21, 2000, Concrete Works filed its bill of costs and a motion for award of attorneys’ fees and expert witness fees.

The City of Denver moved to stay the court’s injunctive order. At a hearing on March 28, 2000, Judge Matsch denied the City’s motion and tabled Concrete Works’ motion regarding fees. On March 29, 2000, he issued a written order to that effect.

On April 6, 2000, the City of Denver filed a notice of appeal from the decision of March 7, 2000, and the post-trial order of March 29, 2000. Attorneys from a Chicago, Illinois, firm entered appearances for the City, together with the City Attorney and Assistant City Attorney. On August 28, 2000, after two unopposed motions for extension
of time, Denver filed its opening brief and appendix. Concrete Works 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, Concrete Works filed its response one day out of time, together with a motion to file response one day late, which was granted that same day. 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 Concrete Works, and 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. Concrete Works 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, Concrete Works filed a motion to withdraw the order of abatement on the grounds that the Supreme Court had 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.

On February 10, 2003, the Tenth Circuit ruled in favor of the City and County of Denver, overturning Judge Matsch’s ruling for Concrete Works.

On May 12, 2003, Concrete Works filed a petition for writ of certiorari, and the petition was docketed on May 15, 2003. Denver requested an extension of time until July 14, 2003, in which to file its opposition that was granted by the Court and extended to all respondents.

On June 10, 2003, on behalf of itself and others, Pacific Legal Foundation filed an amicus brief in support of the petition. On July 11, 2003, L.S. Lee, Inc., filed an amicus brief in support of the petition.

On July 14, 2003, Denver filed its opposition to Concrete Works’ petition, and Landmark Legal Foundation filed an amicus brief in support of the petition. On July 30, 2003, the petition, opposition, and all amicus briefs were distributed to the justices. On August 1, 2003, Concrete Works’ reply was filed and distributed to the justices.

The petition was considered at the justices’ conference on September 29, 2003, and carried over to the conference on October 10, 2003. Finally, at its sixth conference on the matter, on November 17, 2003, the Court denied Concrete Works’ petition for writ of certiorari. MSLF is reviewing Denver’s bill of costs and is considering the filing of a motion for attorneys’ fees through December 28, 1998, the date on which the City and
County of Denver amended its affirmative action program immediately prior to the trial on the constitutionality of the program.

On February 6, 2004, the City of Denver filed a motion with the District Court for relief from the stipulated stay of further proceedings and a request for the Court Clerk to tax the previously filed amended bill of costs against plaintiff Concrete Works. The motion was granted on February 9, 2004.

A hearing on Denver’s bill of costs will be held before the Clerk of the Court on March 23, 2004. (Scott Detamore) (92-3131)

**CRIPPLED HORSE INVESTMENTS LIMITED PARTNERSHIP v. NORTON, et al.**
(Private Property Rights) (Counsel for Crippled Horse)
(U.S. District Court, Utah; Civil Action No. 2:96-cv-0813G)

Crippled Horse Investments Limited Partnership (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 notified 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. On February 4, 2003, Crippled Horse filed a motion to file a supplemental memorandum regarding recent developments in the case and the supplemental memorandum.

On February 6, 2003, the Court granted Crippled Horse’s motion to file a supplemental memorandum regarding recent developments and ordered that any responsive memorandum by the government was to be filed within 20 days, by March 5, 2003. On March 4, 2003, the government filed its response to Crippled Horse’s memorandum regarding recent developments.

A hearing on all matters before the Court, including the government’s motion to strike and Crippled Horse’s motion for summary judgment, will be held on May 11, 2004. (Steve Lechner) (Mentor: Ruffatto) (Co-Counsel: Robert G. Pruitt, Jr.) (89-2747)

**DESPARD v. MANHEIM TOWNSHIP SCHOOL DISTRICT and PENNSYLVANIA DEPARTMENT OF EDUCATION**
(Limited and Ethical Government) (Counsel for Thomas Despard)
(Pennsylvania State Court)

This case was approved by the Board of Directors on February 6, 2004, with the proviso that staff clearly establish that the state funding formula violates the 1972 state statute.

The Manheim Township School District (“the District”) and the Pennsylvania Department of Education (“the Department”) are designing and constructing a new high school in Manheim Township, near Lancaster, Pennsylvania. The cost of the proposed school project is $110 million ($72 million construction cost and $38 million in interest expense over 20 years). The school board’s plan calls for half of the existing school to be torn down and the other half to be renovated in order to increase the size of the school over 80,000 square feet. The primary purpose of this plan is to allow for an experimental new method of teaching in which students are isolated into “small learning communities” in individual “schoolhouses” and student interaction among grade levels is reduced.

Although Pennsylvania state law limits expenditures for such projects and requires a referendum if those costs are exceeded, the District and the Department refuse to comply with that law. A majority of township residents and taxpayers believe that the school board and state department are grossly overspending for the new school in violation of Pennsylvania law. The construction plan will increase school property taxes in the district by at least 10–15 percent for the next 20 years and will increase the
redundancy of facilities, resulting in increased maintenance costs. If the facility were constructed entirely as a new building, the school would exceed the Department’s size limitations by 23 percent. Most district taxpayers believe that the existing school can be renovated sufficiently to serve the needs of the school district and in accordance with Pennsylvania law at less than half of the proposed cost; that is, for about $36 million.

Under Pennsylvania’s Act 34 of 1973, 24 P. S. § 7-701, if a new school or substantial addition is being constructed, the school board must set a maximum project cost and a maximum building construction cost to be financed by the district. A public referendum is required for approval of the maximum building construction cost if the maximum building construction cost exceeds an amount identified in the statute as the “aggregate building expenditure standard.”

MSLF will represent Thomas Despard and other local taxpayers in challenging the current school building regulations as a violation of Act 34. It will assert that approval by public referendum is required for construction of a new high school in the District and that the method used by the District and the Department to calculate “rated pupil capacity” for purposes of determining the “aggregate building expenditure standard” comports with Pennsylvania law. Representation letter(s) will be sent after the School Board approves the construction plans on June 17, 2004. (Amanda Koehler) (03-5390)

**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. (Steve 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 ranched. At an
unknown time, J. Douglas Dow inherited the property from Alex Dow. Years later, three
brothers, Peter, Stuart, and Bryden, 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
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,
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

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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 blade 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.

On February 28, 2003, the Clerk of the Arizona District Court determined that the case was subject to the voluntary, non-binding arbitration program of the Court and the case was referred to that program for the conduct of all further proceedings. Any party wishing to withdraw from the program must submit a Notice of Withdrawal from Arbitration within 21 days, in this case, on or before March 21, 2003. MSLF submitted such notice and was removed from the arbitration program.

On June 23, 2003, the parties filed a joint case management plan, and the pretrial conference was held by telephone on June 30, 2003. On July 1, 2003, the Court issued a Rule 16 scheduling order under which discovery ends on March 19, 2004; and dispositive motions are due on May 7, 2004. In July 2003 the parties began discovery, which will close on March 19, 2004. (Kelly Hall) (Mentors: Davis, Stanley) (01-4927)

**THOMAS H. DUNBAR, TRUSTEE v. UNITED STATES**
(Private Property Rights; Access to Public Lands)
(Counsel for Thomas H. Dunbar, Trustee of Margaret E. Dunbar Revocable Living Trust)
(U.S. District Court, Montana, Civil Action 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 Margaret E. Dunbar Revocable Living Trust and thus the representative owner of Blodgett Reservoir, located within the boundaries of the Bitterroot National Forest and the 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 Blodgett Reservoir as a facility having pre-FLPMA easement status and 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 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. The Department of Interior Annual Report for the fiscal year ending June 30, 1899, provides that “[c]rude 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 does suggest that the dam was in place before
1911, the year the Forest Service contends the dam was constructed. Because an exact date is not mentioned, additional research would be necessary to 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 refuses to admit that such a right-of-way exists because the dam was not built before 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. In addition, in order to obtain an 1891 Act easement on reserved unsurveyed lands it was 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 never asserted that Blodgett Reservoir and Dam has interfered with other uses of the Forest.

Final preparation of the Complaint was stalled until MSLF 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.

On February 7, 2003, the United States filed its answer, and on February 21, 2003, the parties conferred pursuant to FRCP 26(f). On March 18, 2003, the parties filed a joint written report outlining their proposed discovery plan, and, the parties having conferred regarding pretrial statements, each party filed a preliminary pretrial statement pursuant to Local Rule 16.2(b)(1).

On March 25, 2003, a preliminary pretrial conference was held by telephone before the Magistrate Judge, and on the same date, the judge issued a pretrial scheduling order. Following that schedule, discovery ended on December 31, 2003. MSLF filed Mr. Dunbar’s motion for summary judgment on February 25, 2004. The government’s response and cross motion for summary judgment is due on March 26, 2004. (Amanda Koehler) (Mentor: Joscelyn; Local Counsel: Ward Shanahan) (01-4918)

**ENTERPRISE FLASHER COMPANY v. MINETA, et al.**
(Equal Protection) (Counsel for Enterprise Flasher)
(U.S. District Court, Delaware, Civil Action No. 03-CV-198-JJF)

This case was approved by the Board of Directors on June 8, 1998. Enterprise Flasher Company 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.

Enterprise Flasher 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. 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 considerably narrowed. In January 2002, MSLF received the DBE plans submitted by Delaware, which had been finally approved by the Federal Highway Administration.

Also, 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. Those materials were received in late April 2002, and the complaint was finished in May. Enterprise Flasher then advised MSLF that before the complaint was filed it wanted to obtain both the signature of the Delaware Secretary of Transportation on an unrelated source-sole contract and the funding for the 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. On December 2, 2003, MSLF contacted Mr. Logan, who asked that MSLF prepare a summons for the Delaware Attorney General and change some facts in the Complaint, which was based on Census data, to reflect more accurately current conditions reflected in a new Delaware study. The summons and the modified Complaint to Mr. Logan about January 15, 2003. On or about February 14, 2003, Local Counsel’s Senior Partner informed MSLF that Local Counsel would soon file the case.

On February 14, 2003, the complaint was filed and summonses issued. The State’s answer was due on March 12, 2003, and the federal government’s answer on about April 21, 2003. The State requested an extension of time and MSLF agreed to the filing of a stipulated motion by the State and federal government requesting until May 19, 2003, to file their answers. The Court, in the midst of this, but before the motion was filed, scheduled a Rule 16 scheduling conference for April 10, 2003, to last 15 minutes! The U.S. Attorney
suggested that MSLF, the State, and the federal government request a continuance. On April 2, 2003, local counsel informed MSLF that the scheduling conference had been vacated and federal and state answers are due on June 6, 2003, after which a scheduling conference will be held.

On June 6, 2003, the federal government filed an answer, a partial motion to dismiss the complaint, a motion to substitute the U.S. Department of Transportation for the named federal defendants, and a brief in support of the motions. MSLF had been contacted previously about the motion to substitute and indicated that did not object to the substitution. Enterprise’s response to the motions was due on June 23, 2003, but the federal government stipulated to Enterprise’s motion for an extension of time until July 3, 2003.

On June 24, 2003, an initial “meet and greet” scheduling conference was held by telephone, during which a Scheduling Conference was set for October 23, 2003.

On July 3, 2003, Enterprise Flasher and the federal government, in compromise and resolution of the government’s partial motion to dismiss and motion to substitute, filed a joint motion to amend the complaint with respect to claims against the federal Defendants. In the motion, the parties proposed that: (1) Enterprise Flasher’s claims against the federal Defendants filed under 42 U.S.C. § 1981 and §1983 be dismissed with prejudice; (2) Enterprise Flasher’s claims and allegations against the federal Defendants related to USDOT’s direct federal procurement, as of the date of filing of the complaint, be dismissed with prejudice; and (3) the federal Defendants consist of the Secretary, Norman Mineta, the Administrator of the Federal Highway Administration, Mary Peters, and the USDOT.

On July 15, 2003, Enterprise Flasher filed a motion to bifurcate standing and the merits. On July 23, 2003, the parties stipulated to amending the complaint with respect to the defendant parties and claims against the defendants. On July 23, 2003, the Court granted the stipulation with respect to the dismissal of all but three of the federal Defendants.

On August 1, 2003, the federal government filed a response supporting the motion to bifurcate.

On October 16, 2003, the parties filed status reports in preparation for the scheduling conference to be held on October 22, 2003. That conference was delayed several times and was finally held on December 1, 2003. On December 2, 2003, a schedule was issued under which discovery on the issue of standing is to be completed by February 20, 2004, plaintiff’s motion for summary judgment be filed by April 19, 2004 (35 pages), federal Defendants’ answer brief be filed by May 19, 2004, and plaintiff’s reply brief be filed by June 18, 2004 (20 pages).


On January 27, 2004, the parties filed a joint stipulation with regard to confidential information and a joint motion for a protective order and proposed protective order. On January 30, 2004, Judge Sleet signed the proposed protective order.
(Scott Detamore/Joe Becker) (Local counsel: Donald Logan, Tighe, Cottrell & Logan) (98-4257)

**EEOC v. KIDMAN, et al.**

(Limited and Ethical Government) (Counsel for Richard and Shauna Kidman)  
(U.S. District Court, Arizona, Civil Action No. 02-cv-1911-PCT-SMM)

This case was approved by the Board of Directors on October 3, 2003. Richard Kidman and his wife, Shauna, started a small business, RD’s Drive-In, more than 25 years ago in Page, Arizona. Since the diner began operations in 1976, the great majority of its employees and customers have been Navajo Indians from the neighboring reservation. From the start, employees of the diner have been required to speak English while on the job, a reflection of the reality that many, if not most, of the Navajo employees and customers are more comfortable speaking English than Navajo.

That policy was not enforced strictly until May 2000, when a young Navajo girl complained to the Kidmans about sexually suggestive comments made to her in Navajo by two male Navajo employees. The Kidmans, who do not speak Navajo, had no idea that anything was wrong. They learned, to their surprise, that many of their Navajo customers and employees were repelled by the language they heard from employees when they were in RD’s. Since the EEOC filed suit against RD’s, the Kidmans have heard from numerous Navajo residents of the area who expressed their support for the Kidmans. Some said that they had stopped coming to the restaurant because of the foul language they heard from some members of the staff. Several employees had given Kidman family members obscene nicknames in Navajo.

Soon thereafter, the Kidmans’ son, Steve Kidman, manager of the restaurant, extensively researched the law using the EEOC’s Web site. He determined that employers were permitted to require that English alone be spoken in the workplace so long as there was a business reason to do so. Steve Kidman then announced the policy, as required by EEOC, which required employees to speak English while on the job unless they were serving a non-English-speaking customer and required employees to sign a waiver that they were aware of the policy. He said that the great majority did so without incident, including the two employees who had been the most prolific users of vulgar language in Navajo.

Four other Navajo employees, however, filed a complaint with the EEOC, accusing the Kidmans of discrimination by not permitting them to speak Navajo on the job. In September 2002 the EEOC filed suit against the Kidmans on behalf of the complainants. From late 2002 until September 2003, the Kidmans were in settlement negotiations with the assistance of private counsel, but in September 2003 they decided that they were unable to reach a satisfactory settlement and asked MSLF to become lead counsel in their lawsuit and to return the case to federal district court.

During this suit MSLF will assert that the English-only policy instituted for the purpose of enforcement and monitoring of a company policy against sexual and other harassment of employees and customers was “job related for the position in question and consistent with business necessity,” thus exempting the Kidmans under Title VII of the
Civil Rights Act of 1964, § 703(k)(1)(A)(i), and that the English-only policy does not disparately impact American Indian/Navajo employees or result in disparate treatment of these employees in the terms and conditions of their employment in violation of Title VII of the Civil Rights Act of 1964, § 703(a).

On October 20, 2003, a status conference was held in district court. Mr. Becker was admitted pro hac vice to represent Mr. and Mrs. Kidman with the Kidmans’ first attorney continuing as co-counsel. The Court was informed by Kidmans’ co-counsel that no settlement had been agreed to; however, attorneys for the EEOC alleged that a settlement had been reached. The Court’s minute entry states that the parties stipulated to the magistrate conducting a settlement conference regarding new issues that have developed. The Court also stated that a continuation in the break-down of the settlement process requires the Court to set an evidentiary hearing in the matter.

On October 22, 2003, a settlement conference was held with the magistrate judge, at which the judge instructed to EEOC to settle the case. Letters have been exchanged but an acceptable offer has not yet been proffered.

On January 9, 2004, the EEOC filed a motion to enforce what it believes is a settlement agreement agreed to during discussions between the parties in August and early September 2003, before MSLF began representing the Kidmans. MSLF received the motion by mail on January 12, 2004, the day of a scheduled status hearing. If it had been sent by fax, as was previously agreed to by the parties, Mr. Becker would have received it before the hearing and the hearing would have been mooted. At the hearing, the Court set a schedule for briefing of the motion.

On January 29, 2004, MSLF filed the Kidmans’ opposition to the motion to enforce; on February 9, 2004, the EEOC filed its reply. A hearing has not yet been scheduled. (Joe Becker) (Mentor: Mead) (02-5180)

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. CV 02-0069-PCT-DKD)

In 1986, the Forest Supervisor, Sitgreaves National Forest, prepared a Special-Use Permit and requested that the Fitzgeralds sign it in order to continue using the only road to their inholding. After reviewing the permit, the Fitzgeralds 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 Fitzgeralds 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 Fitzgeralds, 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 Fitzgeralds 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 Fitzgeralds 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 Fitzgeraladrs 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 Fitzgeraladrs 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 Fitzgeraladrs, 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, 2002. In early January, the Court granted the Fitzgeraladrs’ motion for extension of time, setting their motion for summary judgment due on March 3, 2003.

On March 3, 2003, the Fitzgeraladrs filed a motion for summary judgment, memorandum in support of the motion for summary judgment, and statement of material facts, together with a joint motion for extension of the page limitations for the memorandum, the government’s response and memorandum in support of any cross motion, the Fitzgeraladrs’ response, and both replies. On April 3, 2003, the government filed its response and its cross motion for summary judgment. The Fitzgeraladrs’ reply to the government’s response and their response to the cross motion for summary judgment was filed on May 2, 2003. The government’s reply to the Fitzgeraladrs’ response was filed on May 20, 2003. Oral arguments have not yet been scheduled.

In an order filed on November 7, 2003, Judge Rosenblatt recused himself from the case and, by automated random selection, the case was transferred to Judge David K. Duncan. (Kelly Hall) (88-2599)
This case was approved by the Board of Directors on April 14, 2003. In June of 2002, the largest fire in the history of the State of Arizona, the Rodeo/Chediski Fire, burned 460,000 acres of Arizona’s forests, including 176,000 acres within the Tonto and Apache-Sitgreaves National Forests. Thirty communities and subdivisions were threatened by the fire and 470 structures were destroyed. The fire killed trees constituting an estimated 300 million board feet of commercial timber.

The dead-burned trees are creating fire danger and safety hazards. In response to these hazards, the Apache-Sitgreaves and Tonto National Forest Supervisors published a scoping request proposing to salvage fire killed and dying timber from the Rodeo/Chediski Fire. Thereafter, the U.S. Forest Service published a Notice of Intent to Prepare an EIS in the Federal Register. The USFS expected a draft EIS to be completed by February 2003 and the final EIS to be completed by July 2003.

However, on December 23, 2002, these Forest Supervisors released three Decision Memoranda authorizing the USFS to conduct its post-fire salvage activities under various categorical exclusions (CE’s). These post-salvage activities include: treatment of dead trees extending beyond the 150 foot safety zone up to a half mile in the wildland/urban interface; treatment of dead trees within 500 feet of administrative and recreation sites; treatment of dead trees within 200 feet of roads; treatment of dead trees within 100 feet of trails; and treatment of dead trees within 150 feet of fences and utility lines. The USFS proposes to treat a total of 25,000 acres, producing 24.9 million board feet of timber. About 20,000 acres will be treated to create “defense zones” along the wildland/urban interface and the remaining 5,000 will be treated to alleviate safety concerns from falling trees along roads, trails, administrative sites, fences and utility lines.

The USFS relies on five specific CE’s to justify its decision to prepare neither an environmental assessment (EA) nor an EIS: CE 31.2(6) “timber stand and/or wildlife habitat improvement activities;” CE 31.1b(3) “repair and maintenance of administrative sites;” CE 31.1b(4) “repair and maintenance of roads, trails, and line boundaries;” CE 31.1b(5) “repair and maintenance of recreation sites and facilities;” CE 31.2(2) “additional construction or reconstruction of existing telephone or utility lines in a designated corridor.”

On January 10, 2003, the Forest Conservation Council filed a lawsuit challenging the USFS’s use of these CE’s to justify the salvage sales in the Rodeo/Chediski fire area (Civil Action No. 03-CV-54-FJM). The Forest Conservation Council alleges that, because of the magnitude of the project, the USFS violated the National Environmental Policy Act (NEPA). In February, the Forest Conservation Council filed a motion for preliminary injunction to enjoin the project until further environmental analysis is conducted. In response, the Forest Service filed a motion for summary judgment arguing that the Forest Conservation Council’s legal claims have no merit and the public interest would be harmed if the post-fire management project is enjoined. On March 12, 2003,
Navajo County, Apache County, City of Winslow, Showlow Fire District, and American Forest Resource Council moved to intervene on behalf of the Defendants.

On March 24, 2003, Judge Martone ordered that the Forest Conservation Council’s pending motion for preliminary injunction be treated as a motion for summary judgment and set an expedited briefing schedule requiring that the respective motions for summary judgment be briefed fully by April 17, 2003. On April 15, 2003, MSLF’s amicus brief supporting the Forest Service’s use of categorical exclusions in this situation was lodged and its motion for permission to file an amicus brief was filed. On May 1, 2003, the Court granted MSLF’s motion for leave to file an amicus brief and the brief was filed.

On July 9, 2003, the Court issued an order and entered final judgment holding that two of three categorical exclusions (“administrative sites, roads, trails, developed recreation sites, and concentrated use areas” and “along fence and utility lines”) were within the Forest Service’s purview, but that the third (19,364 acres within the wildland/urban interface) was not. It did not, however, enjoin the Forest Service from cutting the dead trees in the wildland/urban interface but requires the Forest Service to simultaneously prepare an environmental assessment, and if necessary, an environmental impact statement within 6 months of the filing of the order.

On July 14, 2003, the Forest Conservation Council filed a motion to stay the Court’s order pending its appeal. On July 16, 2003, the Forest Service filed its response to the motion, and on July 18, 2003, the defendant-intervenors filed their response. On July 25, 2003, the Court denied the Forest Conservation Council’s motion to stay.

On August 11, 2003, the Forest Conservation Council filed its notice of appeal. On August 18, 2003, the appeal was docketed (Case No. 03-16511), and on August 19, 2003, the Council filed an emergency motion for a stay pending appeal.

On September 8, 2003, the Forest Service filed its notice of appeal. The Forest Service appeal was docketed on September 15, 2003 (Case No. 16705), and the Ninth Circuit issued a cross-appeal briefing schedule with the first cross-appeal brief (Forest Conservation Council) due no later than November 28, 2003 and the second cross-appeal brief (Forest Service) is due no later than January 7, 2004. Under this briefing schedule, an amicus brief filed by MSLF in defense of the Forest Service position most likely would be due on January 14, 2003 (7 days after the second cross-appeal brief is filed).

On September 29, 2003, the Court remanded the Council’s appeal to the District Court for the limited purpose of determining whether there exists in the record sufficient evidence of imminent risk of fire in one or all of the areas in question. The Court denied the motion for stay without prejudice to renew, if appropriate, after issuance of the District Court’s decision on the limited remand.

On December 2, 2003, three days after its brief was due, the Forest Conservation Council called the Ninth Circuit extensions attorney for an extension to file its brief, which was denied. The Court then twice issued new briefing schedules. Under the second of these, issued on December 23, 2003, the Forest Conservation Council’s opening brief or a motion for other appropriate relief would be due on January 22, 2004;
the Forest Service’s answer/opening brief would be due on February 23, 2004; and MSLF’s amicus brief would be due on March 4, 2004.

Briefing to the District Court on the issue of whether an imminent fire risk exists was completed by the parties on December 22, 2003.

On January 8, 2004, the Forest Conservation Council’s telephone request for a 14-day extension of time in which to file its opening brief, due on January 22, 2004, was denied.

On January 23, 2004, the District Court issued an order finding that the imminent risk of fire as of July 9, 2003, in the project areas did not play a major role in the contentions of the party or in the District Court’s decision of July 9, 2003. The Court held that the critical imminent risk was the declining value of the dead trees, the removal of which depended on their value and was vital to the elimination of a huge fuel load for the next fires. On January 27, 2004, the Ninth Circuit received a copy of this decision.

On February 2, 2004, the Forest Conservation Council filed a motion for stay of the appellate proceedings. On that same day, the Ninth Circuit issued an order granting the motion for stay. The Court ordered the Council to file either the first cross-appeal brief or a motion for appropriate relief by February 19, 2004.

On February 18, 2003, a joint stipulated motion for dismissal was filed in the Forest Service’s cross-appeal (case no. 16705). That motion was granted, and the Court set a new briefing schedule in the remaining case (16511), the appeal of the Forest Conservation Council. Forest Conservation Council’s opening brief is due on March 22, 2004; the Forest Service’s response is due on April 21, 2004; MSLF’s amicus brief is due on or about May 3, 2004; and the Council’s optional reply brief is due 14 days after service of response brief, on or about May 10, 2004. (Kelly Hall) (03-5244)

GDF REALTY, et al. v. UNITED STATES
(Private Property Rights, Takings; Limited Government)
(Counsel for GDF Realty, et al.) (Claims Court, Texas, Case No. 99-519L)

This case was approved by the Board of Directors on June 6, 2003. The litigation concerns approximately 216 acres of a total of 1,620 acres, specifically nine adjacent parcels of land, which have been organized into seven tracts owned by Plaintiffs, Fred and Gary Purcell and GDF Realty, Inc. The ownership interest of the property traces to 1983, when Fred and Gary Purcell first acquired an interest in the property. Through various partnerships and business ventures, Fred and Gary Purcell own a combined 70 percent of the property and GDF Realty owns the remaining 30 percent. Fred Purcell is the sole owner of Parke Properties I and II. (All of these owners of the property discussed herein will be referred to henceforth as “the owners.”)

The property, within the extraterritorial jurisdiction of the City of Austin, in western Travis County, Texas, is on the southern margin of a geologic area known as the Jollyville Plateau, which in turn is part of the Edwards Plateau region of central Texas. It is characterized by karst topography in which water percolating through limestone creates such geological features as caves, sinkholes, and steep canyons.

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Western Travis County is one of the most rapidly growing areas in Texas. A strong demand exists for commercial and/or residential development of the property, situated at the intersection of two highways.

The owners originally planned to develop the property as part of a mixed-use development to include residential housing, office buildings, and retail facilities. In 1984, the owners submitted the plans for development to the City of Austin, pursuant to its extraterritorial jurisdiction. As a condition of obtaining the necessary permits, the owners constructed water lines, wastewater gravity lines, force mains, lift stations, and other utilities and then dedicated them to the City of Austin. They also dedicated a right-of-way on the adjoining highways to Travis County. Final approval for the development was granted by the City in 1984.

While planning for the development was underway, eight species found on the property were listed as endangered by the Secretary of the Interior, pursuant to authority under Section 4 of the Endangered Species Act (ESA). Two migratory songbirds, the Black-Capped Vireo and the Golden-Cheeked Warbler, both of which nest in woodlands on the property, were listed as endangered in 1987 and 1990, respectively. Six invertebrate species living in the numerous caves on the property were listed in 1988: the Bee Creek Harvestman, Bone Cave Harvestman, Tooth Cave pseudoscorpion, Tooth Cave spider, Tooth Cave ground beetle, and Kretschmarr mold beetle, collectively, the “Cave Bugs.” Within the first year after a species is listed as endangered, the Secretary must designate the critical habitat of the species. In the decade since these species were listed, no critical habitat has been designated for any of the eight endangered species.

Under Section 10(a) of the ESA, the Secretary of the Interior may grant a permit authorizing a non-federally funded project to “take” a species incidental to the project. An applicant must provide a conservation plan specifying the impact of the project on the species, the efforts taken to minimize the taking, and the reasons why alternatives to the taking are not feasible. Accordingly, the Fish and Wildlife Service (FWS) asked the owners to fund surveys of the property to determine what steps would need to be taken to protect the endangered species. The owners did so and in 1990, following all recommendations of the survey, placed gates over the entrances to the most ecologically sensitive caves and deeded several caves and sinks and buffer zones surrounding each to Texas System Natural Laboratories, Inc., a non-profit corporation dedicated to research of environmental issues. In 1991, the owners entered into a sales contract with Inland Laboratories, Inc., a biotechnology research and development company, to develop and sell approximately 10 acres of the property. The contract required the owners to provide a letter from the FWS indicating that construction of the proposed project would not constitute a “take” under the ESA. Although the owners had complied with all recommendations in the surveys conducted for the FWS, the FWS refused to provide the letter and the contract fell through. In 1993, the FWS represented to the owners that any development activities on the property were prohibited without a Section 10(a) permit.

On October 22, 1993, GDF Realty, Ltd., Parke Properties I, L.P., Parke Properties II, L.P., and Gary Purcell (GDF Realty) filed suit seeking a declaratory judgment that development of their property would not result in a “take” of any endangered species and that a Section 10(a) permit was not necessary. The district court ordered the FWS to review GDF Realty’s proposed development and state whether a Section 10(a) permit
was necessary. In response to the order, the FWS found that, with some slight modifications, some portions of the proposed development could proceed without causing a take or requiring a Section 10(a) permit. The FWS also stated, however, that other parts of the proposed development would likely result in a "take" of endangered species and advised GDF Realty to file Section 10(a) permit applications for those parts of the development so that the FWS could "work with" GDF Realty to develop satisfactory proposals. On October 4, 1994, the court dismissed GDF Realty's complaint as unripe because they had not filed for a Section 10(a) permit. It noted that the FWS had indicated that, "although much of the area could be developed without fear of a 'take,' some areas of land may involve 'takes.'"

The FWS subsequently changed its position and told the owners that no development could occur above certain contour elevation lines. On December 30, 1997, the owners filed seven applications for Section 10(a) permits, one for each of the seven tracts. The proposed development was significantly less ambitious than that in earlier proposals and included a shopping center, residential subdivision, and office buildings. In an attempt to secure approval of the applications, and in compliance with FWS's policy and practice of entertaining modifications to proposals during the application process, the owners continued to meet with the FWS to propose alternative, less intensive, developments. None of these proposals met with the approval of the FWS, and, in fact, the FWS verbally informed the owners that pending permit applications would be denied and that most of the property could not be developed under any scenario.

On November 25, 1998, the plaintiffs in the earlier lawsuit, GDF Realty, filed a second lawsuit in federal district court seeking a declaration that its permit applications had been denied de facto. The FWS responded with a declaration by the FWS regional director that all of the owners’ permit applications were deficient. The declaration listed numerous requirements to obtain a Section 10(a) permit, requirements that did not allow any economically beneficial use of the property. The district court held that the declaration constituted final agency action and that the owners’ permit applications were de facto denied.

On July 27, 1999, the plaintiffs referred to as GDF Realty filed suit in the Court of Federal Claims alleging that the United States had taken their property without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

On June 15, 2000, the same plaintiffs, GDF Realty, filed suit in the U.S. District Court for the Western District of Texas, Austin Division, seeking a declaration that the regulation of Cave Bugs on their property pursuant to the ESA is unconstitutional because it exceeds Congress’ power to act under the Commerce Clause of the U.S. Constitution. (The Claims Court action was stayed pending resolution of this suit.) On August 31, 2001, the District Court rejected GDF Realty’s claims, and on October 26, 2001, GDF Realty filed a notice of appeal (5th Cir. Case No. 01-51099). On March 26, 2003, the Fifth Circuit Court of Appeals rejected the Commerce Clause arguments, and on May 12, 2003, GDF Realty filed petitions for rehearing and for rehearing en banc.

Following resolution of the petitions and possible Supreme Court action, MSLF will revive the Claims Court suit, asserting that by refusing to allow development of
Plaintiffs' property the United States has taken that property for public use without just compensation. Without FWS restrictions the current fair market value of the property is more than $60 million, whereas with restrictions the property has no economically beneficial use. GDF Realty will allege that denial of the permits constituted a permanent taking of their property and will assert that they are entitled to the fair market value of the property. (Chris Massey) (Mentors: Haas, Runft) (03-5208)

GLOSEMEYER, et al. v. COMMISSIONER, I.R.S.
(Private Property Rights, Limited and Ethical Government)
(Counsel for Glosemeyers) (District Court, Missouri)

This case was approved by the Board of Directors on January 23, 2003. Maurice L. and Delores J. Glosemeyer 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 Glosemeyers 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 Glosemeyers on the issue of liability. Glosemeyer v. United States, 45 Fed. Cl. 771 (2000). It ruled that the National Trails System Act effectuated a taking of the Glosemeyers' property because it precluded the easement from reverting to the Glosemeyers when the easement ceased being used for railroad purposes.

After lengthy 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 of Federal Claims' order by depositing $200,000 into the Glosemeyers' 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 Glosemeyers. 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 Glosemeyers' gross income.

MSLF will pursue, on the Glosemeyers' behalf, a private letter ruling from the IRS. (It is estimated that it will cost the Glosemeyers $3,000 to apply for a private letter ruling.) If that 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 the ruling and ask the United States to pay MSLF an amount in attorneys' fees that would cause the Glosemeyers to incur a $1,000 increase in taxes. The Glosemeyers will then file a tax return and pay the additional tax, after which, with the assistance of MSLF, they will seek a refund in U.S. District Court for the District of Missouri.
On April 21, 2003, MSLF sent the Glosemeyers’ Request for a Letter Ruling to the Commissioner of the IRS. On August 1, 2003, a conference of right was held between MSLF and the IRS, at which the IRS stated that any attorneys’ fees recovered by MSLF for its representation of the Glosemeyers would be includable in the Glosemeyers’ gross income because the Glosemeyers had entered into a contingency agreement with MSLF. In support of that position the IRS cited Preseault v. United States, 52 Fed. Cl. 667 (Fed. Cl. 2002). In a letter dated August 21, 2003, the Glosemeyers provided additional information as to why the agreement they had with MSLF was not a contingency agreement and stating that there had not been an assignment of income.

On October 2, 2003, the IRS advised MSLF that its position was still adverse to the Glosemeyers, although the basis for its position had changed. Instead of relying on the assignment of income doctrine, the IRS now stated that payment of attorneys’ fees to MSLF by the United States would be a discharge of indebtedness. As a result of this change, on October 6, 2003, MSLF sent the IRS a letter requesting an additional conference pursuant to Rev. Proc. 2003-1, §11.05, which provides that the IRS “will offer the taxpayer an additional conference if, after the conference of right, an adverse holding is proposed, but on a new issue, or on the same issue but on a different ground.” MSLF requested the additional conference so that it can address the IRS’s new position that the payment of attorneys fees to MSLF would be a “discharge of indebtedness.” (Steve Lechner/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

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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.

On May 3, 2001, Judge Robinson held a preliminary telephone conference. On June 15, 2001, each side submitted its negotiating position. A settlement negotiation 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 Glosemeysers requested the immediate submission of summary judgment motions on the issue of just compensation, motions that could be supported by expert witness evidence. The Glosemeysers requested that if, 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 Glosemeysers 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, Preseault 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 Preseault 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. The Court later extended that date to July 18, 2002.

After lengthy 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.

The Court 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 believes it is entitled to those fees under the Uniform Relocation and Real Property Acquisition Act. It 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. If that ruling is adverse, it will be challenged in U.S. District Court. (See the preceding entry, Glosemeyer v. Commissioner, I.R.S.)

On February 3, 2003, the Glosemeyers filed an unopposed motion for an administrative stay of the filing for attorneys’ fees while they seek a private letter ruling from the I.R.S. On February 7, 2003, the Court granted the motion and ordered the parties to file a joint status report when the issue of fee taxation is resolved or in six months, whichever occurs first. (Steve Lechner/Scott Detamore) (92-3259)

HARROWER v. COMMISSIONERS,
SUBLETT COUNTY BOARD OF COUNTY COMMISSIONERS
(Limited and Ethical Government; Private Property Rights)
(Counsel for Robert Harrower)
(District Court, Ninth Judicial District of Wyoming, Civil Action No. 6541)

This case was approved by the Board of Directors on October 3, 2003. On May 6, 2003, the Sublette County, Wyoming, Board of County Commissioners (the Commission) voted 2 to 1 in favor of spending $500,000 to fund the purchase of development rights (PDR’s). The PDR program, promoted by the Green Valley Trust, is a land protection tool through which willing landowners sell development rights in exchange for a perpetual conservation easement, or deed restriction, on their property. The landowner is provided an economically attractive alternative to selling land outright through compensation for development rights. The lands are kept dormant, however, and improvements and development are discouraged. Lands that have conservation easements generally may be sold or transferred, but the deed restriction remains in place.

MSLF will file suit in Wyoming State Court on behalf of Robert Harrower and others resident taxpayers of Sublette County against Gordon Johnson, Betty Fear, and
Bill Cramer, individually and in their official capacities as Commissioners, Sublette County Board of County Commissioners, challenging the Commission’s decision to purchase PDR’s in violation of Article 16, Section 6, of the Wyoming Constitution, which prohibits the expenditure of money absent receipt of adequate consideration. Section 6 states, “Neither the State nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor.”

On February 6, 2004, MSLF filed suit on behalf of Robert Harrower. The named parties and the Sublette County Attorney were served on February 10, 2004, and the Wyoming Attorney General on February 11, 2004. The Commissioners’ answer was due in 20 days, on March 1, 2004.

On February 20, 2004, the state filed its answer with the Court. On March 5, 2004, MSLF had not yet received the answer. (Joe Becker) (03-5273)

**HAYDEN v. UNITED STATES**
(Private Property Rights, Access to Private Property) (Counsel for Rómney Hayden)
(U.S. District Court, S.D.Calif., Civil Action No. 03-CV-761-H (NLS))

On February 7, 2003, the Board of Directors approved MSLF’s representation of Mr. Romney Hayden in a quiet title action for an easement to access his private property. In 1998, Mr. Hayden purchased 160 acres about 60 miles east of San Diego known as the McCain Ranch on which he planned to build his retirement home. The ranch is surrounded on all sides by the McCain Valley Resource Conservation Area, created in 1963 and managed by the BLM to emphasize “wildlife conservation, livestock grazing, and recreation.” The Conservation Area is surrounded, in turn, by the Manzanita Indian Reservation. San Diego County will not issue Mr. Hayden the required building permits unless he provides proof of legal access to the property.

Three roads lead to the ranch. The first, a road from the north, no longer provides access because about 15 years ago the BLM placed large boulders across it to regulate access to the nearby BLM Cottonwood campground. The second road, from the south, traverses part of the Manzanita Indian Reservation and then BLM land before reaching the ranch. Mr. Hayden has a verbal agreement with the Manzanita tribe to use this road to access McCain Ranch. He is concerned, however, that the tribe may someday rescind its verbal agreement and deny him access. More importantly, because his agreement with the Manzanita tribe is not in writing, he cannot prove that he has access for purpose of obtaining the necessary building permits. The BLM is unaware that Mr. Hayden is driving on BLM land between the reservation and the ranch. A third road, traveling east from McCain Valley Road, a public highway, provides convenient access to McCain Ranch. This historic access road originally was used for moving cattle and supplies and has existed since at least the early 1940’s, more likely since the 1800’s when the area was first homesteaded. The road, although visible in aerial photographs, is not shown on any known plats or maps, has not been used for an unknown number of years, and must be repaired in several places to be drivable.
Soon after he purchased the property, Mr. Hayden contacted the BLM by telephone and asked that they recognize his common law rights to drive over this road to access McCain Ranch. The BLM denied that he had any such rights and told him that he would need to purchase a right of way in order to access McCain Ranch by vehicle. It also warned him that he would be fined if he attempted to grade or repair the historic access road. (The BLM also offered to purchase McCain Ranch from Mr. Hayden at a price far below its fair market value.)

On April 16, 2003, MSLF filed a quiet title action on behalf of Mr. Hayden in an attempt to determine: (1) whether Mr. Hayden possesses either an easement by necessity or an easement by implication for an access route across the government land that surrounds McCain Ranch; (2) whether the patent held by Mr. Hayden provides an express easement across the government land that surrounds McCain Ranch; or (3) whether a Revised Statute 2477 (R.S. 2477) public right of way exists over the historic access road.

The United States’ answer was due on June 24, 2003. On June 18, 2003, the United States filed a motion for either a clarifying amended complaint or dismissal of the case. The government alleges that the metes and bounds description of the subject property, the McCain Ranch, is not where the property is located.

On July 17, 2003, MSLF filed Mr. Hayden’s opposition to the government’s motion for a clarifying amended complaint or, alternatively, for dismissal and his amended complaint. On July 22, 2003, in response to a notice of document discrepancies issued by the Court, MSLF filed an amended opposition.

On July 21, 2003, the Court issued an order denying as moot the government’s motion for a clarifying amended complaint or dismissal, and on August 1, 2003, the United States filed its answer. On August 7, 2003, Magistrate Judge John Houston ordered that an early neutral evaluation conference be held on September 10, 2003, at which all counsel, all parties, and any others who are required to negotiate or enter into settlement must be present in person.

On September 10, 2003, the evaluation conference was held and a schedule set for settlement discussions, a meet and confer, the submission of a discovery plan and initial disclosures, and a case management conference. The case management conference, originally scheduled for October 22, 2003, was vacated because of a change in Judge for the suit. District Court Judge Houston, formerly Magistrate Judge Houston, has been assigned to the case.

On October 17, 2003, the parties exchanged initial disclosures. On October 22, 2003, a telephonic case management conference was held, following which, on October 29, 2003, the Court issued a scheduling order regulating discovery and other pretrial proceedings. Designation of all experts and all rule 26 disclosures are to be completed by March 23, 2004, and on April 12, 2004, an “early” settlement conference will be held. Discovery is to be completed by July 23, 2004, and the mandatory settlement conference will be held on October 12, 2004. Memoranda of contentions of fact and law are due on November 15, 2004, and the final pretrial conference order is to be lodged with the Court by November 29, 2004. The final pretrial conference is scheduled to be held with District Court Judge Houston on December 10, 2004.
Shortly after the filing of the scheduling order, Judge Houston recused himself and vacated the final pretrial conference of December 10, 2004, and the case was transferred to Chief Judge Huff. On November 11, 2003, Magistrate Judge Stormes, after consultation with Judge Huff, reset the final pretrial conference to December 6, 2004. It is assumed that all other dates remain the same in that no mention was made of them by Judge Stormes and the final events before the rescheduled pretrial conference are within the limits set for them by the Local Rules of the Court. (Kelly Hall) (Mentors: Jenson, Montero) (02-5152)

**JORGENSEN v. UNITED STATES**

(Access to Private Property) (Counsel for Jorgensen and Binning-Jorgensen Corp.)

(U.S. District Court, Wyoming)

This case was revoked by the Board of Directors on February 6, 2004. (Kelly Hall) (Mentor: Jenson) (02-4994)

**MANN v. UNITED STATES**

(Private Property Rights; Limited and Ethical Government)

(Counsel for Mann) (Court of Federal Claims, New Mexico, Case No. 98-312 (remand))

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 production 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.

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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 (Case No. 03-5013). 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 was filed on February 19, 2003, one day late due to the Court’s snow closure, and Mann’s reply brief was filed on March 10, 2003. The joint appendix was filed on March 17, 2003. Oral arguments were held on June 3, 2003, in Washington, D.C.

On June 27, 2003, the Federal Circuit issued its decision. It held that the United States breached the lease by failing to provide Mr. Mann with notice prior to terminating his lease, and reversed and remanded the case. On July 10, 2003, MSLF filed its bill of costs. On October 17, 2003, the U.S. Treasury paid that bill of costs.
On December 15, 2003, a status/scheduling conference was held with the Claims Court and a scheduling order was issued for the damages phase. On January 20, 2004, Mann filed his initial disclosures. (Steve Lechner) (96-3743)

**McCONNELL, et al. v. BLAINE COUNTY, et al.**  
(Equal Protection) (Counsel for Blaine County)  
(U.S. District Court, Montana, Civil Action 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.
(Access to Federal Lands; Limited and Ethical Government)
(Counsel for McFarland) (Ninth Circuit, Montana, Case No. 03-35831)

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 restraining order 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. Mr. Berg filed motions for Mr. Thode and Mr. Pendley to appear pro hac vice with the Court on November 21, 2000. On November 22, 2000, a 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 the administrative record on June 25, 2001. The proposed Case Management Order was filed on November 16, 2001, and subsequently issued by the Court. Discovery will end on May 31, 2002, and the briefing of dispositive motions filed must be completed by August 2, 2002.

On about February 4, 2002, Suzanne Lewis, the Glacier National Park Superintendent, contacted Mr. McFarland about trying to reach a settlement. Several days later, the Assistant U.S. Attorney advised Ms. Lewis to have no contact with Mr. McFarland. On March 6, 2002, the Assistant U.S. Attorney sent a letter to MSLF stating 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 accompanied the letter. MSLF filed a response to defendant’s motion requesting that the court set a settlement conference.
A settlement conference was set for April 3, 2002, in Missoula and, shortly thereafter, rescheduled for April 9, 2002. On March 26, 2002, MSLF sent defendants a settlement demand and on April 2, 2002, submitted a confidential settlement brochure to the Magistrate Judge in charge of settlement proceedings. 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 lodged an 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 had never allowed inholders special access rights, but each of Plaintiff’s witnesses testified as to specific incidents, going back more than 50 years, of inholders exercising 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 discovery 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, filed a joint motion for summary judgment and a joint motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(B)(1).

Responses were filed on August 30, 2002, and replies were filed on September 11, 2002. On July 9, 2003, without oral argument, which had been requested, the Court denied both motions for summary judgment, and granted the joint motion to dismiss for subject matter jurisdiction. On July 22, 2003, MSLF filed a motion for reconsideration. The United States filed its response to the motion on July 31, 2002, and MSLF filed its reply on August 13, 2003.

On September 15, 2003, McFarland’s motion for reconsideration was denied as being without merit. Again, Judge Molloy stated that the Quiet Title Act is the only statute under which a party can challenge the United States’ title to real property, and that Mr. McFarland could not avoid the time limitations of the Quiet Title Act by bringing an action under the Administrative Procedure Act.

On October 1, 2003, MSLF filed McFarland’s notice of appeal and civil docketing statement. McFarland’s opening brief and excerpts of record are due on January 20, 2004; the government’s response is due on February 17, 2004; and McFarland’s reply is due on March 1, 2004.

On November 26, 2003, the Court set a settlement assessment conference (telephone) for December 19, 2003. At that conference, it was decided that settlement was not possible and that the parties would proceed with briefing in the case.

On January 20, 2004, MSLF filed McFarland’s opening brief and excerpts of record. The NPS response is due on March 18, 2004. (Kelly Hall) (Mentors: Hill, Kimball) (00-4615)
(Environmental Laws; Access to Federal Lands)
(Counsel for Montana Shooting Sports Association, et al.)
(U.S. District Court, D.C., Civil Action 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 was 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 Administrative Record finally was transmitted to MSLF. On August 12, 2002, MSLF filed a motion for summary judgment, and on September 11, 2002, the government filed its response and cross-motion for summary judgment.

MSSA filed its response and reply on November 1, 2002, and the government filed its reply on November 25, 2002. Oral arguments have not been scheduled. (Chris Massey) (Mentor: Cockrell) (00-4586)

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

(Access To Federal Lands and Resources) (Counsel for Macum Energy)

(U.S. District Court, Montana, Civil Action 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 it was 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.
On May 22, 2001, the Court filed an order striking Macum’s motion for summary judgment.

Oral arguments on the motions for summary judgment were held on October 22, 2003, and a decision is pending. (William Perry Pendley/Steve Lechner) (00-4650)

**MOUNT ROYAL JOINT VENTURE, et al. v. NORTON, et al.**
(Limited and Ethical Government; Access To Federal Lands and Resources)
(Counsel for Mount Royal Joint Venture)
(U.S. District Court, D.C., Civil Action 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.


On December 6, 2002, MRJV filed an unopposed motion for oral argument, stressing the importance of this case and the need for oral arguments. On September 30, 2003, the Court denied the motion, without prejudice. (Steve Lechner) (93-3413)
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.

MSLF voluntarily dismissed its lawsuit August 8, 1997. A new Complaint with additional claims was filed November 5, 1997. On November 18, 1997, Judge Green ordered that a case management hearing be held December 15, 1997, to discuss the voluntary dismissal and new Complaint. On December 4, 1997, MSLF filed a status 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 declared 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.

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, The Wilderness Society, Grand Canyon Trust, Escalante Canyon Outfitters, Escalante’s Grand Staircase B&B Inn, and Boulder Mountain Lodge (herein, The Wilderness Society) filed a renewed motion to intervene, which the Court granted on September 6, 2001.

The previously ordered discovery was completed, and at a status/scheduling conference held on October 7, 2002, it was agreed that the case could be decided by dispositive motions. The federal defendants stated that they would stand by their earlier brief in support of their motion to dismiss or, in the alternative, for summary judgment, which had been filed on July 31, 1998.

On March 17, 2003, The Wilderness Society filed a motion to dismiss and memorandum in support. On April 3, 2003, the case was reassigned to Judge David Nuffer by the Chief Judge. On April 29, 2003, UAC and MSLF each filed a consolidated opposition to the motions for summary judgment and/or motions to dismiss and a cross motion for summary judgment. On August 20, 2003, the federal defendants and the defendants-intervenors each filed a reply to plaintiffs’ oppositions and a response to plaintiffs’ cross motions for summary judgment. On October 14, 2003, UAC and MSLF each filed a reply to the various oppositions to the cross motions for summary judgment. Oral arguments were held on January 15, 2004. (Amanda Koeher) (Co-Counsel: Steve Christiansen) (96-3866)

**MOUNTAIN STATES LEGAL FOUNDATION v. NORTON, et al.**
(Endangered Species Act) (Plaintiff)
(U.S. District Court, Wyoming, Civil Action No. 2:03-cv-00250-ABJ)

This case was approved by the Board of Directors on June 7, 2002, and is a follow to the first lawsuit filed as part of that approval, **Hoff v. Norton and Williams** (D. Colo., see preceding description in this Update). 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

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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 to 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. This comment cycle ended in the spring of 2003. On September 26, 2003, MSLF filed a 60-day letter of intent to sue under the ESA on behalf of the Wheatland Irrigation District and Mountain States Legal Foundation.

On December 9, 2003, MSLF, on behalf of itself and its members, filed a Complaint in Wyoming federal district court against Secretary of the Interior Gale Norton, the FWS, the Director of the FWS, and the Director of Region 6 of the FWS challenging the listing of the Preble’s jumping mouse and the subsequent designation of critical habitat for the mouse.

On March 3, 2004, the federal government filed its answer. (Chris Massey) (Mentor: Smith) (03-5380)

NATIONAL ASSOCIATION OF SCHOLARS v. UNIVERSITY OF NEBRASKA BOARD OF REGENTS (Equal Protection) (Counsel for National Association of Scholars) (U.S. District Court, Nebraska)

This case was revoked by the Board of Directors on February 6, 2004. (Joe Becker) (Mentor: Balkenbush) (02-5106)
(Constitutional Rights and Liberties; Access To Federal Lands)  
(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, 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-Ericson, Leake, Johnson, and NABS for lack of standing and as to DeWaal’s

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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 plaintiffs DeWaal and Johnson. The docketing statement was filed on June 14, 2002. On August 27, 2002, an unsuccessful telephone mediation conference was held.

MSLF filed the opening brief on November 14, 2002, and the government filed its response 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 brief in support of appellees. The filing of that brief reset the reply due date to February 18, 2003, and on February 7, 2002, the reply was filed.

Oral arguments were held on September 15, 2003, and a decision is pending. (Kelly Hall) (96-3871) (Mentor: Pos)


(Access To Federal Lands and Resources)

(Counsel for Park Lake Resources and Park County Mining Association)

(Tenth Circuit, Colorado, Case No. 02-1429)

This case is a continuation of *Park Lake Resources and Park County Mining Ass’n v. U.S. Forest Service, et al.*, under that case’s approval authority. On March 5, 2001, MSLF filed a Complaint on behalf of Park Lake Resources, L.L.C., 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 Weinshienk, who had presided over the first Park Lake case. On May 17, 2001, Park Lake filed an unopposed motion for leave to respond to the motion to dismiss. On May 22, 2001, the motion was granted and the response ordered to be filed by June 8, 2001, and not exceed 10 pages. A hearing on the motion was set for July 17, 2001.

On June 4, 2001, Judge Weinshienk vacated, on Park Lake’s unopposed motion, the briefing schedule and hearing; granted Park Lake’s unopposed motion to file an 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 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 for leave to file a response to the government’s motion to dismiss by August 30, 2001. On August 9, 2001, Judge Weinshienk 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 31, 2001, Park Lake filed its response to the motion to dismiss, arguing 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, arguing that the actions of the Forest Service were not determinative in DOI’s actions and submitting a declaration by Doris Chelius, a Forest Service employee, in support of that 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 was filed on February 4, 2003, and, after an extension of time, Park Lake’s reply was filed on March 5, 2003. Oral arguments were held on September 15, 2003, and a decision is pending. (Chris Massey) (01-4796)

(Access to Public Lands and Resources)  
(Counsel for Appellee Nance Petroleum Corp.)  
(Tenth Circuit, Wyoming, Case No. 03-8062)

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 (NEPA) procedures that require the agency to take a “hard look” at such oil and gas sales. *See Wyoming Outdoor Council*, 156 IBLA 347 (2002).


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. In a sworn affidavit (Zander Affidavit), the Assistant Field Manager for the Buffalo Area 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.

An analysis of the potential environmental impacts of these disparate oil and gas activities is presented 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 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 either 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 the same for coalbed methane wells and for 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, the BLM

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regulates coalbed methane and other oil and gas wells under the same regulatory authorities.

In order to comply with NEPA's hard-look requirement for these parcels, the BLM assembled an interdisciplinary team of experienced natural resource specialists. On September 28, 1999, based on this team's analysis, 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 of the three parcels 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). The BLM concluded 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 pre-leasing 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 applied 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. The grounds of the protests are believed to be similar to those in the Pennaco case; that is, the BLM failed to comply with NEPA. The BLM announced that despite the protests it would offer the 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. The protests regarding these parcels were decided by the Wyoming State Director, BLM, in December 2003 (see this section, below).

On October 3, 2002, MSLF, on behalf of Nance, filed a motion to intervene in Pennaco Energy, Inc. v. U.S. Department of the Interior, et al. (D.Wyo., Case No. 02-CV-116), and a brief in support of the motion. On October 28, 2002, the federal government filed its opposition to the motion to intervene. At the request of the Court, on November 7, 2002, five days before it was due, Nance replied to the opposition.

At the initial pretrial conference on November 13, 2002, the Magistrate Court granted Nance's motion to intervene, set a briefing schedule, and scheduled a hearing on the briefs for March 13, 2003, before District Court Judge Brimmer. On December 23, 2002, Pennaco and the various plaintiff-intervenors, including Nance Petroleum, filed opening briefs. On February 3, 2003, the federal government filed its response, and on February 12, 2003, the defendant-intervenors Wyoming Outdoor Council, et al., filed their response. On February 24, 2003, plaintiff-intervenor Petroleum Association of Wyoming, plaintiff-intervenor/appellant State of Wyoming, and plaintiff-intervenor Nance Petroleum filed replies and Pennaco filed a motion to exceed the page limits and
its reply brief was lodged. On March 13, 2003, a hearing on the briefs was held, and on May 30, 2003, Judge Brimmer reversed the decision of the IBLA that the BLM had not properly followed NEPA procedures requiring it to take a “hard look” at oil and gas sales.

On July 28, 2003, the federal government filed a notice of appeal to the Tenth Circuit (Case No. 03-8061), and on July 29, 2003, the Wyoming Outdoor Council, et al., filed a notice of appeal (Case No. 03-8062). Appellees in both appeals are the plaintiff Pennaco and the plaintiff-intervenors, including Nance. Both appeals were docketed by the Tenth Circuit on August 1, 2003.

On August 28, 2003, the district court notified the Tenth Circuit that the record in the government’s appeal, Case No. 03-8061, was complete and the briefing schedule set. On October 6, 2003, the federal government filed a motion voluntarily dismissing its appeal, and the Court granted the motion and issued the mandate in the case.

In Case No. 03-8062, Wyoming Outdoor Council, et al. v. Pennaco Energy, Inc., Nance Petroleum Corporation, et al., the Wyoming Outdoor Council requested a transcript of the March 13, 2003, hearing. On December 8, 2003, the Tenth Circuit issued a notice that the record finally was complete in the case and that appellants’ opening brief was due on December 10, 2003. On December 11, 2003, the Wyoming Outdoor Council filed a deficient brief in that no lower court decision was attached. On December 12, 2003, it filed a corrected brief.

On January 9, 2004, a mediation conference was held in the appeal of the district court case, chaired by the Conference Administrator.

On January 29, 2004, the appellees in the case filed a joint response brief, one day late, with permission of the Court. The Wyoming Outdoor Council’s reply brief is due on February 17, 2004.

On February 6, 2004, the Wyoming Outdoor Council, through its attorneys Earthjustice, filed an unopposed motion for extension of time to file its reply brief. On that same date the Court granted the motion, and the reply brief is now due on March 5, 2004. (Chris Massey) (02-5045)

**RANCHO VIEJO, LLC v. NORTON, et al.**  
(Endangered Species Act) (Amicus) (Supreme Court, D.C., Case No. 03-761)

This case was approved by the Board of Directors on December 17, 2003. Petitioner, Rancho Viejo, LLC (Rancho Viejo), is the owner of a 202-acre project located in Fallbrook, San Diego County, California (Property). Intending to make viable use of its private property, Rancho Viejo plans to construct approximately 280 homes upon 52 acres of upland area.

In May 1999, Rancho Viejo filed an application with the U.S. Department of the Army for authorization to conduct work within the jurisdiction of the U.S. Army Corps of Engineers (Corps) under the Clean Water Act, 33 U.S.C. § 1344. In a letter dated July 9, 1999, and pursuant to the Endangered Species Act, 16 U.S.C. § 1531, et seq. (ESA), the Corps requested a formal Section 7 consultation with the U.S. Fish and Wildlife Service (FWS) concerning Rancho Viejo’s application. This consultation was requested because

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the Corps determined that the project could potentially affect the arroyo southwestern toad (*Bufo microscaphus californicus*), an isolated species occurring within the State of California listed as endangered by the FWS in 1994. (The FWS’s listing did not contain express findings of any connection between the arroyo toad and interstate commerce and, in subsequent designation of 182,360 acres as arroyo toad habitat, the FWS specifically found that its habitat designation would have no significant impact on commerce. 66 *Fed. Reg.* 9414, 9440 (Feb. 7, 2001).) Section 7 requires federal governmental agencies to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species....” 16 U.S.C. § 1536(a)(2).

In May 2000, as part of its continued effort to develop its private property, Rancho Viejo constructed a fence on part of the upland area of the Property. The FWS claims that the fence has prevented and may continue to impede movement of the arroyo toads from upland areas outside the project area to alleged breeding habitat purportedly located in a creek adjacent to the Property. The upland portion of the fence is not buried and, according to Rancho Viejo consultants, would easily allow passage of arroyo toads should any occupy the surrounding area. Nevertheless, in a letter dated May 22, 2000, the FWS alleged that the continued existence of the fence on the Property constituted an “illegal take” of the arroyo toad under the meaning of the ESA. The FWS subsequently indicated that it may institute an enforcement action against Rancho Viejo.

Given the lack of evidence to support the Service’s contentions and its own expert’s opinion to the contrary, Rancho Viejo refused the FWS’s request to remove the fence from its private property. On June 8, 2000, the Corps notified Rancho Viejo that the Corps and FWS agreed that the ongoing Section 7 consultation for the project should be temporarily suspended. Rather than citing any legal authority for this suspension, the Corps made vague references to issues of potential Section 9 and 7(d) of the ESA violations and contended that the agency’s preeminent priority was to assure that any ongoing “take” of the arroyo toad cease immediately.

Because of the listing and the assertion by the Service that portion of Rancho Viejo’s property may be potential arroyo toad habitat, Rancho Viejo has been unable to obtain permits necessary to grade its property and has been threatened with prosecution for the erection of a fence on its property that, according to the Corps and the FWS, interferes with the migration of the arroyo toad. To date, this broad use of federal authority not only has had a severe financial impact on Rancho Viejo, but also has subjected Rancho Viejo to potential civil and criminal liability under Section 9 of the ESA.

This case concerns the constitutional validity of federal law regulating an isolated but purported endangered species allegedly on or near private land owned by Rancho Viejo. The case involves an “as applied” Commerce Clause challenge to the ESA, in respect to the arroyo toad. Specifically, it addresses whether a federal regulatory agency exceeds the scope of the Commerce Clause by extending Section 9(a)(1)(B) of the ESA to wholly intrastate, non-commercial species and by prohibiting such non-commercial activity as the erection of a fence on private property merely because the fence might hinder movement of those species.
Asserting that the federal government’s actions—both in listing the arroyo toad and in threatening prosecution for conduct that might affect the toad’s habitat and movement—exceeded Congress’ power to regulate commerce among the states, Rancho Viejo brought this suit for declaratory and injunctive relief.

The parties executed an extensive joint stipulation of facts and subsequently filed cross motions for summary judgment. The district court denied Rancho Viejo’s motion for summary judgment and, after rejecting the federal government’s contention that the case was not ripe, granted Defendants’ motion for summary judgment, holding that the decision in National Ass’n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), was dispositive, notwithstanding the subsequent decisions in United States v. Morrison, 529 U.S. 598 (2000), and Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001). The district court entered final judgment for the federal government on August 20, 2001. On appeal, the D.C. Circuit affirmed the decision of the lower court. Rancho Viejo’s petition for rehearing and rehearing en banc was denied subsequently on July 22, 2003; dissenting opinions by two judges emphasized that the panel’s decision is inconsistent with the Supreme Court’s Commerce Clause precedents and conflicts with the decision of the Fifth Circuit in GDF Realty, Inc. v. Norton, 326 F.3d 622 (5th Cir. 2003).

On November 19, 2003, Rancho Viejo filed a petition for writ of certiorari. MSLF’s amicus brief in support of Rancho Viejo’s petition was filed on January 27, 2004. On January 28, 2004, amicus briefs also were filed by Pacific Legal Foundation and the CATO Institute; Washington Legal Foundation and others; the State of Texas and others; and GDF Realty Investments and others.

On January 28, 2004, the government filed its opposition to the petition and on February 9, 2004, Rancho Viejo filed its reply. On February 11, 2004, the petition and all related pleadings were distributed to the justices for their consideration at the conference of February 27, 2004. (Chris Massey) (03-5301)

**RICHARDSON v. CALIFORNIA DEPT OF FORESTRY AND FIRE PROTECTION**

(Limited and Ethical Government, Private Property Rights; Free Enterprise)

(Counsel for Harold Richardson) ()

This case was approved by the Board of Directors on February 6, 2004. On December 26, 2000, the California Department of Forestry and Fire Protection (“the Department”) received Harold Richardson’s Timber Harvest Plan (“THP”). A THP, a detailed and complicated document, is the blueprint submitted by a landowner to the Department outlining what timber he wants to harvest, how it will be harvested, and the steps that will be taken to prevent damage to the environment. It is prepared by a Registered Professional Forester (“RPF”) licensed to prepare such plans as required by the California Forest Practice Act enacted in 1973. Cal. Public Resources Code § 4511, et seq. The THP submitted by Mr. Richardson proposed a timber harvest on 55 acres of land owned by him. It was reviewed by multiple agencies, including the State Department of Fish and Game, State Division of Mines and Geology, North Coast Regional Water Quality Control Board, and U.S. Fish and Wildlife Service. On January 4, 2001, the Department returned the THP to Mr. Richardson, together with a request for
additional information concerning cumulative impacts of the removal of late succession forest stands in the proposed harvest area.

On March 28, 2001, Mr. Richardson resubmitted the THP, together with information revised by the RPF further discussing the cumulative impacts of the removal of late succession forest stands. On April 15, 2001, the review team met and developed further questions for the RPF, including questions concerning removal of late succession timber. On April 7, 2001, the Department accepted the THP for filing. On April 25, 2001, the RPF responded to additional questions of the review team. Pre-harvest inspections occurred on May 29 and June 7, 2001. On July 14, 2001, at the request of the Department of Fish and Game, the RPF provided additional information regarding late succession forest stands, stating that California Code of Regulations Title 14, § 919.16(a), (b), did not apply because removal of late succession forest stands described in the THP would not have an adverse impact.

On August 16 and 18, 2001, the RPF responded in writing to the request of the North Coast Regional Water Quality Control Board for additional information regarding sedimentation. On October 27, 2002, the RPF submitted surveys relating to the endangered marbled murrelet and the northern spotted owl, completed with the technical assistance of the U.S. Fish and Wildlife Service, for incorporation into the THP. On October 29, 2002, the Department requested further information about the aforementioned issues, to which the RPF responded on November 22, 2002. On March 22, 2003, the RPF provided a specific discussion of Cal. Code Regs. Title 14, § 919.16(a) and made certain concessions in the THP. On April 23, 2003, the RPF submitted additional wildlife surveys. On that same day, the Department of Fish and Game informed the review team that the information submitted by the RPF was insufficient to allow for adequate review of the plan’s impacts. On May 20, 2003, the Department requested more information concerning wildlife, sedimentation, and water temperature issues. On June 23, 2003, the RPF responded with 15 pages of information.

On July 31, 2003, the review team recommended that the Department deny approval of the plan. On September 5, 2003, the Department sent a letter to Mr. Richardson denying approval, saying that “the THP does not contain sufficient information to determine impacts relative to late successional forest stands.”

Mr. Richardson appealed that denial to the California Board of Forestry and Fire Protection (“the Board”) and a public hearing was held on January 6, 2004. At the conclusion of the hearing, the Board voted to uphold the Department’s decision. On January 14, 2004, Mr. Richardson submitted 27 pages of very specific, revised information in a final attempt to comply with the demands of the Board. On January 27, 2004, the Department again denied the THP.

Under California law, a petition for a writ of mandamus in accordance with Cal. Code Civ. Proc. § 1094.5 provides the proper mode of judicial review of final administrative actions. Henry Mayo Newhall Mem. Hosp. v. Superior Court of Los Angeles Co., 146 Cal. Rptr. 542, 547 n. 9 (Cal. App. 1978). MSLF will file suit on behalf of Mr. Richardson in a challenge to the decision of the California Department of Forestry and Fire Protection to disapprove the THP for his private timber holdings and in seeking such a permit or just compensation. (Amanda Koehler) (Mentor: Haas) (04-5403)
ROTH v. UNITED STATES
(Private Property Rights; Access to Federal Lands)
(Counsel for Roth) (U.S. District Court, Montana, Civil Action No. 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. Roth's motion for summary judgment, opening brief, and statement of facts were filed on March 10, 2003. Shortly thereafter, that motion was denied without prejudice because it lacked the required statement about contacting opposing counsel. On March 18, 2003, MSLF filed an unopposed motion to file out of time a first amended motion for summary judgment and supporting papers. On March 21, 2003, the Court granted the motion and filed the documents. On April 11, 2003, the government filed its response brief and its opening brief in support of its cross motion for summary judgment. The Rothes' response and reply brief was filed on June 2, 2003, and on June 17, 2003, the government filed its reply in support of its cross motion for summary judgment. Oral arguments were held on December 10, 2004, before Magistrate Judge Erickson in Missoula.

On December 12, 2003, Magistrate Judge Erickson issued an order granting Roth's motion for partial summary judgment and denying the United States' cross-
motion for summary judgment. He granted the Roth's easements under the Act of 1866 for the Long, Long-Conner, and Meathrel ditches and an easement under the Act of 1891 for the Tamarack Dam and Reservoir. The government's notice of appeal is due on March 30, 2004, and, if the government does not file a notice of appeal, MSLF's application for attorney fees is due on April 30, 2004. (Amanda Koehler) (Local Counsel: Ward Shanahan) (01-4845)

SHERBROOKE TURF, INC. v. MINNESOTA DEPARTMENT OF TRANSPORTATION and U.S. DEPARTMENT OF TRANSPORTATION
(Equal Protection) (Counsel for Sherbrooke Turf, Inc.)
(Supreme Court, Minnesota, Case No. 03-968)

This case was approved by the Board of Directors on December 12, 2003. Sherbrooke Turf, Inc. is a non-minority landscaping contractor denied subcontracts to perform work on federally funded highway projects because of a federal program, in place and unchanged since 1982, which requires the award of subcontracts on the basis of race to alleged Disadvantage Business Enterprises (DBE's). In 1966, Sherbrooke challenged the constitutionality of the federal law, its regulations and its use, by Minnesota. In August 1998, a federal district court granted summary judgment in favor of Sherbrooke, but when Sherbrooke sought to bar enforcement of Congress' latest version of the statute declared unconstitutional, the district court required that a new suit be filed, which was done in late 1998. In November 2001, the district court granted summary judgment against Sherbrooke.

On October 6, 2003, in a case (8th Cir., Case No. 02-1665) consolidated with Gross Seed Company v. U.S. Department of Transportation, et al. (8th Cir., Case No. 02-3016), the Eighth Circuit, relying on the Tenth Circuit's ruling in Adarand v. Mineta, upheld the constitutionality of the federal program, holding that the program survived "strict scrutiny" because it was narrowly tailored to serve a compelling governmental interest.

On December 30, 2003, Gross Seed Company filed a petition for writ of certiorari with the U.S. Supreme Court, which was docketed on January 6, 2004 (Case No. 03-960), and the government's response is due on February 5, 2004. On December 31, 2003, Sherbrooke Turf, Inc., filed a petition for writ of certiorari, which was docketed on January 7, 2004 (Case No. 03-968). The cases have been combined for the purposes of argument, and Gross Seed Company is in the lead.

The government's response in Sherbrooke is due on February 6, 2004. The government requested and was granted an extension of time to file its response. Its responses in both cases are now due on March 8, 2004. (Scott Detamore) (03-5381)

SIERRA CLUB v. EL PASO GOLD MINES, INC.
(Environmental Law) (Amicus) (Tenth Circuit, Colorado, Case No. 03-1105)

This case was approved by the Board of Directors on June 6, 2003. El Paso Gold Mines, Inc. (El Paso), owns the El Paso Gold Mine, El Paso shaft, and related mineral
rights in Teller County, Colorado. El Paso Gold’s property is located within the Cripple Creek Mining District, which has been explored and mined for over a century. The Mining District is located in a 10,000-acre bowl of impermeable granite, the sides of which extend upward to an altitude of 9,200 feet. As a result, the District has always had flooding problems, to alleviate which a series of tunnels were bored into the mountain to drain ground water away from the underground mine workings. The most significant of these tunnels are the 5-mile Roosevelt Tunnel, about 2,000 feet below the surface, and the 6-mile Carlton Tunnel, about 1,000 feet below the Roosevelt Tunnel.

After completion of the Roosevelt Tunnel in 1918, mine water levels were lowered by over 100 feet per year. After completion of the Carlton Tunnel in 1941, water levels were lowered even further and the flow of water from the Roosevelt Tunnel was also reduced. Today, the Roosevelt Tunnel portal discharges 19 gpm into Cripple Creek, and the Carlton Tunnel discharges 1,440 gpm.

Although there has been no mining activity on El Paso’s property for decades, the Sierra Club and the Mineral Policy Center (collectively, Sierra Club) sued El Paso for violating the Clean Water Act (CWA). 33 U.S.C. § 1251 et seq. Specifically, the Sierra Club alleged that El Paso violated Section 402 of the CWA, 33 U.S.C. § 1342, by discharging pollutants from a point source into Cripple Creek without a valid permit. The basis of this allegation was that water containing zinc and manganese naturally flowed out of the El Paso shaft into the Roosevelt Tunnel where it mixed with water from other shafts and subsequently flowed into Cripple Creek. In its defense, El Paso asserted that it was not “discharging” pollutants without a permit because it was merely a passive property owner that had never engaged in mining activities on the property. Notwithstanding these facts, the District Court held that El Paso was in violation of the CWA; it fined El Paso $94,000 and awarded the Sierra Club $240,000 in costs and attorneys’ fees. Memorandum Opinion and Order, Sierra Club v. El Paso Gold Mines, Inc., Civil Action No. 01-PC-2163 (D. Colo. Nov. 15, 2002).

El Paso filed its opening brief on July 16, 2003. On July 25, 2003, MSLF filed a motion for leave to file an amicus brief in support of El Paso, and its brief was lodged by the Court. In its brief, MSLF asserted that a passive property owner may not be held liable under Section 402 and that the term “discharge” in Section 402 requires affirmative conduct for an allegation of discharge to be valid. Further, MSLF argued that neither of the Sierra Club’s charges was the intent of Congress when it passed the CWA.

On August 1, 2003, the Sierra Club filed a response to MSLF’s motion for leave to file an amicus brief; however, on August 5, 2003, the Clerk of the Court granted MSLF’s motion for leave to become amicus and filed MSLF’s brief. The Clerk stated that if appellees wish to file an overlong answer brief they may file a motion to do so. On the following day, El Paso filed a motion to strike the Sierra Club’s response to MSLF’s motion, together with a response to the Sierra Club’s motion for a page extension. On August 8, 2004, El Paso’s motion to strike and the Sierra Club’s response were submitted to the Court, and on August 12, 2003, Judges Murphy and O’Brien denied El Paso’s motion to strike and its response to the Sierra Club’s motion for a page extension.
On August 15, 2003, the Sierra Club and Mineral Policy Center filed a deficient response brief and an acceptable appendix. On August 18, 2003, the Sierra Club filed a corrected brief.

On September 4, 2003, El Paso lodged a supplemental appendix and filed a motion for leave to supplement the record and file a supplemental appendix and a request for judicial notice. On September 5, 2003, the motion was referred to the merits panel. On September 15, 2003, the Sierra Club filed a response to the motion, and the following day it was referred to the merits panel.

On September 18, 2003, El Paso filed an optional reply brief. On October 7, 2003, the Sierra Club filed a motion to strike the reply brief, to which, on October 20, 2003, El Paso responded. On October 21, 2003, the Clerk referred both the motion and the response to the merits panel.

On February 3, 2004, the Court set oral arguments for the May 2004 session.

(Steve Lechner) (Mentor: Pos) (01-4931)

SOUTHERN UTAH WILDERNESS ALLIANCE v.
DABNEY, et al., and UTAH SHARED ACCESS ALLIANCE, et al.
(Access To Public Lands and Resources)
(Counsel for Defendant-Intervenors and Cross-Claimants
Utah Shared Access Alliance, et al.)
(U.S. District Court, Utah, Civil Action 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 Spring 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 R.S. 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 R.S. 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 R.S. 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 R.S. 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 R.S. 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 R.S. 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 R.S. 2477 issue and it dismissed the County and the State from the case.

On May 22, 2003, USA-ALL filed a first amended cross claim, amending its cross-claim of March 5, 2001, challenging the legality of the NPS closure to motorized vehicles of Salt Creek Road beyond Peekaboo Campsite. It also filed a motion to file the amended cross claim and a motion to lift/vacate the stay so that the remaining issues in the case could be decided. On May 27, 2003, the Court granted both motions. On June 9, 2003, SUWA filed an answer to the amended cross claim.

On June 12, 2003, the parties, SUWA, USA-ALL, and the United States filed a stipulated motion to dismiss requesting that the Court dismiss SUWA’s first amended complaint with prejudice and stating that the dismissal would have no effect on USA-ALL’s first amended cross claim. On June 13, 2003, the Court granted the motion.

On June 13, 2003, the United States filed an answer to USA-ALL’s first amended cross claim. Action in the case has been informally stayed pending rulemaking by the National Park Service.

The Court has set a status conference for March 8, 2004. (Steve Lechner) (Mentor/ Local Counsel: Pos) (95-3707)
(Private Property Rights) (Counsel for Kathy Thrall, et al.)
(Sixth Circuit, W.D. Michigan, Case Nos. 98-1153/1204)

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 (Case No. 98-1153). The Wilderness Society, and others, which had filed an amicus brief in the District Court after being denied intervention status (the denial was appealed and affirmed in the Circuit Court), filed for intervention status in the appeal (Case No. 1204). The briefing schedules of both cases were delayed several times while the map survey appeal was considered. Finally, on September 24, 1998, the Court stayed the briefing schedule for "settlement negotiations," a term used by the Court to describe the delay resulting from the map survey appeal, and ordered the government to file a status report with the Court every six months.

On October 3, 2003, a decision in the Thrall map survey appeal was issued. Shortly thereafter, the Circuit Mediator scheduled a Telephonic Mediation Conference in the case at hand for October 29, 2003. That conference was held and settlement discussions are underway.

On November 7, 2003, the Circuit Mediator set a briefing schedule. Under this schedule, the Forest Service's proof opening brief is due on December 12, 2003; the Thralls' proof response brief is due on January 14, 2004; the optional proof reply brief is due on February 2, 2004; the joint appendix is due on February 9, 2004; and all final briefs are due on March 1, 2004.

On November 17, 2003, Thomas V. Church (landowner on Crooked Lake), the Upper Peninsula Environmental Coalition (UPEC), et al. (UPEC), filed a motion to intervene and supporting documents. MSLF filed Thrall's response in opposition to the motion on December 3, 2003, and the government filed its response on December 8, 2003. Thomas V. Church, et al., filed their reply to Thrall's opposition on December 11, 2003, and their reply to the government's response on December 17, 2003.

On December 1, 2003, the Circuit Mediator modified the briefing schedule. The government's opening brief is now due on March 1, 2004.

On February 26, 2004, the Clerk of the Court ordered the case to be held in abeyance pending pre-argument conference work. The appellant (federal government) is to file a status report to the Court by May 3, 2004. (Steven Lächner) (91-3022)
UNITED STATES v. ALAMOSA COUNTY, COLORADO, et al.
(Equal Protection) (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, 2002, 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 alleged would be 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 was scheduled to begin May 6, 2003.

Discovery began in early April, and depositions by the parties began in June 2002 and were completed on February 7, 2003.
On January 16, 2003, Alamosa County filed a motion for summary judgment on the constitutional issues of the case. The United States’ response was filed on February 4, 2003, and Alamosa County’s reply was filed on February 19, 2003.

The parties’ trial briefs were filed on April 2, 2003, together with the witness and exhibit lists. The trial preparation conference was held on April 22, 2003, at which the Court informed counsel for both parties that their trial briefs did not follow her rules and were deficient, though for different reasons, and were to be resubmitted by April 25, 2003, together with new witness lists reducing witness times by 17 percent.

After watching the first three cases on a trailing docket settle or plead out, the trial finally began on May 6, 2003, in Colorado federal district court in the courtroom of Judge Marcia Krieger. The expert case for both sides was presented first and concluded on May 9, 2003. The “anecdotal” part of the case began on Monday, May 12, 2003, and concluded on May 15, 2003. On May 16, 2003, the Court determined admissibility of exhibits and set written closing arguments due on June 20, 2003.

On June 20, 2003, the parties filed written closing arguments. On June 27, 2003, Alamosa County filed a statement of pertinent and significant authority, and on July 10, 2003, the United States filed its response. On July 15, 2003, the Court issued an order terminating both Alamosa County’s statement and the United States response thereto and declining to consider the legal arguments presented in both. On July 18, 2003, the Court denied Alamosa County’s motion for summary judgment that was filed prior to trial.

On November 26, 2003, the Court issued its Memorandum Decision and entered judgment in favor of Alamosa County. The deadline for the United States to file a notice of appeal was January 26, 2004. On December 11, 2003, Alamosa County filed its bill of costs and a hearing on the costs was set for January 28, 2004.

On January 23, 2004, the United States informed MSLF that it did not intend to file a notice of appeal and that it believed an agreement could be reached regarding MSLF’s costs. On February 5, 2004, the District Court Clerk entered an order awarding $22,080.61 in costs to Alamosa County. (Scott Detamore/Joe Becker) (01-4939)

**UNITED STATES v. BLAINE COUNTY, MONTANA, et al.**  
(Equal Protection) (Counsel for Defendant-Appellants Blaine County, et al.)  
(Ninth Circuit, Montana, Case No. 02-35691)

This case was approved by the Board of Directors on October 8, 1999. Blaine County is a sparsely populated county in north-central Montana and borders Canada. It has a population of about 7,000, about 40 percent of whom are Native Americans who mostly 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 large city is Great Falls, 200 miles southwest of the county seat, Chinook.

Blaine County has three residential commissioner districts. Montana state law requires that a county’s commissioners each reside in a different district. It also requires
that the commissioners be elected at large, for six-year terms, in elections held 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 appear 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 Blaine County, threatening to sue it 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 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 candidate 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 allegedly are not able to 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 file suit, asking 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 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.
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. 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 motion.

On April 9, 2001, the ACLU filed its reply to Blaine County’s response, alleging, 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] Gale 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 summary judgment hearing was set for July 6, 2001, in Las Vegas, and an 8- to 9-day trial was set to begin on October 1, 2001, and take place in Great Falls.

On June 1, 2001, Judge Pro issued an order in which he concluded that the ACLU failed to show either that their request for intervention was timely or that their interests would not be adequately represented by the United States. Judge Pro stated that if intervention were granted, even if the ACLU entered 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 indicated the United States was now not adequate 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 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 certain 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, which 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 parties filed trial briefs, findings of fact and conclusions of law, and witness lists. Trial was held October 9-11 and 15-18, 2001, and post-trial briefs were sent to the Court, Judge Pro, and each other 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 the United States in developing the 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 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 heard arguments from Blaine County and the ACLU on the ACLU's appeal of the denial of its motion to intervene in the merits phase 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 the redistricting plan was approved. On May 21, 2002, the Ninth Circuit docketed that appeal and 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, the plan was approved. It creates a majority-minority district and sets a special election for that district. Both the government and the intervenors had strongly argued for a special election for all three districts such that Commissioner terms would no longer be staggered.

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 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 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.

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On January 14, 2003, Blaine County filed its shortened opening brief and its excerpts of record. On January 21, 2002, MSLF was notified by the Ninth Circuit Clerk that its excerpts were deficient because 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 file correctly prepared excerpts and ruled that the time for filing of the government response brief would toll from the date those excerpts were filed. The excerpts were sent by Federal Express to the Court on January 27, 2003.

On February 13, 2003, the plaintiff-intervenor-appellees, McConnell, et al., filed a response brief. On February 20, 2003, Blaine County filed a motion to strike that brief because the plaintiff-intervenors were admitted to the District Court case only for purposes of the remedy, which remedy Blaine County is not appealing. [When McConnell, et al., appealed the District Court’s refusal to admit them to the merits portion of the case, the Ninth Circuit upheld the District Court’s ruling.] On February 28, 2003, McConnell, et al., filed their response to Blaine County’s motion to strike.

The government’s response brief was filed on March 19, 2003, and Blaine County’s reply was filed on April 21, 2003.

The Ninth Circuit scheduled oral argument in the case to be held on September 10, 2003, in Seattle, during Mr. Detamore’s long-scheduled, non-refundable vacation trip. On July 23, 2003, Blaine County filed an unopposed motion to reschedule oral arguments in the case. The motion was faxed by the Ninth Circuit to the panel, and on July 29, 2003, the panel ordered that oral arguments be moved to the next available Seattle session.

On October 15, 2003, the merits panel for the appeal issued an order to strike the response brief filed by the ACLU for McConnell, et al. On November 4, 2003, the merits panel heard oral arguments in the case. (Scott Detamore) (Mentors: Ruffatto, West) (99-4534)

UNITED STATES v. ENO
(Private Property Rights; Access To Federal Lands and Resources)
(Counsel for Donald Eno) (Interior Board of Land Appeals, Case No. 2004-92)

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 proscribed 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 (Hearings Division, Case CAMC 269556). 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 ALJ 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. The government’s post-hearing reply brief was filed on January 13, 2003, and Eno’s post-hearing reply brief was filed on February 18, 2003.

On December 4, 2003, the ALJ issued an opinion in favor of Mr. Eno, rejecting all arguments made by the federal government. On December 30, 2003, the government filed a notice of appeal with the Interior Board of Land Appeal (IBLA), together with a petition for stay of the effect of the ALJ’s decision and a request for extension of time to file its statement of reasons with the IBLA. On January 2, 2004, the appeal was docketed

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(Case No. 2004-92), and on January 6, 2004, the government’s request for an extension of time was granted. The government’s statement of reasons is due on March 1, 2004.

On January 12, 2004, Mr. Eno’s opposition to the petition for stay was filed. On January 23, 2004, government replied to Mr. Eno’s opposition, and on January 27, 2004, Mr. Eno filed a motion to strike the assignments of error made in the government’s reply, asserting that any assignments of error must be included in the petition itself.

On February 13, 2004, the IBLA denied the government’s petition for stay and Mr. Eno’s motion to strike. In addition, the IBLA judge changed the name of the appellee in the case from Burton to Eno.

On February 27, 2004, the government filed its statement of reasons. (Steve Lechner) (Mentor: Ruffatto) (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 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 U.S.C. §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.

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.


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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 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

On November 28, 2001, the Court set oral arguments for May 9, 2002, before
its opening brief on the merits of the Flight Caps Rule. By order of the Court, the amicus
party Helicopter Association International joined MSLF on a portion of that brief.

The Grand Canyon Trust, et al., also filed its opening brief on November 30,
the intervenor Hualapai Tribe filed its brief, and on March 4, 2002, the intervenors Grand
Canyon Trust, et al., filed their brief.

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. The petition was filed on December 13, 2002 (case 02-
931), and on April 21, 2003, the petition for writ of certiorari was denied.]

MSLF continues 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.
(Joe Becker) (Mentors: Sullivan, Wilson) (98-4373)

U.S. FISH AND WILDLIFE SERVICE v. DRAKE
(Endangered Species Act; Private Property Rights) (Counsel for 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.


**UNNAMED MONTANA RESIDENT(S) v. STATE OF MONTANA**
(Private Property Rights, Limited and Ethical Government, Equal Protection)
(U.S. District Court, Montana)

This case was approved by the Board of Directors on February 6, 2004. Section 87-1-304 of the Montana Code gives the Montana Game Commission the authority to set hunting seasons and bag and possession limits. More specifically, it allows the Commission to “open or close or shorten or lengthen seasons on any species of game, bird, fish, or fur-bearing animal[].” Under this authority, the Montana Big Game Hunting Regulations provide, in part, that “[b]ig game hunting privileges on Indian Reservations are limited to tribal members only.” Accordingly, the State of Montana is denying individuals the right to hunt big game on their private non-Indian property, even if that the individual possesses the appropriate deer license and tag.

MSLF will file suit in federal district court in Montana and argue that these regulations limit the rights of private property owners and hunters because of their race and therefore violate the Equal Protection Clause of the United States Constitution. More specifically, MSLF will argue that the plain language of the regulation does not distinguish between Indians and non-Indians and does not serve a legitimate state interest and afford equal protection under the law.

The State of Montana most likely will argue that the regulation does not amount to an equal protection violation because, based on federal precedent, Indians represent a political classification, not a racial classification. The State will rely heavily on *Morton v. Mancari*, 417 U.S. 535 (1974), which explicitly considers whether laws that

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distinguish based on tribal membership violate equal protection. It will argue that the regulation, which distinguishes between persons based on tribal membership, is constitutional under equal protection requirements because the distinction is political rather than racial. Following this rationale courts previously have decided that they need only address whether the regulation that prohibits non-tribal members from hunting big game on Indian reservations is rationally tied to the fulfillment of federal and state obligations toward Indians. In so doing, the courts have determined that there is a rational basis for the challenged regulation and, thus, that the regulation does not violate equal protection.

MSLF will argue that Morton v. Mancari is misguided and in direct conflict with Adarand Constructors v. Peña, which determined that all racial classifications, including those associated with Native Americans, are subject to strict scrutiny. (Chris Massey) (03-5360)

**UNNAMED PETROLEUM ASS’N v. OKLAHOMA TAX COMMISSION**

(Limited and Ethical Government; Equal Protection) (Counsel for Petroleum Ass’n) (U.S. District Court, Oklahoma)

This case was approved by the Board of Directors on October 3, 2003. In 2001, the Oklahoma Legislature passed a statute subjecting all nonresident oil and gas leaseholders to a withholding tax on the proceeds of their Oklahoma oil and gas leases. §68-2385.26. This statute, which took effect on July 1, 2001, requires remitters to withhold Oklahoma State income tax from royalty payments and most other types of income that flow to out-of-State residents from Oklahoma oil and gas leases. No withholding is required from persons that have an Oklahoma address. Also excluded from the withholding provision are the United States, the State of Oklahoma or any of its subdivisions, federally recognized Indian nations and tribes; nonprofit [501(c)(3)] organizations, and recipients whose payment is subject to further distribution to working interest owners, royalty interest owners, overriding royalty interest owners, and/or production payment interest owners. The withholding rate is 6.75 percent of the gross royalty. The monies withheld are required to be remitted to the Oklahoma Tax Commission (OTC) on a quarterly basis.

On April 17, 2003, the New Mexico Legislature passed the Oil and Gas Proceeds Withholding Tax Act. 7-3A-1 NMSA 1978. This statute, effective October 1, 2003, requires remitters to withhold New Mexico State income tax from royalty payments and most types of income that flow to out-of-State residents from New Mexico oil and gas leases. Proceeds are credited against personal income tax liability just like regular withholding tax. The initial withholding rate is 6.75 percent through December 2004. No withholding is required from persons that have a New Mexico address. Also excluded from withholding are the United States, the State of New Mexico or any of its subdivisions, federally recognized Indian nations and tribes, non-profit [501(c)(3)] organizations, and recipients whose payment is subject to further distribution to working interest owners, royalty interest owners, overriding royalty interest owners and/or production payment interest owners, and persons whose payments are less than $10.
On October 1, 2003, the implementing New Mexico regulation was amended by the Taxation and Revenue Department such that an out-of-state leaseholder can avoid the withholding by filing with the remitter a written agreement stating that the remitter will report and pay tax on any amounts remitted. The agreement must be in a form prescribed by the Department and must be in the possession of the remitter at the time the remitter files its annual statement of withholding. The agreement may be restricted to a single taxable year or to multiple taxable years or be for an indefinite term subject to revocation by the remitter. No such escape from withholding is believed to be possible in Oklahoma.

MSLF will file suit in U.S. District Court in Oklahoma or New Mexico on behalf of a petroleum association against either the Oklahoma Tax Commission (OTC) or the New Mexico Taxation and Revenue Department (NMTRD). It will challenge the state statute requiring tax withholding for out-of-state residents, but exempting state residents and other entities or persons, asserting that the withholding violates the privileges and immunities clause, the interstate commerce clause, and/or the Equal Protection Clause. (Joe Becker) (Mentor: Haas) (03-5342)

**UNNAMED STUDENT(S) v. WESTERN UNIVERSITY(S)**
(Equal Protection)
(U.S. District Court, California, Montana, California, Utah, and/or Oregon)

This case was approved by the Board of Directors on February 6, 2004. The Board approved the sending of letters to various western universities and the filing of a complaint with the Office of Civil Rights, Department of Education, in the case of a university that does not drop or change its program. Before a complaint is filed on behalf of a named plaintiff, however, Board approval must be received for that filing.

At least four universities in Montana, California, Utah, and Oregon currently maintain joint federal and state government-funded academic and/or scholarship programs that exclude participation based on race. For example, at the University of Montana, the Big Horn Teacher Project makes certain financial assistance available only to Native American students. At the University of Oregon, the Sapsik’wala’ academic teacher program is open only to “members of an Indian tribe or band, or a descendent of parent or grandparent who meets tribal membership qualifications.” Humboldt State University, a member of the California State University system, offers “The Indian Teacher and Educational Personnel Program” for “American Indian students wishing to pursue careers in education, counseling, social work, or tribal government service.” The University of Utah maintains an American Indian Teacher Training Program, and according to university guidelines applicants to the program “must be American Indian or Alaskan Native Americans.”

In an effort to discern the commitment of these universities to their programs, MSLF will send a letter to at least each of the four universities described asserting that the university’s exclusion of non-Native American students from its government-funded academic and scholarship program on the basis of race (tribal affiliation) is illegal and should be discontinued. If the university does not either discontinue the program or open
it to students of races other than Native American, MSLF will file a complaint with the Office of Civil Rights of the U.S. Department of Education.

On February 10, 2004, MSLF sent letters to the University of Oregon, Montana State University, Humboldt State University (California), and University of Utah, challenging the legality of their government-funded program that excludes non-Native American students. (Joe Becker) (03-5327)

WYOMING OUTDOOR COUNCIL and POWDER RIVER BASIN OUTDOOR COUNCIL v. AL PIERSON, STATE DIRECTOR, BLM, and NANCE PETROLEUM CORPORATION

(Limited and Ethical Government) (Counsel for Intervenor Nance Petroleum Corp.)
(Interior Board of Land Appeals, IBLA 2004-76)

In February 2002, the BLM posted notice of a competitive oil and gas lease sale scheduled for April 2002. Approximately 142 parcels were to be offered for sale and the Wyoming Outdoor Council and Powder River Basin Outdoor Council (herein, the Council) immediately protested the planned sale of 105 of them on similar grounds to the Pennaco case described immediately above; that is, the BLM failed to comply with NEPA. The BLM announced that despite the protests it would offer the parcels for sale, and on April 9, 2002, 95 parcels were offered for sale. Nance Petroleum Corporation (Nance) successfully bid on 10 of them, namely, parcels 34–38, 41, and 45–48, all within the Buffalo Area.

On April 4 and 5, 2002, the Council filed protests of 95 parcels offered in the April 9th sale. On May 21, 2003, the BLM issued a decision deferring any action to issue leases on the 29 parcels that were offered for sale and are located in the Buffalo Field Office area (including all of Nance's leases). Following Judge Brimmer's decision in Pennaco Energy, Inc., et al. v. U.S. DOI, the BLM performed an updated Determination of Land Use Plan Conformance and NEPA Adequacy (DNA) for the leasing decisions in the Buffalo RMP, issuing the DNA on October 30, 2003. In the DNA, the BLM determined that the issuance of leases having a high potential for coal-bed methane development and including appropriate stipulations and mitigation measures was supported by the Buffalo RMP/EIS and other NEPA documentation. On November 4, 2003, based on the Pennaco decision and on the DNA, the Deputy State Director dismissed the Councils' protests as to the 29 leases.

Shortly thereafter, the Councils appealed the dismissal to the Interior Board of Land Appeals (Case No. IBLA 2004-76) and filed a petition for stay. On January 5, 2004, MSLF filed an appearance on behalf of Nance in the Wyoming Outdoor Council's appeal to the IBLA, together with a motion to dismiss the appeal in which Nance asserted that the Council lacks standing to challenge the leases. On January 22, 2004, the Deputy Chief Administrative Judge of the IBLA denied the Wyoming Outdoor Council's petition for a stay of the ALJ's decision, concluding that the Council had failed to show a likelihood of success on the merits of its appeal. He granted Nance intervenor status and took Nance's motion to dismiss under advisement. He ordered the Council, within 30 days of receipt of his order, on or about February 23, 2004, to show cause why its appeal should not be dismissed in its entirety for lack of standing.
On February 19, 2004, the Wyoming Outdoor Council moved to dismiss its appeal to the IBLA, and on same day, the Chief Administrative Judge of the IBLA dismissed the appeal. (Chris Massey) (02-5045)

**WYOMING OUTDOOR COUNCIL, et al. v. State of WYOMING**
(Limited and Ethical Government; Access to Federal Lands)
(Amicus) (Tenth Circuit, Wyoming, Case No. 03-8058)

This case was approved by the Board of Directors on October 3, 2003. President Clinton began the process of creating new rules to apply to the National Forest System (NFS) that would define “roadless areas,” affect the current roads within the NFS, and change the NFS planning process. On October 13, 1999, he issued a directive to the Secretary of Agriculture instructing the U.S. Forest Service (Forest Service) to develop 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.”

On October 19, 1999, a Notice of Intent to complete an Environmental Impact Statement (EIS) outlining alternatives for the protection of roadless areas was published. In May 2000, a draft EIS was published and the actual regulations were proposed on May 10, 2000. On November 13, 2000, the final EIS was published. On January 12, 2001, the Record of Decision and final rules were published and were to become effective on March 13, 2001. The final rules would have prohibited, with significant exceptions, new roads in inventoried roadless areas; prohibited most timber harvests in roadless areas but allowed cutting under certain circumstances; and applied these same prohibitions to the Tongass National Forest in Alaska but allowed certain road and harvest activities already in place to go forward.

The final rule set out by the Clinton Administration (Roadless Rule) was more restrictive than either the proposed rule or the preferred alternative in the EIS. It imposed, effective immediately, national- and Service-wide limitations on new road construction and road reconstruction in the inventoried roadless areas throughout the NFS and also imposed nationwide prohibitions on timber harvesting in those areas. It allowed cutting and sale of timber from inventoried roadless areas only in limited situations.

As soon as the Record of Decision was published, numerous lawsuits were filed challenging the Roadless Rule, including: *State of Wyoming v. USDA*, Civil Action No. 01-cv-00086-CAB (D. Wyo.); *Kootenai Tribe of Idaho v. Veneman*, Civil Actio No. CV01-10-N-EIL (D. Idaho); *Communities for a Great Northwest v. Veneman*, Civil Actio No. 1:00CV01394-TPJ (D.D.C.); *American Forest & Paper Ass'n v. Veneman*, Civil Actio No.01CV00871-TPJ (D.D.C.); *State of Alaska v. United States Department of Agriculture*, Civil Actio No. A01-039CV (D. Alaska); *State of Utah v. United States Forest Service*, Civil Actio No. 2:01CV00277B (D. Utah); and *Billings County v. Veneman*, Civil Actio No. A1-01-045.

On May 18, 2001, the State of Wyoming filed suit against the U.S. Department of Agriculture asking for a declaratory judgment and injunctive relief. Specifically, the State asked that that court set aside: (1) adoption of the Roadless Areas Conservation
Final Rule; (2) revisions to the National Forest Management Act Planning Regulations; (3) revisions to the Forest Transportation System Final Administrative Policy; and (4) revisions to the National Forest System Road Management Rule. The State also sought a declaration that the Department’s actions violated: (1) National Environmental Policy Act (NEPA); (2) National Forest Management Act; (3) Wilderness Act and the Wyoming Wilderness Act; (4) Multiple Use and Sustained Yield Act; (5) National Historic Preservation Act; (6) Federal Advisory Committee Act; (7) Regulatory Flexibility Act; and, (8) Administrative Procedures Act.

On July 14, 2003, the Court entered a judgment permanently enjoining implementation of the Roadless Rule. It held that the Forest Service violated NEPA and the Wilderness Act and that in its “mad dash to complete the Roadless Initiative before President Clinton left office,” the Forest Service only complied pro forma with NEPA.

The Court held that promulgation of the Roadless Rule violated the NEPA process in a number of ways: (1) the scoping period should have been longer; (2) the Forest Service arbitrarily and capriciously denied cooperating agency status to Wyoming and nine other States most affected by the Rule; (3) the alternatives section of the EIS was implemented to justify the predetermined decision to prohibit all road construction and timber harvesting in roadless areas, even if such activity was beneficial to the forest; (4) the Forest Service failed to conducted cumulative impacts analysis of the proposed action; and (5) the Forest Service should have done a Supplemental EIS to include the new acreage that would be affected by the rulemaking or the timber harvest exceptions.

The Court found that through the promulgation of the Roadless Rule the Forest Service had created 58.5 million acres of de facto wilderness out of National Forest land in violation of the Wilderness Act. It declined to rule on the National Forest Management Act and Multiple Use and Sustained Yield Act claims of the State of Wyoming because it had already held that the Roadless Rule violated NEPA and the Wilderness Act.

On July 21, 2003, various environmental groups (herein, Wyoming Outdoor Council) appealed the Court’s decision to the Tenth Circuit (Case No. 03-8058). The federal government declined to appeal the decision.

MSLF will file an amicus brief on behalf of itself and Communities for a Great Northwest, Lincoln County, Montana, and Montana Coalition of Forest Counties (herein, MSLF), asserting that the Roadless Rule was promulgated in violation of the NEPA and that it administratively creates de facto wilderness, not using procedures set forth in the Wilderness Act.

On September 29, 2003, the State of Wyoming filed a motion to dismiss the appeal. On October 14, 2003, the Court, responding to a motion filed by the United States, granted the United States until October 28, 2003, to file an amicus brief regarding the motion to dismiss and, responding to a motion filed by appellants, granted the appellants until November 6, 2003, to file a response to the motion to dismiss.

On October 27, 2003, MSLF filed an amicus brief challenging the article III standing of the appellants. On October 29, 2003, in response to an unopposed motion filed on October 24, 2003, the Court extended until November 12, 2003, the date on
which the amicus brief of the United States was due, and until November 21, 2003, the date on which the Wyoming Outdoor Council’s reply to the motion to dismiss was due.

On November 7, 2003, the Wyoming Outdoor Council filed an opposition to the filing of MSLF’s amicus brief. On November 10, 2003, MSLF filed a reply to the opposition and a motion to file its amicus brief out of time.

On November 13, 2003, the United States filed its amicus in support of Wyoming’s motion to dismiss. On November 14, 2003, the Wyoming Outdoor Council filed a motion to file an overlong response to that amicus brief and for extension of time until November 25, 2003, to file the response. The Wyoming Outdoor Council also filed an opposition to MSLF’s motion to file its amicus brief out of time.

On November 19, 2003, the Court granted the Wyoming Outdoor Council’s motion for extension of time until December 2, 2003, to respond to the United States’ amicus brief and to exceed page limitations for that response. It referred to the panel selected to hear the matter of Wyoming’s motion to dismiss all of the pleadings related to MSLF’s motion for leave to file an amicus brief and motion for leave to file an amicus brief out of time.

On November 25, 2003, the Wyoming Outdoor Council filed an opposition to Wyoming’s motion to dismiss. On December 8, 2003, Wyoming filed its reply to the Wyoming Outdoor Council’s opposition to Wyoming’s motion to dismiss. On December 24, 2003, the amicus United States filed supplemental authority. (Kelly Hall) (03-5315)

**WYOMING SAWMILLS, INC. V. U.S. FOREST SERVICE, ET AL.**
(Constitutional Rights; Access To Federal Lands and Resources)
(Counsel for 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 operation. 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.

Case Update
March 2004
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. 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. Oral arguments were held on May 6, 2003, and a decision is pending. (Kelly Hall) (Mentor: Runit) (97-4019)
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