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.

For the 2004 calendar year, or tax year beginning

Name of organization

MOUNTAIN STATES LEGAL FOUNDATION

2596 SOUTH LEWIS WAY

LAKEWOOD, CO 80227

Employer Identification number

84-0736725

Telephone number

303-292-2021

Accounting method

Cash

Websites:

WWW.MOUNTAINSTATESLEGAL.ORG

Organization type

501(c)(3)

Gross receipts

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

2,292,361

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

1 Contributions, gifts, grants, and similar amounts received

a Direct public support

1a

1,937,330

1b

1c

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

2

150,000

3 Membership dues and assessments

3

4 Interest on savings and temporary cash investments

4

12,165

5 Dividends and interest from securities

5

6 Gross rents

6a

6b

7 Other investment income (describe ▶)

7

8 Gross amount from sales of assets other than inventory

8a (A) Securities

106,862

8b (B) Other

108,492

8c Gain or (loss) (attach schedule)

-1,630

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

STMT 1 STMT 2 STMT 3

8d -23,422

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

9a Gross revenue (not including ▶ portion of contributions reported on line 1a)

9b Less direct expenses other than fundraising expenses

9c Net income or (loss) from special events (subtract line 9a from line 9b)

10 Gross sales of inventory, less returns and allowances

10a

10b Less cost of goods sold

10c Gross profit or (loss) from sales of inventory (attach schedule) (subtract line 10b from line 10a)

10c

11 Other revenue (from Part VII, line 11)

11

86,004

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

12

2,162,077

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

13

1,095,614

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

14

489,170

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

15

344,235

16 Payments to affiliates (attach schedule)

16

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

17

1,929,019

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

18

233,058

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

19

2,845,385

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

20

67,986

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

21

3,146,429

See Statement 4

LHA For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.

Form 990 (2004)
<table>
<thead>
<tr>
<th>Part II</th>
<th>Statement of Functional Expenses</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Do not include amounts reported on line 6b, 8b, 9b, 10b, or 16 of Part I.</td>
<td>(A) Total</td>
<td>(B) Program services</td>
</tr>
<tr>
<td>22 Grants and allocations (attach schedule)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(cash $)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(noncash $)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>23 Specific assistance to individuals (attach schedule)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>24 Benefits paid to or for members (attach schedule)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>25 Compensation of officers, directors, etc</td>
<td>210,000</td>
<td>157,500</td>
</tr>
<tr>
<td>26 Other salaries and wages</td>
<td>612,326</td>
<td>473,189</td>
</tr>
<tr>
<td>27 Pension plan contributions</td>
<td>31,158</td>
<td>23,527</td>
</tr>
<tr>
<td>28 Other employee benefits</td>
<td>89,260</td>
<td>67,043</td>
</tr>
<tr>
<td>29 Payroll taxes</td>
<td>60,541</td>
<td>46,189</td>
</tr>
<tr>
<td>30 Professional fundraising fees</td>
<td>396,706</td>
<td></td>
</tr>
<tr>
<td>31 Accounting fees</td>
<td></td>
<td></td>
</tr>
<tr>
<td>32 Legal fees</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33 Supplies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>34 Telephone</td>
<td>11,976</td>
<td>8,982</td>
</tr>
<tr>
<td>35 Postage and shipping</td>
<td>11,710</td>
<td>6,806</td>
</tr>
<tr>
<td>36 Occupancy</td>
<td>38,211</td>
<td>28,658</td>
</tr>
<tr>
<td>37 Equipment rental and maintenance</td>
<td>13,813</td>
<td>8,479</td>
</tr>
<tr>
<td>38 Printing and publications</td>
<td>51,756</td>
<td>9,578</td>
</tr>
<tr>
<td>39 Travel</td>
<td>29,876</td>
<td>27,403</td>
</tr>
<tr>
<td>40 Conferences, conventions, and meetings</td>
<td>25,832</td>
<td>20,666</td>
</tr>
<tr>
<td>41 Interest</td>
<td>54,540</td>
<td>43,632</td>
</tr>
<tr>
<td>42 Depreciation, depletion, etc (attach schedule)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>43 Other expenses not covered above (itemize)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e SEE STATEMENT 5</td>
<td>291,314</td>
<td>173,962</td>
</tr>
<tr>
<td>44 Total functional expenses paid (line 33 through 43)</td>
<td>1,929,019</td>
<td>1,095,614</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 □ No

If "Yes," enter (I) the aggregate amount of these joint costs $ ________, (ii) the amount allocated to Program services $ ________, (iii) the amount allocated to Management and general $ ________, and (iv) the amount allocated to Fundraising $ ________.

---

**Part III | Statement of Program Service Accomplishments**

What is the organization's primary exempt purpose? □

**PUBLIC INTEREST LAW FIRM**

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

| a | LEGAL ACTIVITIES—PUBLIC INTEREST LAW FIRM. SEE SCHEDULE 1 | 1,095,614 |
| b | | |
| c | | |
| d | | |
| e | Other program services (attach schedule) | |
| f Total of Program Service Expenses (should equal line 44, column (B), Program services) | 1,095,614 |

Form 990 (2004)
### 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></th>
<th>(B) End of year</th>
</tr>
</thead>
<tbody>
<tr>
<td>45</td>
<td>Cash - non-interest-bearing</td>
<td>38,483</td>
<td>45</td>
</tr>
<tr>
<td>46</td>
<td>Savings and temporary cash investments</td>
<td>610,782</td>
<td>46</td>
</tr>
<tr>
<td>47 a</td>
<td>Accounts receivable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47 b</td>
<td>Less allowance for doubtful accounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>48 a</td>
<td>Pledges receivable</td>
<td>206,793</td>
<td>48c</td>
</tr>
<tr>
<td>49</td>
<td>Grants receivable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>50</td>
<td>Receivables from officers, directors, trustees, and key employees</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51 a</td>
<td>Other notes and loans receivable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51 b</td>
<td>Less allowance for doubtful accounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>52</td>
<td>Inventories for sale or use</td>
<td></td>
<td></td>
</tr>
<tr>
<td>53</td>
<td>Prepaid expenses and deferred charges</td>
<td>13,881</td>
<td>53</td>
</tr>
<tr>
<td>54</td>
<td>Investments - securities STMT 6 STMT 7 ➤ Cost ➤ FMV</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55 a</td>
<td>Investments - land, buildings, and equipment basis</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55 b</td>
<td>Less accumulated depreciation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55 c</td>
<td>Investments - other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>56</td>
<td>Land, buildings, and equipment basis</td>
<td>1,842,348</td>
<td>57b</td>
</tr>
<tr>
<td>57 a</td>
<td>SEE STATEMENT 9</td>
<td>729,809</td>
<td>58</td>
</tr>
<tr>
<td>58</td>
<td>Other assets (describe ➤)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### 59 Total assets (add lines 45 through 58) (must equal line 74)

|   | 3,440,290 | 59 | 3,746,554 |

#### 60 Accounts payable and accrued expenses

|   | 85,335 | 60 | 104,891 |

#### 61 Grants payable

|   | 61 |

#### 62 Deferred revenue

|   | 62 |

#### 63 Loans from officers, directors, trustees, and key employees

|   | 63 |

#### 64 a Tax-exempt bond liabilities

|   | 84a |

#### 64 b Mortgages and other notes payable STMT 10

|   | 477,591.84b | 450,780 |

#### 65 Other liabilities (describe ➤) SEE STATEMENT 11

|   | 31,979 | 65 | 44,454 |

#### 66 Total liabilities (add lines 60 through 65)

|   | 594,905 | 66 | 600,125 |

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

|   | 2,382,285 | 67 | 2,646,782 |

#### 67 Unrestricted

|   | 2,382,285 | 67 | 2,646,782 |

#### 68 Temporarily restricted

|   | 463,100 | 69 | 499,647 |

#### 69 Permanently restricted

|   | 463,100 | 69 | 499,647 |

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

|   | 70 |

#### 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)

|   | 2,845,385 | 73 | 3,146,429 |

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

|   | 3,440,290 | 74 | 3,746,554 |

---

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

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Total revenue, gains, and other support per audited financial statements</td>
</tr>
<tr>
<td>b</td>
<td>Amounts included on line a but not on line 12, Form 990</td>
</tr>
<tr>
<td></td>
<td>(1) Net unrealized gains on investments</td>
</tr>
<tr>
<td></td>
<td>(2) Donated services and use of facilities</td>
</tr>
<tr>
<td></td>
<td>(3) Recoveries of prior year grants</td>
</tr>
<tr>
<td></td>
<td>(4) Other (specify)</td>
</tr>
<tr>
<td>c</td>
<td>Line a minus line b</td>
</tr>
<tr>
<td>d</td>
<td>Amounts included on line 12, Form 990 but not on line a:</td>
</tr>
<tr>
<td></td>
<td>(1) Investment expenses not included on line 6b, Form 990</td>
</tr>
<tr>
<td></td>
<td>(2) Other (specify).</td>
</tr>
<tr>
<td>e</td>
<td>Total revenue per line 12, Form 990 (line c plus line d)</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>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Total expenses and losses per audited financial statements</td>
</tr>
<tr>
<td>b</td>
<td>Amounts included on line a but not on line 17, Form 990</td>
</tr>
<tr>
<td></td>
<td>(1) Donated services and use of facilities</td>
</tr>
<tr>
<td></td>
<td>(2) Prior year adjustments reported on line 20, Form 990</td>
</tr>
<tr>
<td></td>
<td>(3) Losses reported on line 20, Form 990</td>
</tr>
<tr>
<td></td>
<td>(4) Other (specify)</td>
</tr>
<tr>
<td>c</td>
<td>Line a minus line b</td>
</tr>
<tr>
<td>d</td>
<td>Amounts included on line 17, Form 990 but not on line a</td>
</tr>
<tr>
<td></td>
<td>(1) Investment expenses not included on line 6b, Form 990</td>
</tr>
<tr>
<td></td>
<td>(2) Other (specify)</td>
</tr>
<tr>
<td>e</td>
<td>Total expenses per line 17, Form 990 (line c plus line d)</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>A</th>
<th>Name and address</th>
<th>B</th>
<th>Title and average hours per week devoted to position</th>
<th>C</th>
<th>Compensation (If not paid, enter -0-)</th>
<th>D</th>
<th>Contributions to employee benefit plans &amp; deferred compensation</th>
<th>E</th>
<th>Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>THOMAS M. HAUPTMAN</td>
<td>2812 1ST AVE NORTH, STE 408 BILLINGS, MT 59103-2235</td>
<td>CHAIRMAN</td>
<td>15</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>W. PERRY PENDLEY</td>
<td>2596 S LEWIS WAY LAKEWOOD, CO 80227</td>
<td>PRESIDENT</td>
<td>40</td>
<td>210,000</td>
<td>21,399</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JOHN F. KANE</td>
<td>P.O. BOX 729 BARTLESVILLE, OK 74005</td>
<td>TREASURER</td>
<td>15</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SEE ATTACHED LISTING</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></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 □ No
MOUNTAIN STATES LEGAL FOUNDATION 84-0736725

Part VI Other Information

76 Did the organization engage in any activity not previously reported to the IRS? If "Yes," attach a detailed description of each activity

77 Were any changes made in the organizing or governing documents but not reported to the IRS?

Yes No

76 X

77 X

78 a Did the organization have unrelated business gross income of $1,000 or more during the year covered by this return? N/A

78b X

79 Was there a liquidation, dissolution, termination, or substantial contraction during the year?

79 X

80 a 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? X

80b N/A

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

81b X

82 a 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?

82b N/A

83 a Did the organization comply with the public inspection requirements for returns and exemption applications?

83b X

84 a Did the organization solicit any contributions or gifts that were not tax deductible?

84b N/A

85 501(c)(4), (5), or (6) organizations. a Were substantially all dues nondeductible by members?

85a N/A

85b N/A

86 501(c)(7) organizations. Enter a limitation fees and capital contributions included on line 12

86a N/A

86b N/A

87 501(c)(12) organizations. Enter a Gross income from members or shareholders

87a N/A

87b N/A

88 At any time during the year, did the organization own a 50% or greater interest in a taxable corporation or partnership, or an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3?

88 X

89 a 501(c)(3) organizations. Enter Amount of tax imposed on the organization during the year under section 4911, section 4912, section 4913, section 4915, section 4955.

89b X

90 a List the states with which a copy of this return is filed: AR, GA, IN, IL, MN, MS, MO, NU, NC, OK, OR, PA, SC, TN, VA, WA

90b

91 The books are in care of THE FOUNDATION Telephone no. 303-292-2021

92 Section 4947(a)(1) nonexempt charitable trusts filing Form 990 in lieu of Form 1041 - Check here and enter the amount of tax-exempt interest received or accrued during the tax year

92 N/A
### Part VII Analysis of Income-Producing Activities

**Note:** Enter gross amounts unless otherwise indicated.

<table>
<thead>
<tr>
<th>93 Program service revenue</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a <strong>EAJA ATTORNEY FEE AWARD</strong></td>
<td></td>
<td></td>
<td>150,000.</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</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f Medicare/Medicaid payments</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>g Fees and contracts from government agencies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>94 Membership dues and assessments</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>95 Interest on savings and temporary cash investments</td>
<td>14</td>
<td>12,165.</td>
<td></td>
</tr>
<tr>
<td>96 Dividends and interest from securities</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>
</tr>
<tr>
<td>a debt-financed property</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b not debt-financed property</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>
</tr>
<tr>
<td>99 Other investment income</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>100 Gain or (loss) from sales of assets</td>
<td>01</td>
<td>6,984.</td>
<td></td>
</tr>
<tr>
<td>other than inventory</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>
</tr>
<tr>
<td>102 Gross profit or (loss) from sales of inventory</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>103 Other revenue</td>
<td>93</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a <strong>MISCELLANEOUS</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b <strong>MAILING LIST INCOME</strong></td>
<td>13</td>
<td>78,927.</td>
<td></td>
</tr>
<tr>
<td>c <strong>ESTATE OF PAUL BERGER</strong></td>
<td>01</td>
<td>6,984.</td>
<td></td>
</tr>
<tr>
<td>d <strong>71-6212120</strong></td>
<td>0.</td>
<td>74,654.</td>
<td>150,093.</td>
</tr>
<tr>
<td>e</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total (add line 104, columns (B), (D), and (E))</strong></td>
<td></td>
<td></td>
<td>224,747.</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).

**103 MISC INCOME PROVIDED FUNDS TO MEET EXEMPT PURPOSE**

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

**Note:** See page 34 of the instructions.

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

### Part X Information Regarding Transfers Associated with Personal Benefit Contracts

(a) Did the organization, during the year, receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(b) Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Note:** If "Yes" to (b), file Form 8870 and Form 4720 (see instructions).
MOUNTAIN STATES LEGAL FOUNDATION

### Part I Compensation of the Five Highest Paid Employees Other Than Officers, Directors, and Trustees

<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 9830 XAVIER CR, WESTMINSTER, CO 80031</td>
<td>STAFF ATTORNE 40+</td>
<td>105,000 20,501</td>
<td></td>
<td></td>
</tr>
<tr>
<td>J. SCOTT DETAMORE 12610 W. BAYAUD #3, LAKewood, CO 80228</td>
<td>STAFF ATTORNE 40+</td>
<td>72,292 22,873</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SUSAN AMANDA KOEHLER 550 E. 12TH AVE., #1102, DENVER, CO 80203</td>
<td>STAFF ATTORNE 40+</td>
<td>53,785 13,434</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></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

<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>55,153</td>
</tr>
<tr>
<td>JANICE V. CHASE CPA 5404 STONEMOOR DRIVE, PUEBLO, CO 81005</td>
<td>ACCOUNTING</td>
<td>51,150</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>
</tr>
</tbody>
</table>

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

1. During the year, has the organization attempted to influence national, state, or local legislation, including any attempt to influence public opinion on a legislative matter or referendum? If "Yes," enter the total expenses paid or incurred in connection with the lobbying activities $__________ $__________ (Must equal amounts on line 38, Part VI-A, or line I of Part VI-B)

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>X</td>
</tr>
</tbody>
</table>

Organizations that made an election under section 501(h) by filing Form 5768 must complete Part VI-A. Other organizations checking "Yes," must complete Part VI-B and attach a statement giving a detailed description of the lobbying activities.

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

<table>
<thead>
<tr>
<th>a</th>
<th>b</th>
<th>c</th>
<th>d</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale, exchange, or leasing of property?</td>
<td>Lending of money or other extension of credit?</td>
<td>Furnishing of goods, services, or facilities?</td>
<td>Payment of compensation (or payment or reimbursement of expenses if more than $1,000)? SEE PART V, FORM 990</td>
</tr>
<tr>
<td>2a</td>
<td>X</td>
<td>2b</td>
<td>X</td>
</tr>
</tbody>
</table>

3. Do you make grants for scholarships, fellowships, student loans, etc.? (If "Yes," attach an explanation of how you determine that recipients qualify to receive payments)

<table>
<thead>
<tr>
<th>a</th>
<th>b</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you make grants for scholarships, fellowships, student loans, etc.?</td>
<td>Do you have a section 403(b) annuity plan for your employees?</td>
</tr>
<tr>
<td>3a</td>
<td>X</td>
</tr>
</tbody>
</table>

4. Did you maintain any separate account for participating donors where donors have the right to provide advice on the use or distribution of funds?

<table>
<thead>
<tr>
<th>a</th>
<th>b</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you provide credit counseling, debt management, credit repair, or debt negotiation services?</td>
<td></td>
</tr>
<tr>
<td>4a</td>
<td>X</td>
</tr>
</tbody>
</table>

### Part IV  Reason for Non-Private Foundation Status

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

<table>
<thead>
<tr>
<th>5</th>
<th>A church, convention of churches, or association of churches. Section 170(b)(1)(A)(i)</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>A school. Section 170(b)(1)(A)(ii) (Also complete Part V)</td>
</tr>
<tr>
<td>7</td>
<td>A hospital or a cooperative hospital service organization. Section 170(b)(1)(A)(iii)</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)(v) 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)(vi) (Also complete the Support Schedule in Part IV-A)</td>
</tr>
<tr>
<td>11A</td>
<td>X</td>
</tr>
<tr>
<td>11B</td>
<td></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>
</tbody>
</table>

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)

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

| 14 | An organization organized and operated to test for public safety. Section 509(a)(4) (See page 5 of the instructions) |

Schedule A (Form 990 or 990-EZ) 2004
### Support Schedule

**Part IV—A** Support Schedule (Complete only if you checked a box on line 10, 11, or 12) Use cash method of accounting.

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

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

<table>
<thead>
<tr>
<th></th>
<th>(a) 2003</th>
<th>(b) 2002</th>
<th>(c) 2001</th>
<th>(d) 2000</th>
<th>(e) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 Gifts, grants, and contributions received (Do not include unusual grants. See line 20)</td>
<td>2,036,203.</td>
<td>1,998,697.</td>
<td>2,509,649.</td>
<td>3,323,559.</td>
<td>9,868,108.</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, merchandise sold or services performed, or furnishing of facilities in any activity that is related to the organization's charitable, etc., purpose</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18 Gross income from interest, dividends, amounts received from payments on securities loans (section 512(a)(5)), rents, royalties, and unrelated business taxable income (less section 511 taxes) from businesses acquired by the organization after June 30, 1975</td>
<td>10,503.</td>
<td>15,527.</td>
<td>43,533.</td>
<td>42,191.</td>
<td>111,754.</td>
</tr>
<tr>
<td>19 Net income from unrelated business 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 organization’s benefit and either 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 furnished to the organization by a governmental unit without charge Do not include the value of services or facilities generally furnished to the public without charge</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 Other income Attach a schedule Do not include gain or (loss) from sale of capital assets</td>
<td>10,470.</td>
<td>8,821.</td>
<td>576.</td>
<td>243.</td>
<td>20,110.</td>
</tr>
<tr>
<td>23 Total of lines 15 through 22</td>
<td>2,057,176.</td>
<td>2,023,045.</td>
<td>2,553,758.</td>
<td>3,365,993.</td>
<td>9,999,972.</td>
</tr>
<tr>
<td>24 Line 23 minus line 17</td>
<td>2,057,176.</td>
<td>2,023,045.</td>
<td>2,553,758.</td>
<td>3,365,993.</td>
<td>9,999,972.</td>
</tr>
<tr>
<td>25 Enter 1% of line 23</td>
<td>20,572.</td>
<td>20,230.</td>
<td>25,538.</td>
<td>33,660.</td>
<td></td>
</tr>
</tbody>
</table>

#### Organizations described on lines 10 or 11:
- **a** Enter % 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 2000 through 2003 exceeded the amount shown in line 26a
- **c** Do not file this list with your return. Enter the total of all these excess amounts
- **d** Total support for section 509(a)(1) test Enter line 24, column (e)
- **e** Add Amounts from column (e) for lines
- **f** Public support (line 26c minus line 26d total)
- **g** Public support percentage (line 26e (numerator) divided by line 26f (denominator))

#### 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 from, each "disqualified person." Do not file this list with your return. Enter the sum of such amounts for each year
  - **N/A**
  - **N/A**
- **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
  - **N/A**
- **c** Add Amounts from column (e) for lines
- **d** Add Line 27a total and line 27b total
- **e** Public support (line 27c total minus line 27d total)
- **f** Total support for section 509(a)(2) test Enter amount on line 23, column (e)
- **g** Public support percentage (line 27e (numerator) divided by line 27f (denominator))
- **h** Investment income percentage (line 27e, column (e) (numerator) divided by line 27f (denominator))

#### Unusual Grants:
- **For an organization described in line 10, 11, or 12 that received any unusual grants during 2000 through 2003, 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>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>29 Does the organization have a racially nondiscriminatory policy toward students by statement in its charter, bylaws, other governing instrument, or in a resolution of its governing body?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>30 Does the organization include a statement of its racially nondiscriminatory policy toward students in all its brochures, catalogues, and other written communications with the public dealing with student admissions, programs, and scholarships?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>31 Has the organization publicized its racially nondiscriminatory policy through newspaper or broadcast media during the period of solicitation for students, or during the registration period if it has no solicitation program, in a way that makes the policy known to all parts of the general community it serves? If &quot;Yes,&quot; please describe; if &quot;No,&quot; please explain (If you need more space, attach a separate statement.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>32 Does the organization maintain the following</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a Records indicating the racial composition of the student body, faculty, and administrative staff?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b Records documenting that scholarships and other financial assistance are awarded on a racially nondiscriminatory basis?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c Copies of all catalogues, brochures, announcements, and other written communications to the public dealing with student admissions, programs, and scholarships?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d Copies of all material used by the organization or on its behalf to solicit contributions? If you answered &quot;No&quot; to any of the above, please explain (If you need more space, attach a separate statement.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33 Does the organization discriminate by race in any way with respect to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a Students' rights or privileges?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b Admissions policies?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c Employment of faculty or administrative staff?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d Scholarships or other financial assistance?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e Educational policies?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>f Use of facilities?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>g Athletic programs?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>h Other extracurricular activities? If you answered &quot;Yes&quot; to any of the above, please explain (If you need more space, attach a separate statement)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>34 Does the organization receive any financial aid or assistance from a governmental agency?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b Has the organization's right to such aid ever been revoked or suspended?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If you answered &quot;Yes&quot; to either 34a or b, please explain using an attached statement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>35 Does the organization certify that it has complied with the applicable requirements of sections 401 through 405 of Rev Proc 75-50, 1975-2 C.B. 587, covering racial nondiscrimination? If &quot;No,&quot; attach an explanation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Limits on Lobbying Expenditures

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

<table>
<thead>
<tr>
<th></th>
<th>(a) Affiliated group totals</th>
<th>(b) To be completed for ALL</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>Total lobbying expenditures to influence public opinion (grassroots lobbying)</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>Total lobbying expenditures to influence a legislative body (direct lobbying)</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>Total lobbying expenditures (add lines 36 and 37)</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>Other exempt purpose expenditures</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Total exempt purpose expenditures (add lines 38 and 39)</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

#### Lobbying Nontaxable Amount

Enter the amount from the following table:

- **If the amount on line 40 is:**
- **The lobbying nontaxable amount 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

#### 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>2004</th>
<th>2003</th>
<th>2002</th>
<th>2001</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>45 Lobbying nontaxable amount</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>46 Lobbying ceiling amount (150% of line 45(e))</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47 Total lobbying expenditures</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>48 Grassroots nontaxable amount</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>49 Grassroots ceiling amount (150% of line 48(e))</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>50 Grassroots lobbying expenditures</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Lobbying Activity by Nonelecting Public Charities

(For reporting only by organizations that did not complete Part VI-A. See page 11 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 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.
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>X</td>
</tr>
<tr>
<td>b</td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

- a Transfers from the reporting organization to a noncharitable exempt organization of
  - (i) Cash
  - (ii) Other assets
- b Other transactions
  - (i) Sales or exchanges of assets with a noncharitable exempt organization
  - (ii) Purchases of assets from a noncharitable exempt organization
  - (iii) Rental of facilities, equipment, or other assets
  - (iv) Reimbursement arrangements
  - (v) Loans or loan guarantees
  - (vi) Performance of services or membership or fundraising solicitations
- c Sharing of facilities, equipment, mailing lists, other assets, or paid employees

52 a 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></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

- b If "Yes," complete the following schedule

<table>
<thead>
<tr>
<th>(a) Name of organization</th>
<th>(b) Type of organization</th>
<th>(c) Description of relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
### Part I: Election To Expense Certain Property Under Section 179

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

1. Maximum amount. See instructions for a higher limit for certain businesses: 102,000.
2. Total cost of section 179 property placed in service (see instructions): 410,000.
3. Threshold cost of section 179 property before reduction in limitation: 5.
4. Reduction in limitation. Subtract line 3 from line 2. If zero or less, enter 0: 5.
5. Dollar limitation for tax year. Subtract line 4 from line 1. If zero or less, enter 0. If name filing separately, see instructions: 5.

<table>
<thead>
<tr>
<th>(a) Description of property</th>
<th>(b) Cost (business use only)</th>
<th>(c) Elected cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>102,000.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>410,000.</td>
</tr>
</tbody>
</table>

- **7** Listed property. Enter the amount from line 29: 7
- **8** Total elected cost of section 179 property. Add amounts in column (c), lines 6 and 7: 8
- **9** Tentative deduction. Enter the smaller of line 5 or line 8: 9
- **10** Carryover of disallowed deduction from line 13 of your 2003 Form 4562: 10
- **11** Business income limitation. Enter the smaller of business income (not less than zero) or line 5: 11
- **12** Section 179 expense deduction. Add lines 9 and 10, but do not enter more than line 11: 12
- **13** Carryover of disallowed deduction to 2005. Add lines 9 and 10, less line 12: 13

**Note:** Do not use Part II or Part III below for listed property. Instead, use Part V.

### Part II: Special Depreciation Allowance and Other Depreciation (Do not include listed property.)

14. Special depreciation allowance for qualified property (other than listed property) placed in service during the tax year (see instructions): 14
15. Property subject to section 168(f)(1) election (see instructions): 15
16. Other depreciation (including ACRS) (see instructions): 52,552.

### Part III: MACRS Depreciation (Do not include listed property.) (See instructions.)

#### Section A

- **17** MACRS deductions for assets placed in service in tax years beginning before 2004: 17
- **18** If you are electing under section 168(g)(4) to group any assets placed in service during the tax year into one or more general asset accounts, check here: 18

#### Section B - Assets Placed in Service During 2004 Tax Year Using the General Depreciation System

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

#### Section C - Assets Placed in Service During 2004 Tax Year Using the Alternative Depreciation System

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

### Part IV: Summary (See instructions.)

- **21** Listed property. Enter amount from line 28: 21
- **22** Total. Add amounts from line 12, lines 14 through 17, lines 19 and 20 in column (g), and line 21. Enter here and on the appropriate lines of your return. Partnerships and S corporations - see instr: 52,552.
- **23** For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs: 23
### Part V - Listed Property

<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>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</td>
<td>25</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

| % |

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

| % | S/L - |

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

| 28 |

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

| 29 |}

### 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.

<table>
<thead>
<tr>
<th>(a) Vehicle</th>
<th>(b) Vehicle</th>
<th>(c) Vehicle</th>
<th>(d) Vehicle</th>
<th>(e) Vehicle</th>
<th>(f) Vehicle</th>
</tr>
</thead>
</table>

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.

34 Add lines 30 through 32

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

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

### 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.

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

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>
</table>

42 Amortization of costs that begins during your 2004 tax year:

| 42 | |

43 Amortization of costs that began before your 2004 tax year

| 43 | 1,988. |

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

<p>| 44 | 1,988. |</p>
<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>400 SHARES ELAN</td>
<td>7,840.</td>
<td>9,372.</td>
<td>0.</td>
<td>-1,532.</td>
</tr>
<tr>
<td>85 SHARES MERCK</td>
<td>2,339.</td>
<td>2,682.</td>
<td>0.</td>
<td>-343.</td>
</tr>
<tr>
<td>8 SH MARSHALL &amp; ILLSLEY</td>
<td>313.</td>
<td>342.</td>
<td>0.</td>
<td>-29.</td>
</tr>
<tr>
<td>123 SH MERRILL LYNCH</td>
<td>7,391.</td>
<td>7,304.</td>
<td>0.</td>
<td>87.</td>
</tr>
<tr>
<td>35 SH AMGEN</td>
<td>2,177.</td>
<td>2,239.</td>
<td>0.</td>
<td>-62.</td>
</tr>
<tr>
<td>4650 SH LIBERTY MEDIA</td>
<td>54,550.</td>
<td>54,219.</td>
<td>0.</td>
<td>331.</td>
</tr>
<tr>
<td>8 SH MARSHALL &amp; ILLSLEY</td>
<td>252.</td>
<td>302.</td>
<td>0.</td>
<td>-50.</td>
</tr>
</tbody>
</table>

TO FORM 990, PART I, LINE 8         | 74,862.           | 76,460.             | 0.              | -1,598.           |
<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>DATE ACQUIRED</th>
<th>DATE SOLD</th>
<th>METHOD ACQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>3190.429 SH PIMCO ST BOND FUND</td>
<td>VARIOUS</td>
<td>12/17/04</td>
<td>DONATED</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>NET GAIN OR (LOSS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>32,000.00</td>
<td>32,032.00</td>
<td>0.00</td>
<td>-32.00</td>
</tr>
</tbody>
</table>

TOTAL TO FM 990, PART I, LN 8

|               | 32,000.00         | 32,032.00           | 0.00            | -32.00            |

STATEMENT(S) 2
### FORM 990: Gain (Loss) from Sale of Other Assets

**Date Acquired:** Various  
**Date Sold:** Various  
**Method Acquired:** Purchased

<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>0.</td>
<td>50,547.</td>
<td>0.</td>
<td>28,755.</td>
<td>-21,792.</td>
</tr>
</tbody>
</table>

### Form 990: Other Changes in Net Assets or Fund Balances

**Description:** Unrealized Gain  
**Amount:** 67,986.

**Total to Form 990, Part I, Line 20:** 67,986.

### Form 990: Other Expenses

<table>
<thead>
<tr>
<th>Description</th>
<th>(A) Total</th>
<th>(B) Program Services</th>
<th>(C) Management and General</th>
<th>(D) Fundraising</th>
</tr>
</thead>
<tbody>
<tr>
<td>Membership / Education</td>
<td>16,867.</td>
<td>16,867.</td>
<td>20,562.</td>
<td>1,522.</td>
</tr>
<tr>
<td>Professional Service</td>
<td>82,249.</td>
<td>61,687.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td>17,066.</td>
<td>15,544.</td>
<td>1,522.</td>
<td></td>
</tr>
<tr>
<td>Library Maintenance</td>
<td>28,049.</td>
<td>28,049.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Auto</td>
<td>23.</td>
<td>17.</td>
<td>6.</td>
<td></td>
</tr>
<tr>
<td>Meetings</td>
<td>24,238.</td>
<td>19,390.</td>
<td>4,848.</td>
<td></td>
</tr>
<tr>
<td>Litigation Outside Attorneys</td>
<td>2,876.</td>
<td>2,876.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Relations</td>
<td>6,503.</td>
<td>2,601.</td>
<td>3,902.</td>
<td></td>
</tr>
<tr>
<td>Direct Mail</td>
<td>56,653.</td>
<td></td>
<td>56,653.</td>
<td></td>
</tr>
<tr>
<td>Office Expense</td>
<td>47,455.</td>
<td>17,814.</td>
<td>26,618.</td>
<td>3,023.</td>
</tr>
</tbody>
</table>

**Total to Form 990, LN 43:** 291,314.  
**Statement(s):** 3, 4, 5
### FORM 990

#### NON-GOVERNMENT SECURITIES

<table>
<thead>
<tr>
<th>SECURITY DESCRIPTION</th>
<th>COST/CMV</th>
<th>CORPORATE STOCKS</th>
<th>CORPORATE BONDS</th>
<th>OTHER PUBLICLY TRADED SECURITIES</th>
<th>TOTAL NON-GOV'T SECURITIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>STOCKS</td>
<td>COST</td>
<td>1,000.</td>
<td></td>
<td></td>
<td>1,000.</td>
</tr>
<tr>
<td>BONDS</td>
<td>FMV</td>
<td></td>
<td>77,390.</td>
<td></td>
<td>77,390.</td>
</tr>
<tr>
<td>TO FORM 990, LINE 54, COL B</td>
<td>1,000.</td>
<td>77,390.</td>
<td></td>
<td></td>
<td>78,390.</td>
</tr>
</tbody>
</table>

#### FORM 990

#### GOVERNMENT SECURITIES

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>COST/CMV</th>
<th>U.S. GOVERNMENT</th>
<th>STATE AND LOCAL GOV'T</th>
<th>TOTAL GOV'T SECURITIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>BONDS</td>
<td>FMV</td>
<td></td>
<td></td>
<td>100,523.</td>
</tr>
<tr>
<td>TOTAL TO FORM 990, LINE 54, COL B</td>
<td>100,523.</td>
<td></td>
<td></td>
<td>100,523.</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>96,917.</td>
<td>1,300,801.</td>
</tr>
<tr>
<td>FURNITURE &amp; FIXTURES</td>
<td>140,111.</td>
<td>79,553.</td>
<td>60,558.</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>140,099.</td>
<td>59,524.</td>
<td>80,575.</td>
</tr>
<tr>
<td>OTHER</td>
<td>9,715.</td>
<td>5,905.</td>
<td>3,810.</td>
</tr>
<tr>
<td>TOTAL TO FORM 990, PART IV, LN 57</td>
<td>1,842,348.</td>
<td>241,899.</td>
<td>1,600,449.</td>
</tr>
</tbody>
</table>

#### FORM 990

#### OTHER ASSETS

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>ENDOWMENT FUND</td>
<td>839,804.</td>
</tr>
<tr>
<td>INTEREST RECEIVABLE</td>
<td>7.</td>
</tr>
<tr>
<td>TOTAL TO FORM 990, PART IV, LINE 58, COLUMN B</td>
<td>839,811.</td>
</tr>
</tbody>
</table>
### FORM 990 MORTGAGES PAYABLE

**DESCRIPTION**

**US BANK**

**TOTAL INCLUDED ON FORM 990, PART IV, LINE 64B, COLUMN B**

**BALANCE DUE**

450,780.

450,780.

---

### FORM 990 OTHER LIABILITIES

**DESCRIPTION**

**AMOUNT**

**ENDOWMENT FUND PAYABLE**

14,302.

**PENSION FUND PAYABLE**

30,152.

**TOTAL TO FORM 990, PART IV, LINE 65, COLUMN B**

44,454.

---

### SCHEDULE A OTHER INCOME

**DESCRIPTION**

<table>
<thead>
<tr>
<th>2003 AMOUNT</th>
<th>2002 AMOUNT</th>
<th>2001 AMOUNT</th>
<th>2000 AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>UNCLAIMED FUNDS</strong></td>
<td>0.</td>
<td>3,821.</td>
<td>0.</td>
</tr>
<tr>
<td><strong>PROP TAX REIMBURSEMENT</strong></td>
<td>824.</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td><strong>INSURANCE REIMBURSEMENT</strong></td>
<td>9,646.</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td><strong>OTHER</strong></td>
<td>0.</td>
<td>5,000.</td>
<td>576.</td>
</tr>
</tbody>
</table>

**TOTAL TO SCHEDULE A, LINE 22**

10,470. | 8,821. | 576. | 243. |
CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT

EIN: 84-0736725
2004 Form 990

CASE UPDATE
February 2005
Part III
Schedule 1

AMERICAN QUALITY LANDSCAPE MAINTENANCE, INC. v.
CHERRY CREEK VALLEY WATER AND SANITATION DISTRICT
(Private Property, Takings; Equal Protection)
(Counsel for American Quality) (Colorado State District Court)

On February 4, 2005, the Board of Directors revoked approval of this case. (Joe Becker) (02-4990)

BEMENT v. COMMISSIONERS, BOULDER COUNTY BOARD OF COUNTY COMMISSIONERS
(Limited and Ethical Government; Private Property Rights)
(Counsel for Delta Bement) (U.S. District Court, Colorado)

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.
Ms. Bement’s private attorney filed an application for a variance from the ordinance requiring merger of same-owner contiguous plots, and, during that process the County Commissioners overturned that part of the Land Use Code. (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 Supreme Court, Sixth Judicial District, Tripp County Court)

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 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 (hereinafter referred to as the Bensons), four individuals directly and immediately affected by HB 1163, for compensation for the taking of their property (Sixth Judicial District, Tripp County Court, Civ. 03-121). On November 18, 2003, the State Attorney General served the State’s answer.


Discovery ended on May 21, 2004, and a hearing on the motions for summary judgment was held on June 30, 2004. On November 30, 2004, Circuit Judge Kathleen Trandahl issued a memorandum decision granting the Bensons’ motion for summary judgment and denying the State of South Dakota’s motion for summary judgment. The Court held that “the Legislature went too far when it granted hunters the right to shoot onto private land. This is the very kind of thing that the Taking Clause was meant to prevent. The Taking Clause stands as a shield against the arbitrary use of governmental power . . . [T]he unconstitutionality of [the state statute] is
clearly and unmistakably shown... it violates constitutional principles... [It is] a taking violative of the Fifth and Fourteenth Amendments... and the South Dakota Constitution."

On December 29, 2004, the State filed a notice of appeal to the South Dakota Supreme Court. The State’s opening brief was due on February 18, 2005; the Bensons’ response 45 days after service of the opening brief; and the State’s reply 15 days after service of the response brief. The State has requested a 30-day extension on its opening brief; if granted, the State’s brief would be due on about March 21, 2005. (Joe Becker) (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 Association)

(U.S. District Court, Montana, Civil Action No. CV 04-39-M-DWM)

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 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.

On March 11, 2004, MSLF filed a quiet title action in Montana federal district court on behalf of the Big Creek Lakes Reservoir Association. The government’s answer was due about May 20, 2004. Shortly after the complaint was filed, the Court issued a scheduling order for the first part of the case. Under that order, preliminary pretrial statements of both parties were due on May 26, 2004.

Case Update
February 2005
On May 24, 2004, after consultation between the parties, the United States filed a motion for an extension of time in which to file its answer until June 14, 2004. Accordingly, Big Creek filed a motion for extension of time of the dates in the Court's order; specifically, that preliminary pretrial statements be due on June 30, 2004, and that the case management plan be due on July 16, 2004.

The United States filed its answer on June 11, 2004; a preliminary pretrial statement were was filed by Big Creek on June 28, 2004; and a final joint case management plan was filed on July 16, 2004, and approved by the Court on July 26, 2004. Under that plan, expert reports are due by January 31, 2005; expert rebuttal reports are due by February 28, 2005; discovery ends April 29, 2005; and Big Creek's motion for summary judgment is due by June 24, 2005. (Alison Roberts) (Mentor: Ruffatto; Local Counsel: Joscelyn) (03-5273)

CARLTON CREEK IRRIGATION COMPANY v. UNITED STATES
(Private Property Rights; Access to Public Lands) (Counsel for Carlton Creek Irrigation Co.)
(U.S. District Court, Montana, Civil Action No. 04-cv-152-M-DWM)

This case was approved by the Board of Directors on June 4, 2004. Carlton Creek Irrigation Company ("the Company") is the owner of the Little Carlton Lake Reservoir, located within the boundaries of the Bitterroot National Forest and Selway-Bitterroot Wilderness in western Montana. The Company's water infrastructure also includes the main Carlton Lake Reservoir, not in the wilderness area, for which the federal government has acknowledged that the Company owns pre-FLPMA rights-of-way under the Act of 1866 and 1891.

The Little Carlton Lake Reservoir was constructed around 1889 by the predecessors-in-interest of the Company. On December 13, 1995, the Forest Service denied that the Company owns a right-of-way for the Little Carlton Lake Reservoir under either the Act of 1866 or the Act of 1891, and stated that even if such right had vested, it had been abandoned by the Company. The Forest Service does recognize that the Company has a valid water right to the water flowing naturally from Little Carlton Lake, which stores water without the aid of a man-made facility.

Testimony presented in the Montana Water Court overcame the presumption that the water right for the Little Carlton Lake Reservoir had been abandoned as a result of non-use since the 1960s. That testimony explains how the Forest Service systematically prevented the Company from using or maintaining the Little Carlton Reservoir.

The Company also has declared a right-of-way under R.S. 2477 for the road to the reservoirs. The owners of the Company may drive to the main Carlton Lake Reservoir because it is not in the wilderness area but may not use the road to the Little Carlton Reservoir inside the wilderness area.

Because the Forest Service denies that the Company owns a right-of-way for the Little Carlton Lake Reservoir, the Company must pursue a quiet title action in order to resolve this matter.

On August 5, 2004, MSLF filed a quiet title action on behalf of the Company against the United States, arguing that the Company owns a congressionally granted right-of-way for the Little Carlton Lake Reservoir pursuant to the Act of 1866 and/or the Act of 1891. On October 22, 2004, the government filed its answer. After preliminary matters are completed, MSLF plans
to move for summary judgment with regard to the vesting of the rights-of-way and on the abandonment issue, in that regard arguing that rights-of-way acquired pursuant to the Acts of 1866 and 1891 cannot be lost by abandonment. (Alison Roberts) (Mentor: Ruffatto; Local Counsel: Ward Shanahan) (04-5423)

CHOLLA READY MIX, INC. v. FEDERAL HIGHWAY ADMINISTRATION, et al.
(Freedom of Enterprise) (Counsel for Cholla Ready Mix)
(Ninth Circuit, Arizona, Case No. 04-952)

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.

When Mr. McKinnon first approached MSLF, the McKinnons, in their personal capacities, were defendants and cross-claimants in Hopi Tribe v. Federal Highway Administration, et al. (U.S. District Court, Arizona, Civil Action No. 98-CV-1061), an NHPA
section 106 suit. The license of the McKinnons' attorney in this case had been suspended indefinitely, though neither the McKinnons nor MSLF were aware of the suspension until well after Board approval. Armed with this information, however, the Court quickly granted MSLF's motions for substitution of counsel and for admission pro hac vice.

Once admitted, MSLF had to decide whether to attempt a third amendment of the McKinnons' 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 new lawsuit. 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.

At the status conference on April 17, 2002, the Judge himself suggested that MSLF move for leave to amend the claims, which it did on May 14, 2002. At the conference, MSLF also requested expedited consideration because the statute of limitations for any new suit that might become necessary would 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 was granted on June 3, 2002. On June 13, 2002, MSLF filed a stipulated notice of voluntary dismissal of the McKinnons' cross-claim, and on June 17, 2002, the cross-claim was dismissed.

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

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 set the initial scheduling conference for December 20, 2002. On November 5, 2002, Cholla filed an amended complaint and its response to the State'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 to file an 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 adding BLM as a defendant and a motion for reconsideration of the dismissal of the State from the case.

On February 25, 2003, the Court denied Cholla's motion for reconsideration and entered final judgment dismissing the State defendants from the case. On March 7, 2003, Cholla filed a notice of appeal of the dismissal of the State defendants (Case No. 03-15423). On July 8, 2003, Cholla filed its opening brief and excerpts of record. On August 20, 2003, the State filed its response, and on September 9, 2003, Cholla filed its reply.

On August 13, 2003, Cholla and the federal defendants filed a joint stipulation to dismiss the remaining district court case without prejudice. On August 18, 2003, Judge Martone granted the motion, and his order was filed on August 20, 2003.

MSLF is preparing a petition to delist the Butte as a National Historic Site.

Cholla's appeal of the dismissal of the State of Arizona defendants from the District Court case was argued before a three judge panel on May 12, 2004, and on September 1, 2004,
the Ninth Circuit affirmed the District Court’s decision. On September 15, 2004, Cholla filed a petition for rehearing en banc, and on October 14, 2004, the petition was denied.

On January 12, 2005, MSLF filed a petition for writ of certiorari on behalf of Cholla. The State’s response was due on February 14, 2005; however, the Court granted the State an extension to file until March 16, 2005. Cholla’s reply is now due on March 28, 2005. (Chris Massey) (Mentor: Wilson) (01-4919)

COMMISSIONER, INTERNAL REVENUE SERVICE v. BANKS,
COMMISSIONER, INTERNAL REVENUE SERVICE v. BANAITIS
(Private Property Rights; Free Enterprise; Limited and Ethical Government)
( Amicus and Counsel for Amici) (Supreme Court Case Nos. 03-892, 03-907)

On January 24, 2005, in an 8-0 opinion, the Court reversed the lower court decisions and remanded the cases for the appropriate actions below. The Court held that all proceeds of litigation, including that portion paid to a person’s attorneys pursuant to a contingent fee agreement, are gross income to the person receiving those proceeds. The Court did not address, directly or indirectly, the concerns raised by the various non-profit organizations filing amicus briefs. (Scott Detamore) (04-5521)

(Limited and Ethical Government; Access To Federal Lands) (Counsel for CGNW, et al.)
(U.S. District Court, D.C., Civil Action No. 1:00-cv-1394-GK)

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

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].” He issued a memorandum to the Secretary of Agriculture regarding “Protection of Forest ‘Roadless’ Areas” that 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.”

A public rulemaking was announced and 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. Communities for a Great Northwest (CGNW) and other groups believe that these actions represented part of an effort to eliminate as many roads as possible in the National Forests; to end all mechanical/motorized uses in National Forests including recreational and other multiple-use activities; to terminate economic uses of National Forests; to adopt de facto wilderness areas; and to establish new limits of human intrusion into National Forests.

Case Update
February 2005
CGNW had been actively involved in efforts to use the Kootenai National Forest (Kootenai) in Lincoln County, Montana, 78 percent of which is federal land. For many years, Lincoln County relied on the Kootenai for jobs in mining and timber harvesting. CGNW had worked in good faith with the Forest Service to plan for a ski hill/summer recreation area near Libby and, together with others, had expended considerable resources in trying to meet the Forest Service’s requirements for the area.

On June 12, 2000, MSLF filed a lawsuit on behalf of CGNW challenging President Clinton’s order to the Forest Service that it conduct a roadless area review of 40 million acres of National Forest land. On August 17, 2000, The Wilderness Society, Sierra Club, Pacific Rivers Council, and Oregon Natural Resources Council (hereinafter, the Wilderness Society) moved to intervene as defendants and lodged a motion to dismiss. On August 25, 2000, the federal defendants filed a motion to dismiss complaint.

On September 1, 2000, CGNW moved to stay briefing on intervention until the federal defendants’ motion to dismiss was decided and for an extension of time to respond to the motion to dismiss until December 4, 2000. On September 7, 2000, the court granted that motion.

On October 3, 2000, the Wilderness Society filed a motion for reconsideration of the stay order. CGNW responded on October 17, 2000, and on November 9, 2000, the court denied the motion for reconsideration.

On December 1, 2000, CGNW moved to amend its complaint, lodged an amended complaint, and filed a memorandum in opposition to the federal motion to dismiss. On December 7, 2000, the court granted the motion to amend and ordered the federal defendants to respond to the amended complaint within 10 days. On December 8, 2000, the federal defendants moved to withdraw their motion to dismiss.

On December 12, 2000, CGNW and the Wilderness Society moved for entry of a stipulated briefing schedule and the Wilderness Society lodged an amended motion to intervene. On December 20, 2000, the court granted the proposed briefing schedule and ordered the amended motion to intervene filed.

On January 9, 2001, CGNW filed a memorandum in opposition to the amended motion to intervene and an unopposed motion to dismiss its fifth claim for relief. On January 10, 2001, the case was reassigned from Judge June L. Green to Judge Thomas Penfield Jackson. On January 12, 2001, the Wilderness Society filed a reply to CGNW’s opposition to the amended motion to intervene.

On January 22, 2001, the Court granted a January 17, 2001, joint motion for a scheduling order. It ordered CGNW to file an amended complaint by February 12, 2001, and defendants to respond within 45 days of service of the complaint. On January 25, 2001, the Court dismissed CGNW’s fifth claim for relief.

On February 2, 2001, the MSLF Board of Directors approved the addition of the Montana Coalition of Forest Counties as a plaintiff in this case. On February 9, 2001, the Court granted CGNW’s unopposed motion of February 8, 2001, to add the Montana Coalition of Forest Counties as a plaintiff, and on March 2, 2001, CGNW filed a second amended complaint.

On March 19, 2001, the Wilderness Society filed a motion for leave to file an answer to the second amended complaint and lodged a supplemental authority in support of their motion to intervene and an answer to the second amended complaint.

Case Update
February 2005
On April 18, 2001, federal defendants filed an unopposed motion for an extension of time until May 23, 2001, to their answer to the second amended complaint, citing as cause the new Administration’s review of the Roadless rules. That motion was granted on April 19, 2001. On May 23, 2001, federal defendants filed an unopposed motion for a second enlargement of time until June 20, 2001, which motion was granted on May 29, 2001. On June 19, 2001, a joint motion was filed for permission for CGNW to file a third amended complaint by June 29, 2001, and federal defendants to respond within 45 days. On June 20, 2001, that motion was granted.

On June 29, 2001, CGNW filed a third amended complaint, in which Dale Bosworth was added as a federal defendant and the complaint amended. On July 27, 2001, the Wilderness Society’s answer to the third amended complaint was filed by order of Judge J. Jackson. On August 13, 2001, federal defendants filed their answer to the third amended complaint.

On August 17, 2001, federal defendants moved to stay proceedings in the case pending resolution of allegedly almost identical claims in an earlier filed lawsuit, *Kootenai Tribe of Idaho, et al. v. Veneman* (D. Idaho, Civil Action No. CV-01-10-N-EJL). (Note: Although *Communities* first was filed on June 12, 2000, and *Kootenai* was filed on January 8, 2001, the third amended complaint in *Communities* was not filed until June 29, 2001.) On September 5, 2001, CGNW filed its opposition to the motion to stay. On September 14, 2001, the federal defendants filed a reply in support of their motion to stay.

At a status hearing on October 1, 2001, the Court granted the Wilderness Society’s motion to intervene and consolidated the case with Civil Action No. 01-cv-00871, *American Forest and Paper Ass’n, et al. v. Veneman, et al.* On October 3, 2001, the Court issued a written order granting the intervention and consolidation and stayed all proceedings until *Kootenai* was decided.

On December 12, 2002, in *Kootenai*, the Ninth Circuit held that the Idaho District Court had abused its discretion when it granted the Tribe’s motion for a preliminary injunction to prevent implementation of the Roadless Rule. The Tribe’s petition for rehearing *en banc* was denied on April 4, 2003.

[Note: On October 27, 2003, MSLF lodged an *amicus* brief 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 appellee the State of Wyoming’s motion to dismiss the appeal. The defendant-intervenors in this case, headed by The Wilderness Society, had appealed the decision of Judge Brimmer overturning Clinton’s roadless rules. See the *State of Wyoming* entry in this Update for a full discussion.]

On September 16, 2004, CGNW’s case was removed from the docket of Judge Thomas Penfield Jackson and, on October 7, 2004, assigned to Judge Gladys Kessler. On October 15, 2004, the Court ordered the parties file a joint praecipe by October 25, 2004, which they did. On October 26, 2004, the Court ordered the government to file a praecipe by November 10, 2004, providing it with the government’s best estimate as to when the proposed NFMA Planning Rule and the proposed Roadless Rule will be published in final form.

In its praecipe, filed on November 10, 2004, the government stated that: (1) the Department of Agriculture is in the final stages of review of the final NFMA implementing regulations and hopes to complete that review by the end of the calendar year; and (2) the comment period for the proposed rule to revise the Roadless Area Conservation Rule was
extended until November 15, 2004, and after the comment period closes, the Department of Agriculture will consider the comments submitted and expects to proceed promptly with a final rulemaking. On November 12, 2004, the Court ordered that the stay of October 21, 2001, entered in Civil Action 01-871 shall remain in effect and also shall be entered in this case and that the government shall immediately inform the Court if: (1) the Tenth Circuit issues a decision in Kootenai Tribe of Idaho v. Veneman; (2) the Department of Agriculture issues a new Roadless Area Conservation Rule; or (3) the Department issues a final NFMA Planning Rule. (Alison Roberts) (Mentor: Pos) (99-4571)

DESERT POWELLACE, INC., et al. v. NATIONAL PARK SERVICE

(Limited and Ethical Government; Private Property Rights)

(Counsel for Desert Powellace, Inc., and Kelly Robinson) (U.S. District Court, Arizona)

This case was approved by the Board of Directors on June 4, 2004. Glen Canyon National Recreation Area borders Lake Powell in southern Utah and northern Arizona. The National Park Service ("Park Service") chooses vendors to provide various concessions in the national parks; in the Glen Canyon National Recreation Area Aramark Corporation is the exclusive provider of mooring services and houseboat rentals.

Park Service rules prohibit both timeshare agreements and the rental of privately owned houseboats by their owners for houseboats on Lake Powell. They also prohibit, at least in a practical way, any single boat owner from owning a boat for personal use because an individual cannot spend more than 14 consecutive days or a total of 30 days in a calendar year in the Recreation Area. (Congress statutorily prohibits National Park "residency," and each National Park Supervisor defines what constitutes residency in his jurisdiction.)

In an attempt to avoid the timeshare prohibition and the high rents charged by Aramark, groups of investors have formed corporations that buy and own houseboats. A corporation’s houseboat is used by each of the corporate shareholders on a weekly or biweekly basis, thus avoiding the residency prohibition and the rental restriction. The houseboat-owning corporation is still subject to Aramark’s control in that each houseboat requires a moorage agreement available only through Aramark.

In late 2003, the Park Service issued regulations limiting the number of owners of a single houseboat to less than the current number of shareholders in at least some of the corporations. If a corporation has more than the allowed number of shareholders, those shareholders can sell their share(s) only to another shareholder in that corporation. Thus, the number of individuals who can use the houseboat is reduced, but the number of days each shareholder can spend on Lake Powell has not.

All shares of stock now must be brokered through Aramark. The only way to avoid Aramark’s commissions is to remove the corporation’s boat from the lake, which action voids the moorage agreement and prohibits the houseboat from returning to Lake Powell. The payment of commissions is monitored and assured by the new moorage agreements, which require substantial disclosures as to shareholder identity.

Ironically, the Park Service uses the residency prohibition to justify its limits on the number of shareholders, suggesting that because no person can be in the park more than 30 days per year, a maximum number of owners set at 12 is reasonable. Such a justification would seem
to cut the other way and require that 12 be the *minimum* number of shareholders allowable because no single shareholder could spend more than 30 days on a boat.

After additional analysis of the moorage agreement, and if a lawsuit is not barred by that agreement, MSLF will file suit on behalf of shareholder Kelly Robinson, Shareholder, and Desert Powellace, Inc., a houseboat corporation. It will assert that Park Service regulations limiting the number of shares a houseboat corporation may issue and severely restricting a shareholder’s right to alienate his shares are a denial of substantive due process. MSLF also will allege that those regulations restricting a shareholder’s right to alienate stock constitute a regulatory taking requiring just compensation. (Joe Becker) (04-5431) (Mentor: Garcia)

**DIMITROV, et al. v. BUREAU OF LAND MANAGEMENT**

(Limited and Ethical Government)

(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. On January 14, 2005, the IBLA affirmed the ALJ’s decision. (Steve Lechner) (97-4133)
DOW, et al. v. UNITED STATES, et al.
(Private Property Rights; Access to Federal Lands) (Counsel for Dows)
(U.S. District Court, Arizona, Civil Action No. 02-cv-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, the property was surrounded by lands owned by the United States and Mr. Contreras accessed the property by crossing these 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.


In March 1994, the Dow family began efforts to establish access rights to their property. In March 1995, the BLM provided an appraisal for the Dow property in an attempt to negotiate a trade for other BLM-owned land. The valuation was unacceptable to the Dow family and a land trade 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 verbally informed Peter Dow that the newly promulgated Wilderness Rule restricted access to the property. He then summarized the conversation in a letter dated July 18, 2001, in which he explained that under the newly promulgated regulations the BLM could not approve or allow construction of new access routes in wilderness areas or improvement of existing routes to a more highly developed condition than at the time of the wilderness designation. At the time of the Hells Canyon Wilderness Area designation the only mechanical access to the property was by all-terrain or four-wheel drive vehicle along the bottom of Garfias Wash, a route that had

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never been maintained or upgraded. Mr. Taylor said that mechanical access to the property could only be considered using the bottom of Garfias Wash but, because this route had not been maintained or upgraded prior to designation of the wilderness area, it could not now be maintained or upgraded. The Dow family, however, could access the property by foot or horse at any time.

In the letter, Mr. Taylor informed Peter Dow that the BLM would process his request for a wilderness access permit for the purposes of family access and property fencing. The BLM also 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; and the third alternative would address fence construction using pack animals.

Before a quiet title action (pursuant to 28 U.S.C. § 2409a) could be filed, it was necessary to determine if there were any administrative remedies that needed to be exhausted. In 1998, the Dow family applied to the BLM to blade a road across government land. Although the BLM had not officially denied this application by the date the lawsuit was filed, it responded negatively to the request with Taylor’s letter of July 18, 2001, which essentially states that the BLM would deny motorized access and could consider mechanical access to the property only using the Garfias Wash route. Unfortunately, part of the Garfias Wash route is privately owned and the landowners have refused the Dow family an easement. Furthermore, the route does not provide complete access.

MSLF determined that there were no administrative remedies to be pursued, and on October 31, 2002, a complaint was filed on behalf of the Dows. On January 7, 2003, the federal government filed its answer.

On February 28, 2003, the case was referred to the Court’s voluntary, non-binding arbitration program. On behalf of the Dows, MSLF filed a notice of withdrawal from arbitration and the case was removed from the program.

On June 23, 2003, the parties filed a joint case management plan, and on June 30, 2003, a pretrial conference was held. On July 1, 2003, the Court issued a scheduling order under which discovery ends on March 19, 2004, and dispositive motions are to be filed by May 7, 2004.

On April 9, 2004, a discovery dispute conference was held at the request of MSLF because the government had not yet provided MSLF with requested discovery materials and MSLF was unable to prepare the Dows’ dispositive motion and brief. The Court ordered the government to provide the outstanding discovery materials and the parties to prepare a joint stipulated scheduling order.

That joint stipulated order was filed on April 22, 2004, and approved by the Court on April 27, 2004. The government is to respond to all of the Dows’ discovery requests by May 29, 2004; the Dows’ motion for summary judgment is due on July 16, 2004; the government’s response and/or cross-motion is due on August 16, 2004; the Dows’ response and/or reply is due on September 15, 2004; and the government’s reply is due on September 30, 2004.

On July 16, 2004, the Dows filed a motion for summary judgment and statement of facts and memorandum in support. On August 31, 2004, the government filed its response and its cross-motion for summary judgment and a motion to strike part of the declaration of Scott
Layton. On September 15, 2004, the Dows filed a response to the motion to strike, and on September 30, 2004, they filed a combined reply to the government’s response and response to the government’s cross motion for summary judgment. The government’s reply was filed on October 18, 2004, three days late. Oral arguments were held on December 20, 2004.

On January 20, 2005, the Court granted the government’s cross-motion for summary judgment. The notice of appeal would be due on April 20, 2005. (Alison Roberts) (Mentors: Davis, Stanley) (01-4927)

**DRAKE v. NORTON, et al.**

(Endangered Species Act; Private Property Rights) (Counsel for Drake)

(U.S. District Court, Utah, Civil Action No. 2:04-cv-01147-TS)

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. After settlement talks failed the FWS indicated it would issue a notice of assessment. On December 19, 1997, Drake filed a petition for relief. On December 16, 1998, the FWS denied the petition 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, before whom an evidentiary hearing was held on July 26-28, 1999. 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. On January 20, 2002, a notice of appeal to the Office of Hearings and Appeals, Ad Hoc Appeals Board (Docket No. D 2002-13), was filed.


On October 1, 2004, the Ad Hoc Appeals Board denied Drake’s appeal. On December 16, 2004, MSLF filed a complaint in the U.S. District Court for the District of Utah on behalf of Lin Drake seeking, pursuant to the Administrative Procedure Act (“APA”), judicial review of the Ad Hoc Board of Appeals’ decision denying his appeal of the ALJ decision and upholding the $15,000 civil penalty assessed against him. In the Complaint, Mr. Drake also challenges the as-applied authority of Congress to regulate purely intrastate, non-commercial activity pursuant to the Commerce Clause of the United States Constitution and seeks a declaration that, as applied to the threatened Utah prairie dogs purportedly on or in close proximity to his property, the “take”
provision of the ESA is unconstitutional because it exceeds Congress’ authority. Mr. Drake seeks a permanent injunction enjoining the federal government from enforcing Section 9(a)(1)(B) of the ESA as applied to Utah prairie dogs.

On January 10, 2005, service of the summons and complaint was executed on the Civil Process Clerk. The government’s answer to the complaint is due on March 11, 2005. (Chris Massey) (96-3857)

**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 have interfered with other uses of the Forest.

Final preparation of the Complaint was delayed until additional materials were received 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, the materials were received on August 19, 2002. 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 each party filed a preliminary pretrial statement.

On March 25, 2003, a preliminary pretrial conference was held by telephone before the Magistrate Judge, and the judge issued a pretrial scheduling order. Following that schedule, discovery ended on December 31, 2003.

On February 25, 2004, MSLF filed Dunbar’s motion for summary judgment. On March 26, 2004, the government filed a brief in support of summary judgment and in response to Dunbar’s motion for summary judgment; however, its motion for summary judgment was not filed until March 29, 2004. On April 23, 2004, MSLF filed Dunbar’s response to the government’s motion and his reply in support of his summary judgment motion. And, lastly, on May 14, 2004, the government filed its reply in support of its motion for summary judgment.

On August 3, 2004, the Magistrate Judge stayed the case pending a decision by the Ninth Circuit in Roth, after which he will lift the stay and decide the pending motions. (Alison Roberts) (Mentor: Joselyn; Local Counsel: Ward Shanahan) (01-4918)

**DYNALANTIC CORP. v. U.S. DEPARTMENT OF DEFENSE**
(Equal Protection; Limited and Ethical Government) (*Amicus*)
(U.S. District Court, District of Columbia, Civil Action No. 95cv2301-EGS)

This case was approved by the Board of Directors on October 8, 2004. The legal issues of the case are quite similar to those of *Adarand*. In *DyanLantic*, however, the U.S. Department of Defense (DOD) is involved rather than the Department of Transportation, the targeted industry is different, and the SBA § 8(a) program is at issue, not the SBA § 8(d) program.

DynaLantic Corporation is a New York corporation formed in 1984. It designs and manufactures aircraft, submarine, ship, and other simulators and training devices and manufactures military equipment simulators, all of which it provides to the DOD, particularly the U.S. Navy and U.S. Army. It is a “small business,” as defined by the Small Business Administration (SBA) and as such is part of the “simulation and training industry.” DynaLantic typically bids on or competes for contracts and subcontracts valued at $15,000,000 or less; most of the contracts are valued at less than $5,000,000. DynaLantic’s main competitors are other small businesses, including small disadvantaged businesses (SDBs) and Section 8(a) firms. Certification as such is achieved by employing a racially discriminatory presumption of social
disadvantage that is afforded a variety of racial and ethnic minority group members and, thus, DynaLantic is denied the right to compete on an equal basis.

After DynaLantic lost a bid in 1995 for a U.S. Navy helicopter simulator as a result of these racial preferences, it filed suit in U.S. District Court for the District of Columbia and moved for a preliminary injunction. MSLF and others were asked by the Court to submit amicus briefs on behalf of DynaLantic, which MSLF did. Eventually, the Court dismissed the case, holding that DynaLantic did not have standing because it was not economically disadvantaged and had never applied for and been denied status as an SDB or a § 8(a) contractor. 


_DynaLantic Corp. v. Department of Defense_, 115 F.3d 1012 (D.C. Cir. 1997). After cross-motions on summary judgment were filed and briefed, Judge Sullivan requested on September 22, 2004, that the 1996 amici, including MSLF, submit briefs on the current state of the law and legal thought regarding racial preferences, and he stayed the case pending submittal of those briefs, which are due on December 20, 2004. Unlike the 1996 proceedings, the solicited amici here have not been invited to participate in oral arguments.

MSLF will file an amicus brief affirming the unconstitutionality of the § 8(a) and SDB programs.

Because of a change of address, the NAACP Legal Defense Fund did not receive the Court’s solicitation of amicus briefs in a timely manner, and it filed an unopposed motion for extension of time. The Court granted the motion and extended the filing deadline for all filers until January 20, 2005.

On January 19, 2005, the NAACP Legal Defense and Educational Fund filed an amicus brief in support of the United States. Amicus briefs in support of DynaLantic were filed by MSLF on January 20, 2005; by Pacific Legal Foundation on January 26, 2005; and by Rothe Development Corp. on January 27, 2005. The Court ordered that responses by the parties to these briefs be filed by February 22, 2005. (Scott Detamore) (04-5545)

**ENTERPRISE FLASHER COMPANY v. MINETA, et al.**

(Constitutional Liberties; Equal Protection) (Counsel for Enterprise Flasher Company)

(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 governments 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; 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 the issue of standing and the merits of the case. 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. After several delays, that conference was finally held on December 1, 2003. On December 8, 2003, the parties filed a proposed scheduling order. On December 10, 2003, the Court issued a schedule for proceedings related to the matter of standing.

On January 27, 2004, a joint stipulation regarding confidential information was filed, together with a joint motion and proposed order for a protective order. On January 30, 2004, Judge Sleet signed the proposed protective order.

On April 19, 2004, Enterprise Flasher filed its motion for summary judgment on the issue of standing. On May 19, 2004, the federal government filed its response, and on May 28, 2004, a letter from the Delaware Attorney General was filed informing the Court that the State defendants adopted the federal government’s response to Enterprise Flasher’s motion for summary judgment on the issue of standing. On June 14, 2004, Enterprise Flasher filed its reply to the federal response. Oral arguments have not yet been scheduled.

On December 16, 2004, the Court granted Enterprise Flasher’s motion for summary judgment on the issue of standing. The parties could now proceed to the merits of the case; however, TEA-21 has been extended for several years beyond its original expiration date and a new transportation bill, to replace TEA-21, is before Congress. The parties intend to file a motion for administrative stay of the case, pending passage and enactment of the new legislation. When the new law is enacted, an amended complaint will be filed. (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)

(Ninth Circuit, Arizona, Case No. 04-17005)

This case was approved by the Board of Directors on October 3, 2003. Richard Kidman and his wife, Shauna, started 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 diner’s start, its employees 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.

That policy was not enforced strictly until May 2000, when a young Navajo girl complained to the Kidmans that sexually suggestive comments had been made to her in Navajo by two male Navajo employees. The Kidmans, who do not speak Navajo, had not known that anything was wrong but 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, numerous Navajo residents of the area have expressed their support for the Kidmans. Some said that they had stopped coming to the restaurant because of the language of some members of the staff. In fact, several employees had given Kidman family members obscene Navajo nicknames.

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

Four other Navajo employees filed a complaint with the EEOC in which they accused the Kidmans of discrimination by not permitting them to speak Navajo on the job. Subsequently, in September 2002, the EEOC filed suit in Arizona federal district court against the Kidmans on behalf of the complainants (Civil Action No. 02-cv-1911-PCT-SMM). From late 2002 until September 2003, the Kidmans were in settlement negotiations, assisted by private counsel. In September 2003, because they had been unable to reach a satisfactory settlement, they asked MSLF to become their lead counsel and return the case to federal district court.

When it took on this case MSLF planned to assert that the English-only policy had been instituted for the purpose of enforcement and monitoring of a company policy against sexual and other harassment of employees and customers and thus was “job related for the position in question and consistent with business necessity,” an argument that exempted the Kidmans under Title VII of the Civil Rights Act of 1964, § 703(k)(1)(A)(i). It also planned to assert that the English-only policy did 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 as counsel representing Mr. and Mrs. Kidman, with the Kidmans’ first attorney continuing as co-counsel. Co-counsel informed the Court that no settlement had been agreed to; however, attorneys for the EEOC alleged that a settlement had been reached. The Court’s minute entry for the conference states that the parties stipulated to a settlement conference conducted by the magistrate judge. The Court stated that a failure to conclude the settlement process would require the Court to set an evidentiary hearing in the matter.
On October 22, 2003, at the end of that settlement conference, the magistrate judge instructed the EEOC to settle the case. Letters continued to be exchanged but an acceptable offer was not proffered.

On January 9, 2004, the EEOC filed a motion to enforce what it believed was a settlement agreement agreed to during discussions between the parties in August and early September 2003, before MSLF began representing the Kidmans. MSLF received that motion by mail on January 12, 2004, on the morning of a scheduled status hearing. If it had been sent by fax, as was previously agreed to by the parties, it would have been received 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 a motion to exceed the page limits in its reply, and the reply was lodged. On June 10, 2004, the Court granted the EEOC’s motion and the reply was filed.

On June 25, 2004, the Court set an evidentiary hearing for July 30, 2004, regarding the motion to enforce. In its order the Court indicated that it was impossible to determine, from the pleadings alone, if there was an enforceable agreement. It also indicated that the possibility of willful, intentional derailing of the alleged agreement would be investigated at the hearing.

On July 30, 2004, after five hours of hearing and two hours of settlement negotiations, there was no agreement and the EEOC had not completed presentation of its case calling for enforcement of the alleged agreement. The hearing was recessed until August 6, 2004, on which date it was completed.

On September 14, 2004, the Court issued a memorandum opinion and order in which it held that a settlement agreement had been achieved. The agreement outlined by the Court had been compiled from various generations of settlement documents and strongly favored the EEOC. The Court declared the lawsuit terminated, except for a status conference to be held on October 8, 2004, the purpose of which was not stated in its order.

On October 1, 2004, MSLF filed a notice of appeal on behalf of the Kidmans in District Court. On October 8, 2004, at the beginning of the status conference, MSLF moved, on behalf of the Kidmans, that the Court stay the case pending a decision on appeal. The Court granted the motion and ordered the Clerk to enter a judgment that the Court would retain jurisdiction to enforce or clarify any provisions of the injunctive relief, to the extent that such relief exists in this case, for a period of three years following the appeal.

On October 12, 2004, the Ninth Circuit docketed the Kidmans’ appeal. On November 1, 2004, MSLF filed the transcript order form. The Court Reporter must file all ordered transcripts with the District Court by December 1, 2004; and the District Court must file the certificate of record by December 8, 2004. The Kidmans’ opening brief and excerpts of record are due on January 18, 2005; the EEOC’s response brief on February 16, 2005; and the Kidmans’ reply brief on March 2, 2005.

On October 19, 2004, the Ninth Circuit issued an order setting a telephone assessment conference to determine if this case should be included in the Circuit’s Mediation Program. The conference was initially set for November 19, 2004, but rescheduled to December 14, 2004.

On December 9, 2004, the EEOC filed a notice of cross-appeal. This notice was timely filed because at the October 8, 2004, status conference, the Court ordered the Clerk to enter final
judgment, in order to clarify any confusion that may have existed as to the finality of the Court’s decision in the case. The Clerk entered final judgment on October 13, 2004. The EEOC is cross-appealing the District Court’s “failure to enforce agreed-upon settlement terms relating to training and to conditions for reinstatement of Defendants’ English-only policy following recision.”

On December 14, 2004, the settlement assessment conference was held with the circuit mediator. It was mutually agreed that the case was not acceptable for mediation, and the briefing will proceed as scheduled.

On December 20, 2004, the Ninth Circuit docketed the cross-appeal and set a new brief schedule. On January 18, 2005, the Kidmans filed their opening brief (first cross-appeal brief) and excerpts of record; the EEOC’s opening brief and response (second cross-appeal brief) is due on March 18, 2005; the Kidman’s response and reply (third cross-appeal brief) is due on April 18, 2005; and the fourth EEOC’s reply (fourth cross-appeal brief) is due on May 1, 2005. (Joe Becker) (Mentor: Mead) (02-5180)

(Private Property Rights; Limited and Ethical Government)
(Counsel for Amici) (U.S. Court of Appeals for the Third Circuit, Case No. 03-4433)

This case was approved by the Board of Directors on December 17, 2004. The Solomon Amendment provides that certain federal grants are not to be made to institutions of higher learning if the Secretary of Defense determines that the institution has a policy or practice that prohibits or, in effect, prevents a military or homeland security agency from entering the institution and accessing its students for the purposes of military recruiting. 10 U.S.C. § 983. In 2004, Congress amended the Solomon Amendment to require that access for military recruiters be “at least equal in quality and scope to the access . . . provided to any other employer.” Pub. L. No. 108-287 (2004).

The Forum for Academic and Institutional Rights (“FAIR”) is self-described as “an association of 24 law schools and law faculties whose mission is to promote academic freedom and to support educational institutions [] opposing discrimination.” Its first project was a legal challenge to the Solomon Amendment in U.S. District Court for the District of New Jersey. In that challenge, it asserted that the Solomon Amendment is unconstitutional because: (1) the government cannot, by imposing conditions on funds, compel institutions of higher education to propagate a message the institutions abhor; (2) the Solomon Amendment violates the First Amendment by conditioning government funds on the willingness of the institutions to surrender their First Amendment right to choose those messages they will or will not express; and (3) it also violates the First Amendment by discriminating on the basis of viewpoint and because it is void for vagueness.


On November 29, 2004, a Third Circuit panel ruled 2-1 that FAIR had demonstrated a likelihood of success on the merits of its First Amendment claims and thus was entitled to a

If the federal government files a petition for rehearing *en banc* (due January 13, 2005) and the petition is granted, and/or if the federal government files a petition for *writ of certiorari* (due February 28, 2005, if *en banc* not requested), MSLF will file an *amicus* brief(s) on behalf of unnamed members of the Federalist Society and Congressman Richard W. Pombo asserting that a federal statute that conditions the grant of federal funds upon the grant of access to representatives of the United States military violates the First Amendment.

On January 14, 2005, the federal government appellees filed a motion with the Third Circuit for a stay of the mandate pending Supreme Court review. On January 20, 2005, the stay was granted. The government’s petition for *writ of certiorari* is due on February 28, 2005, and MSLF’s *amicus* brief is due on March 30, 2005, as is FAIR’s response in opposition. (Joe Becker) (04-5567)

**FIRST FSK LIMITED PARTNERSHIP v. DISTRICT OF COLUMBIA and NATIONAL CAPITAL REVITALIZATION CORPORATION**

(Private Property Rights; Limited and Ethical Government)

(Counsel for First FSK LP) (U.S. District Court, District of Columbia)

This case was approved by the Board of Directors on July 30, 2004. First FSK Limited Partnership (First FSK) owns commercial real estate in the southeastern part of Washington, D.C. Their property is part of the Skyland Shopping Center, a non-contiguous collection of 170,000 square feet of retail properties having 15 different owners that comprises about 11.5 acres. Skyland is part of the Hillcrest Community, east of the Anacostia River. The area, known as “East of the River,” is home to almost one-third of the city’s population. It has beautiful views of downtown Washington, access to quality public transportation via numerous bus routes and several Metro stations, strong residential communities, an abundance of greenery, and a rich physical and cultural history.

East of the River is a target revitalization area of Mayor Anthony Williams, and Skyland is a critical component of the Mayor’s comprehensive revitalization plan and a high-priority project of the NCRC. The Williams Administration has committed more than $530 million in investments over the next 5 years to housing, retail, commercial, and other development East of the River.

Skyland and an adjacent 5 acres of woodlands to its northeast are being threatened with a condemnation action that would result in the transfer of the condemned properties to a private developer. On May 5, 2004, the D.C. Council passed “emergency legislation” giving the National Capital Revitalization Corporation (“NCRC”) the power to use eminent domain to take control of the Skyland Shopping Center if the owners of the parcels that make up the 17-acre parcel are unwilling to sell.

The NCRC currently owns none of the parcel, but it has held preliminary discussions with the major property owners and procured a broker team to negotiate with owners of all the properties within the parcel. The intent of the NCRC is to obtain control of both shopping center and woodlands. The NCRC would raze the utilitarian commercial strips and, partnered with a
developer, would build a larger, more attractive retail complex on the 16.5-acre redevelopment parcel. The NCRC is negotiating with Target Corporation and Shoppers Food Warehouse to anchor the complex and has pledged to lease space to smaller shops and eat-in restaurants. A 5-year-old, 95,000-square-foot retail center across Alabama Avenue from Skyland, Good Hope Marketplace, has a track record of success. It is anchored by a well-designed, profitable 55,000-square-foot Safeway grocery store and includes other tenants such as Ashley Stewart, Hollywood Video, Sun Trust Bank, Chevy Chase Bank, Pizza Hut, One Price Clothing, and a dry cleaner.

MSLF will represent First FSK in challenging the condemnation of its business property. It will assert that the taking of property for divestiture to a large development corporation does not satisfy the "public use" requirements of the D.C. Code, the Community Redevelopment Act, and the Fifth and Fourteenth Amendments to the U.S. Constitution. It also will assert that "blight removal," which will be offered as the public use to justify the redistribution of the property to a private entity, is not relevant because the majority of the city can be said to be blighted by most objective standards. (Joe Becker) (Mentor: Kienzle, Joselyn) (04-5481)

FITZGERALD LIVING TRUST v. UNITED STATES, et al.
(Access To Federal Lands)
(Counsel for Fitzgerald Living Trust) (Ninth Circuit, Arizona, Case No. 04-16149)

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 Fitzgeralds 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 Fitzgeralds applied to the Forest Service for another special-use 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 Fitzgeralds 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 filed its answer on March 28, 2002. On May 2, 2002,
the government moved to file an amended answer, and on May 23, 2002, the Court granted the government’s motion and ordered the lodged answer filed.

On June 4, 2002, the parties filed a joint case management report. On June 17, 2002, a scheduling conference was held, and on June 18, 2002, the Court issued a scheduling order under which discovery was to end by October 1, 2002, and dispositive motions were to be filed by November 22, 2002. On September 6, 2002, the parties filed a joint motion to modify that scheduling order. Under the new schedule, approved by the Court, discovery was to end on December 2, 2002, which it did, and the filing of dispositive motions was to begin on February 3, 2002.

On March 3, 2003, after an extension of time had been granted, the Fitzgeralds filed a motion for summary judgment and supporting documents. On April 3, 2003, the government filed its response and a cross motion for summary judgment. On May 2, 2003, MSLF filed the Fitzgeralds’ reply and their response to the cross-motion for summary judgment was filed. The government’s reply was filed on May 20, 2003.

On November 7, 2003, Judge Rosenblatt recused himself from the case and, by automated random selection, the case was transferred to Magistrate Judge David K. Duncan, the parties having consented to magistrate jurisdiction.

On March 31, 2004, the Court, declaring no need for oral argument though it was requested, issued a decision in favor of the United States. The Court held that the Fitzgeralds had no common law right of access and that the conditions and requirements of the special-use permit were neither arbitrary nor capricious.

On June 1, 2004, the Fitzgeralds filed a notice of appeal to the Ninth Circuit with the District Court. The Ninth Circuit then issued a briefing schedule under which the Fitzgeralds’ opening brief and excerpts of record would be due on September 13, 2004.

On August 19, 2004, the Court stayed the briefing schedule and set a settlement assessment conference for September 22, 2004, at which counsel for the parties and the Circuit Mediator were to determine if the case should be included in the Ninth Circuit’s Mediation Program. At that conference the government attorney offered a FLMPA easement to the Fitzgeralds and the Circuit Mediator instructed MSLF to discuss that offer with the Fitzgeralds and return with the Fitzgeralds’ answer. It is likely that the easement offer is the only offer that the government will make. After a series of unsuccessful settlement conferences during October and November, the mediator set a briefing schedule.

On December 11, 2004, the Ninth Circuit granted MSLF’s motion, filed that same date, requesting that the plaintiff-appellants’ names in the caption be changed to “Fitzgerald Living Trust.”

On January 21, 2005, the Fitzgerald Living Trust filed its opening brief and excerpts of record. The government’s response brief is due on March 18, 2005. (Alison Roberts) (88-2599)
(Limited and Ethical Government; Private Property Rights)
(Counsel for Defendants-Intervenors (-Appellees) Randy Pullen and Yes on Prop. 200)
(U.S. District Court, Arizona, Civil Action No. CV-04-649 TUC DCB;
Ninth Circuit, Case No. 05-15005)

This case was approved by the Board of Directors on November 22, 2004. Arizona ballot
initiative petition I-03-2004 was filed with the Arizona Secretary of State on July 7, 2003, and
was certified to appear on the November 2, 2004, general election ballot as Proposition 200, the
“Arizona Taxpayer and Citizen Protection Act” (hereafter referred to as “Proposition 200”).
Proposition 200 was drafted by the Protect Arizona Now coalition because the State of Arizona
is believed to currently spend more than $1 billion a year to provide services and benefits for
more than half a million illegal aliens, resulting in an added tax burden to each Arizona
household of $700 per year.

The goal of Proposition 200 is to strengthen enforcement of the existing laws that relate
to illegal immigration by requiring all individuals who register to vote or who apply for or vote
for public benefits including welfare, disability, retirement payments, public housing assistance,
and taxpayer-subsidized postsecondary education to provide proof of United States citizenship.
Proposition 200 creates a verification process to enforce current laws that prohibit state and local
governments from providing non-essential public benefits to illegal aliens, similar to the process
used since 1996 to check eligibility for federal benefits. Proposition 200 requires state personnel
who discover a violation of federal immigration law during this verification process to file a
written report with federal authorities. Proposition 200 also requires both documentary proof of
U.S. citizenship for first-time voter registration and presentation of a designated identity
document at the voting polls.

Prior to the general election, both Arizona Governor Janet Napolitano and Arizona
Attorney General Terry Goddard publicly stated their political, legal, and personal opposition to
Proposition 200 and urged the Proposition’s defeat at the polls. Proposition 200 was approved,
however, 56 percent in favor to 44 percent opposed.

Following the election, on November 5, 2003, representatives of the Mexican American
Legal Defense Fund, National Council of La Raza, Service Employees International Union,
American Civil Liberties Union, Chicanos Por La Causa, Valle del Sol, and the law firm of
Kutak Rock (a Proposition 200 opponent) announced their intention to seek a temporary
restraining order in federal district court enjoining the certification and implementation of
Proposition 200 in its entirety.

On November 12, 2004, the Arizona Attorney General issued an opinion that Proposition
200 should be narrowly interpreted and applied only to those state and local benefits that are
subject to the federal eligibility restrictions of 8 U.S.C. § 1621. The proponents of Proposition
200 believe, however, that the scope of the proposition is determined by the federal Welfare

On November 30, 2004, a class action complaint for injunctive and declaratory relief was
filed in federal district court by Friendly House, a 501(c)(3) non-profit comprehensive family
service agency, several public employees, and numerous undocumented adults and children.
Also filed was an ex parte application for a temporary restraining order (TRO) enjoining implementation of Proposition 200 and order to show cause regarding a preliminary injunction.

That same date the Court heard oral argument regarding the requested TRO, saying that its issuance should not be construed in any way as a comment or the merits or legality of Proposition 200, merely maintenance of the status quo while the legal issues are briefed and the Court considers the arguments. The Court determined that Defendants would not be injured by issuance of the TRO and thus no bond was set. The Court ordered Defendants to respond to the application for TRO and order to show cause regarding preliminary injunction by 5:00 p.m. (PST), December 13, 2004, and it set an evidentiary hearing on the request for preliminary injunction for 1:30 p.m., December 22, 2004.

On December 1, 2004, the Court granted several motions by plaintiffs’ counsel allowing certain plaintiffs to participate in proceedings using fictitious names. On December 8, 2004, MSLF filed a motion to intervene as defendants, memorandum in support, and answer in intervention on behalf of Yes on Proposition 200, a non-profit organization that campaigned for passage of the proposition; Randall Pullen, individually; and Federation for American Immigration Reform (FAIR) (hereafter jointly referred to as Yes on Proposition 200). The plaintiffs’ response is due on December 27, 2004, and Yes on Proposition 200’s reply is due on January 3, 2005.

On December 13, 2002, the applicants for intervention and the defendants in the case separately filed responses to the order to show cause regarding the preliminary injunction. On the same date, the plaintiffs lodged a first amended complaint. On December 14, 2004, Kathy McKee and Claudia Bloom filed a motion for leave to intervene as defendants, together with a memorandum in support, and answer.

On December 15, 2004, the Court granted Mr. Pendley’s admission pro hacce vice. On that same date, Washington Legal Foundation and Protect Arizona filed a motion for leave to file an amicus brief and lodged the brief. On December 17, 2004, Friendly House filed responses in opposition to the motions to intervene by Yes on Proposition 200 and by Kathy McKee and Claudia Bloom and it filed a reply to the responses to its motion for a preliminary injunction.

On December 20, 2004, the Court issued an order granting the motion of Washington Legal Foundation and Protect Arizona for leave to file an amicus brief and the brief in opposition to Friendly House’s motion for preliminary injunction was filed.

On December 22, 2004, the Court held a preliminary/permanent injunction hearing during which it denied Friendly House’s motion for order to show cause for preliminary injunction against defendants; denied Friendly House’s motion for a preliminary injunction; ordered that the previously issued temporary restraining order be lifted; and stated that it shall not grant any application for appeal since an interlocutory appeal of this order would not “materially advance the ultimate termination of the litigation.” On that same date the Court issued a formal order regarding these matters.

On December 29, 2004, Friendly House filed a notice of interlocutory appeal from the preliminary/permanent injunction hearing held on December 22, 2004. The appeal was docketed by the Ninth Circuit on January 4, 2005, and because it is a preliminary injunction appeal, all pleadings are to be sent directly to the Motions Attorney for the Circuit.
On January 6, 2005, the Motions Attorney issued a scheduling order indicating that Circuit Rule 3-3 applies to this preliminary injunction appeal. The order sets responses to the motion for emergency stay due on January 11, 2005, and the reply to any responses filed due on January 14, 2005. The opening brief in the appeal is due on January 26, 2005, and response briefs are due on February 23, 2005, or 28 days after service of the opening brief, whichever is earlier. The optional reply brief is due 14 days after service of the response briefs. After briefing is complete, the appeal, and any pending motions, will be referred to the next available motions panel for disposition.


On January 14, 2005, Friendly House filed its reply in support of their motion for emergency stay. On that same date, the Ninth Circuit motions attorney denied the motion for stay and reiterated the briefing schedule issued on January 6, 2005.

On January 26, 2005, Friendly House filed its opening brief and excerpts of record (4 volumes). Because these documents were served on January 25, 2005, response briefs are due on February 22, 2005. (Jayme Ship) (04-5569)

**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 geographical features as caves, sinkholes, and steep canyons.

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 as endangered in 1988: the Bee Creek Harvestman, Bone Cave Harvestman, Tooth Cave pseudo scorpion, Tooth Cave spider, Tooth Cave ground beetle, and Kretschmarr mold beetle, collectively, the “Cave Bugs.” Under the ESA, within a year after a species is listed as endangered, the Secretary must designate the critical habitat for that species. In the decade since these species were listed, no critical habitat has been designated for any of the eight endangered species listed.

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 needed to be taken to protect the endangered species. The owners did so, and in 1990, following all recommendations of the survey, they 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. This 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 sale was not completed. 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 no Section 10(a) permits were necessary. The district court ordered the FWS to review GDF Realty’s proposed development plans and state whether any Section 10(a) permits were necessary. In its response to the order, the FWS stated that, with some slight modifications, some portions of the proposed development could proceed without causing a take or requiring any Section 10(a) permit. The FWS stated, however, that other parts of the proposed development would likely result in a “take” and advised GDF Realty to file Section 10(a) permit applications for those portions so that the FWS could “work with” GDF Realty to develop satisfactory development proposals. On October 4, 1994, the court dismissed GDF Realty’s complaint as unripe because it had not filed for any Section 10(a) permits. 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 the elevation of 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. This proposed development was significantly less ambitious than those 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 the FWS policy and practice of entertaining modifications to proposals during the application process, the owners continued to meet with the FWS to propose alternative, less extensive developments. None of these proposals met with FWS approval, and the FWS informed the owners verbally 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 filed a second lawsuit in federal district court seeking a declaratory judgment 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 regional director’s 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. After completion of GDF Realty’s Supreme Court case (see following paragraphs), MSLF will resume litigation of the Claims Court suit. MSLF will assert that by refusing to allow development of GDF’s 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 estimated to be greater than $60 million, whereas with restrictions the property has no economically beneficial use. MSLF will allege that denial of the permits constitutes a permanent taking of GDF’s property and that GDF is entitled to the fair market value of that property.

On June 15, 2000, these same plaintiffs filed suit against the Secretary of the Interior and others in U.S. District Court for the Western District of Texas, Austin Division, seeking a declaratory judgment that regulation of Cave Bugs on their property pursuant to the ESA is unconstitutional because it exceeds the Congress’ power to act under the Commerce Clause of the U.S. Constitution. (The 1999 Claims Court action has been stayed pending resolution of this suit.) On August 31, 2001, the District Court rejected their claims; on March 26, 2003, the Fifth Circuit affirmed the District Court’s decision, and on February 27, 2004, the Fifth Circuit denied GDF Realty’s petitions for rehearing and rehearing en banc.

On May 27, 2004, GDF Realty filed a petition for writ of certiorari with the U.S. Supreme Court. MSLF prepared an amicus brief to be filed in support of GDF Realty’s petition, which, together with the government’s response brief, was due on July 6, 2004. Following two extensions of time, the government’s response brief was filed on September 3, 2004, and MSLF’s amicus brief was filed that same day. GDF Realty filed its reply brief on September 15, 2004, and that same day the case was distributed to the justices for conference on October 8, 2004. (Chris Massey) (Mentors: Haas, Runft) (03-5208; amicus 04-5471)
HARROWER v. SUBLETTE 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 (PDRs). 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 PDRs 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 Commissioners filed their answer with the Court.

On April 16, 2004, MSLF filed an unopposed motion to file an amended complaint and lodged the amended complaint. On April 19, 2004, the Court granted the motion and on April 22, 2004, the amended complaint was filed. On May 4, 2004, the County Commissioners filed their answer.

On July 22, 2004, Mr. Harrower filed a motion for summary judgment and memorandum. On August 20, 2004, in public session, the Commissioners approved the expenditure of $416,000 for a purchase of development rights. On August 25, 2004, MSLF Mr. Harrower filed a motion for a temporary restraining order and/or preliminary injunction enjoining the Commissioners from purchasing development rights through the PDR program pending a Court hearing on the merits. Counsel for the parties requested that the Court hold a hearing on all motions before it, including Mr. Harrower’s motion for summary judgment, before September 30, 2004. The Commissioners agreed to refrain from purchasing development rights until that date.

On September 7, 2004, the Commissioners filed a response to the motion for summary judgment, and on September 27, 2004, Mr. Harrower filed his reply. At the end of October
2004, a hearing on Mr. Harrower’s motion for summary judgment was scheduled for December 10, 2004, in Pinedale.

On December 8, 2004, upon joint motion, the Court stayed indefinitely the hearing in the case pending action by the Commissioners. At the Commissioners’ meeting on January 4, 2005, the newly elected Commissioner who ran opposing the PDR program took his seat. The Commissioners took no action at the meeting but following the meeting the two incumbent Commissioners indicated to some citizens present and to members of the press that, although they were opposed to the PDR program, they would like to obtain a court opinion as to the program’s legality and therefore might not officially discontinue the program.

On January 7, 2005, MSLF’s local attorney filed a status report with the Court indicating that the Commissioners took no action at their meeting. MSLF is to file another status report on January 21, 2005. (Joe Becker) (03-5273)

HAYDEN v. UNITED STATES
(Private Property Rights, Access to Private Property) (Counsel for Romney 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 building 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; and (3) whether a Revised Statute 2477 (R.S. 2477) public right of way exists over the historic access road.

On June 18, 2003, the United States moved for either a clarifying amended complaint or dismissal of the case, alleging that the metes and bounds description of the McCain Ranch is not where the property is located. On July 17, 2003, MSLF filed an amended complaint and an opposition to the government’s motion. 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 denied as moot the government’s motion for a clarifying amended complaint or dismissal, and on August 1, 2003, the United States filed its answer to the amended complaint. On August 7, 2003, the Court scheduled an early neutral evaluation conference for September 10, 2003, at which all counsel, parties, and any others required to negotiate or enter into settlement must be present in person.

The evaluation conference was held on September 10, 2003, before District Court Judge Houston, formerly Magistrate Judge Houston. A schedule was set for proceedings through the case management conference.

On October 17, 2003, initial disclosures were exchanged. On October 22, 2003, the case management conference was held, and on October 29, 2003, a scheduling order was issued. Under this schedule, as subsequently modified, discovery ends on September 21, 2004, and a mandatory settlement conference will be held on October 12, 2004. Memoranda of contentions of fact and law are due on November 15, 2004, and a proposed final pretrial conference order is due on November 29, 2004. The final pretrial conference is scheduled for December 10, 2004.

On October 31, 2003, Judge Houston recused himself, vacated the final pretrial conference, and transferred the case to Judge Huff. On November 11, 2003, Magistrate Judge Stormes rescheduled the final pretrial conference to December 6, 2004, before Judge Huff.

On June 22, 2004, during a telephone conference of the Magistrate Judge’s clerk, the government attorney, and MSLF, the settlement positions of the parties were presented. On June 30, 2004, a voluntary settlement conference was held before Magistrate Judge Stormes. At that conference, the Court refused to stay the case while Mr. Hayden files for an access easement, which the government said would be granted. Instead, the Court said that the case would be dismissed if Mr. Hayden filed for an easement. The Court scheduled another conference for July 13, 2004, to allow the parties to research the effect that an application for easement and resulting case dismissal would have on the statute of limitations. If the clock cannot be stopped during the application process, then Mr. Hayden would have no choice but to continue to litigate the case.

On July 13, 2004, the parties and magistrate judge met and the results of the attorneys’ research on stopping the clock were presented. Because it is not possible to stop the clock during the easement process, litigation in the case will continue. Discovery ends on September 21,
2004; confidential settlement briefs must be submitted to the Judge’s chambers by October 6, 2004; and a mandatory settlement conference is scheduled for October 12, 2004.

On August 10, 2004, the Magistrate Judge signed a joint stipulation for a new case management schedule that ended with Mr. Hayden’s motion for summary judgment being filed by November 1, 2004.

For a number of reasons, including the death of one of the experts, the Court revised this schedule. Expert reports were exchanged on November 29, 2004; all depositions and discovery were to be completed by January 15, 2005; and the filing of cross-motions for summary judgment was to begin with Hayden’s motion being filed no later than February 15, 2005.

On February 3, 2005, on joint motion to amend the schedule, the Court issued a new schedule under which the mandatory settlement conference will still be held on March 22, 2005. Hayden’s motion for summary judgment is due on April 15, 2005; the government’s response to Hayden’s motion and its cross motion for summary judgment are due on May 16, 2005; Hayden’s reply to the government’s response and his response to the government’s cross motion are due on June 15, 2005; and the government’s reply to Hayden’s response is due on July 1, 2005. Each party’s memorandum of contentions of law and fact is due on August 1, 2005. A joint proposed pretrial conference order is due on August 15, 2005, and the pretrial conference will be held on August 22, 2005. (Alison Roberts) (Mentors: Jenson, Montero) (02-5152)

**IDAHO CONSERVATION LEAGUE v. VALLEY COUNTY, IDAHO, et al.**

(Access to Federal Lands; Environmental Laws)

(Counsel for Valley County, et al.) (U.S. District Court, Idaho)

This case was approved by the Board of Directors on June 4, 2004. Several years ago, Valley County, in west-central Idaho, adopted best management practices focusing primarily on the prevention of surface erosion of roads. Valley County manages its roads for adequate access to lands, fire suppression, wildlife habitat improvement, enhanced biodiversity, and a variety of dispersed and developed recreational activities. The objectives of this management program are to maintain a stable surface and operational drainage system and to protect stream quality.

On May 7, 2004, Valley County, the Valley County Board of Commissioners, and the Superintendent of the Valley County Road Department (henceforth, "the County") received a letter from Advocates for the West, on behalf of their client, the Idaho Conservation League ("the League"), providing the required 60-days notice of the League’s intent to bring a civil action against the County for alleged violations of the Clean Water Act and Endangered Species Act. This Notice of Intent to Sue addresses past and anticipated future actions regarding maintenance work by the County on roads within the Payette and Boise National Forests, generally within the South Fork Salmon River and North Fork Payette River watersheds. The letter alleges that the road maintenance work is not performed in accordance with best management practices and is causing the addition of sediment and other material to waterways, thereby harming threatened species of fish in violation of the Clean Water Act and the Endangered Species Act.

According to the League, for many years the County’s maintenance of roads adjacent to the South Fork Salmon River, East Fork South Fork Salmon River, Lick Creek, Profile Creek, and Johnson Creek has consisted of blading the surface of the roads and removing brush from the
edges of the roads. Specifically, the County is engaging in a technique called “side casting,” which consists of blading a road and creating a berm on the outside edge of the road just above the adjacent stream. According to the League, the County then passes over the road again and pushes the berm over the edge, contributing sediment to the adjacent stream. The League also alleges that last year the County pursued additional projects including removing debris from, installing, or replacing approximately 44 culverts and removing a log jam from the East Fork South Fork Salmon River, projects that also impaired the environment and harmed threatened fish and their habitat.

Specifically, the League alleges that the County’s road maintenance practices cause unpermitted discharges of fill material into waters of the United States in violation of the Clean Water Act. It also alleges that the County’s road maintenance practices have harmed and will continue to harm threatened salmon, steelhead, and bull trout because the delivery of sediment to streams and rivers impairs the breeding, spawning, rearing, and migrating habits of these fish in violation of the Endangered Species Act.

The purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. 33 U.S.C. § 1251. To further this goal, the Clean Water Act prohibits the discharge of dredged or fill material into navigable waters of the United States unless that discharge is permitted under Section 404 of the Act. 33 U.S.C. §§ 1311, 1344. Although the County did not have a Section 404 permit to discharge fill materials into waters of the United States, its road maintenance practices arguably fall within an exemption to the permit requirement because the County is maintaining roads within the Payette and Boise National Forests. Moreover, the primary purpose of the maintenance is not to bring those areas of the navigable waters into a different use. As a result, a colorable defense may be raised that Valley County is not in violation of the Clean Water Act.

Section 9 of the Endangered Species Act prohibits all activities that result in a “take” of an endangered species. 16 U.S.C. § 1538(a). The National Marine Fisheries Service and the U.S. Fish and Wildlife Service have extended this prohibition to threatened species. 16 U.S.C. § 1533(d). “Take” means to harass, harm, injure, or kill a listed species. 16 U.S.C. § 1532(19). The National Marine Fisheries Service and the U.S. Fish and Wildlife Service have defined “harm” to include significant habitat modification or degradation that actually kills or injures wildlife. 50 C.F.R. § 222.201.

Under the Endangered Species Act, the plaintiff has the burden of proving by a preponderance of the evidence that the alleged action has caused a “take.” Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 2000). Based on its 60-day notice letter, the League’s proof consists of unsubstantiated hearsay, and it has provided no actual scientific evidence to validate its claims. MSLF will defend the County on the grounds of lack of evidence and will hold the League to its burden of proof. MSLF will also challenge the League’s lack of standing and demand that it comply with all prerequisites to filing a lawsuit under the citizen suit provision of the Endangered Species Act.

MSLF will establish a client relationship with the County, if and when the League files a lawsuit resulting from its Notice of Intent to Sue. That lawsuit can be filed at any time after July 6, 2004.

On July 15, 2004, the League sent the County a proposal for an agreement with the County under which the League would agree not to pursue litigation in exchange for the County
meeting certain terms regarding road maintenance. On July 28, 2004, Robert Maynard, attorn. of Valley County, replied to that letter stating that, without admitting to any unlawful actions or other allegations contained in the League’s July 15 letter, the County was proceeding consistent with the basic elements of good road maintenance as outlined in the League’s letter. He stated that it remains the decision of the League to litigate or not, but that suing the County would only impair communications and relations between the County and the League and distract from efforts of the County to reach an updated agreement with the Forest Service.

Shortly thereafter, in early August, the League informed the County that it not file a lawsuit at this time but instead would monitor the road work done by County to determine if the County is conducting that work consistent with the League’s demands. Just before the end of 2004, the attorney for the County, Robert Maynard, requested that MSLF continue the active status of this case until at least Spring 2005, at which time he believes the active status of the case can be terminated. (Alison Roberts) (Mentor: Smith) (04-5473)

In re INTERNATIONAL CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACE DISCRIMINATION

This action was approved by the Board of Directors on June 8, 2001. A United Nations treaty, the International Convention for the Elimination of all forms of Race Discrimination (“ICERD”), to which the United States is a party threatens to undo all of MSLF’s victories in cases such as Adarand. Although this treaty prohibits racial preferences, it requires special measures designed to assist members of disadvantaged races to enjoy fully their human rights. The Clinton Administration interpreted ICERD as requiring exclusory forms of “affirmative action” in America such as the programs MSLF challenged in Adarand and Concrete Works of Colorado. The Clinton Administration’s interpretation of the “special measures” provision in the treaty is incorrect for a number of reasons, not the least of which is that exclusory affirmative action programs did not exist until 20 years after the treaty was written and, in fact, violate the terms of the treaty. Nevertheless, in its final days the Clinton Administration submitted its false treaty interpretation, in the form of a compliance report, to the U.N. committee that enforces the treaty. The U.N. committee is scheduled to review the Clinton report in July, and unless the Bush Administration replaces the Clinton report, the committee could accept the Clinton interpretation of special measures and that interpretation might take effect as international treaty law, binding upon the United States. Because such treaties are co-equal with the Constitution as a source of law in the United States, the ICERD, and the Clinton interpretation of the special measures, will have as much force as the Supreme Court’s past and upcoming decisions in Adarand and MSLF’s work will be for naught.

Under the terms of the ICERD, the United States is to submit periodic reports to the U.N. regarding progress toward compliance with the treaty. Three such reports were due during the Clinton Administration, but, instead of submitting them when due, the Clinton Administration submitted only a single “combined” report at the very end of Clinton’s second term. This report states that the “special measures” language in the treaty requires, or at least permits, the exclusionary form of affirmative action dominant in American government contracting today. Although this interpretation is quite incorrect, its adoption could have enormous and far reaching consequences.
Furthermore, an informal working group of non-governmental civil rights and social justice groups comprising organizations such as the NAACP that support exclusory affirmative action submitted an alternate, or “shadow,” report to the committee. That report severely criticizes the United States for its failure to abide by the treaty by expanding exclusory affirmative action, and the report demands that the committee rule that the United States do so. Their report, and their advocacy, has to date gone unanswered.

It is likely that the committee will accept Clinton's interpretation of “special measures” and take the position that exclusory affirmative action is required by the ICERD unless the Bush Administration and MSLF and other like-minded organizations cooperate immediately to stop it. Of all the hundreds of NGOs that have participated so far, not one is against race-based exclusory affirmative action. Many of the participating NGOs are, in fact, dedicated to the preservation and expansion of such programs.

This matter was brought to MSLF’s attention by Mr. Bruce Abramson, a seasoned U.S. attorney who has been a consultant on human rights issues in Geneva for years. It is his judgment that this effort require two fairly extensive legal memoranda. The first will detail why the U.N. committee should postpone its review of the Clinton report and give the Bush Administration the arguments that they will require to secure a delay in the committee review. The second memorandum will detail why the Clinton report is incorrect and must be replaced. It explains that the ICERD prohibition of race discrimination does not permit exclusory affirmative action and will set forth the correct interpretation of the treaty and provide legal support for that interpretation.

The committee is scheduled to review the Clinton report in July of this year and there is a grave danger that the Bush Administration, unless convinced to make a concerted effort to the contrary, will defend the Clinton report. MSLF therefore proposes to bring this matter to the attention of the Bush Administration and convince the Bush Administration to take appropriate steps to prevent such a debacle. To do so, MSLF will need to have other like-minded organizations to sign their names to our efforts.

The campaign to approach and convince the Bush Administration is far more likely to succeed if many other like-minded organizations sign on to the effort in addition to MSLF. Such organizations include Pacific Legal Foundation, Institute for Justice, Center for Individual Rights, Washington Legal Foundation, Southeastern Legal Foundation, Eagle Forum, Campaign for a Color-Blind America, the Claremont Institute, the Heritage Foundation, and myriad others.

It has not been determined who in the Bush Administration should be contacted first, and who will become the primary contact thereafter. Treaty compliance is a matter for the State Department, but U.S. legal matters are handled by the Justice Department.

This project does not represent a significant risk to the Foundation’s 501(3)(c) status. Although the project may appear more closely akin to lobbying than litigation, MSLF is not seeking the passage of any legislation or regulation and will deal solely with the Executive Branch. MSLF is not representing any for-profit enterprise and instead is leading a cooperative effort by similar non-profit enterprises. Finally, MSLF is not engaged in any endeavor that could result in a money award and the percentage of MSLF’s budget expended on this matter will be small. [This case update is as of September 2001. Between that date and July 1, 2004, no case activities have occurred. On July 1, 2004, the case was reassigned and a review of the case and possible future action began.] (Alison Roberts) (01-4820)
IN THE MATTER OF THE ADJUDICATION OF EXISTING RIGHTS TO THE USE OF ALL WATER WITHIN WESTSIDE SUBBASIN OF THE BITTERROOT RIVER

(Private Property Rights; Access to Public Lands)
(Counsel for Claimant Big Creek Lakes Reservoir Ass’n)
(Montana Water Court, Case No. 76HF-168)

This case was approved by the Board of Directors on September 9, 2004. At the time the MSLF Board of Directors was considering Big Creek Lakes Reservoir Association’s (BCLRA) quiet title case (see Big Creek Lakes Reservoir Association v. United States) it was aware that BCLRA was involved in litigation in the Montana Water Court concerning its water right on the South Fork Reservoir and that BCLRA was represented by private counsel in the matter. Since that time, BCLRA has determined that it is no longer economically feasible for it to retain private counsel in defense of its South Fork Reservoir water right and it requested and was granted the help of MSLF in this litigation, the primary issue of which is whether BCLRA abandoned its water right on the South Fork Reservoir.

In 1972, the Montana Constitution was amended to recognize state ownership of all water within the state subject to use and appropriation by its people in accordance with a new legal scheme created for this purpose. Mont. Const. art. IX, § 3. The 1972 constitutional revision included a provision recognizing and protecting all existing water rights in accordance with the prior appropriate doctrine, which is and has been the law of Montana as it is throughout the Western States. Mont. Code Ann. § 85-2-401. This constitutional change prompted a statewide water rights adjudication that is still ongoing with respect to many water supply sources, the purpose of which is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. In re Adjudication of Clark Fork River Drainage, 833 P.2d 1120 (1992). The Montana Water Use Act was enacted in accordance with and for the purpose of implementing article IX, § 3, of the 1973 Montana Constitution. Mont. Code Ann. § 85-2-101, et seq. After July 1, 1973, no further water appropriations were allowed outside the provisions of the Montana Water Use Act. Mont. Code Ann. § 85-2-301. The Water Use Act provides the sole and exclusive means by which any new rights to the use of water can be acquired; that is, through a beneficial water use permit obtained from the Montana Department of Natural Resources and Conservation (DNRC). Mont. Code Ann. §§ 85-2-302, 85-2-301(3).

Under the Montana Water Use Act, a water right is abandoned if “an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions.” Mont. Code Ann. § 85-2-404(1). In addition, a 10-year period of non-use when water is available for use creates, however, a presumption that the water right has been abandoned. Mont. Code Ann. § 85-2-404(2). These abandonment provisions do not apply to a right existing prior to 1973 until such right has been fully adjudicated in accordance with the Water Use Act, and the burden is on DNRC to establish abandonment.

Depending on when the United States believes that BCLRA lost its water right in the South Fork Reservoir by abandonment, the law prior to passage of the Water Use Act in 1973 may apply. See, 79 Ranch, Inc. v. Pitsch, 666 P.2d 215, 217 (Mont. 1983) (Section 89-802, Rev. Codes Mont. 1947, repealed in 1973, was applicable). Because appropriation of water in
Montana is based on beneficial use, when the owner of a water right abandons or ceases to use the water for its beneficial use, the water right ceases. *Matter of Adjudication of Clark Fork River Water Rights*, 833 P.2d 1120, 1122 (Mont. 1992).

Under Montana law, two elements are necessary for the abandonment of a water right: nonuse and intent to abandon. *Clark Fork*, 833 P.2d at 1123. Evidence of a long period of continuous nonuse raises a rebuttable presumption of intent to abandon the water right and shifts the burden of proof to the claimant to explain the reasons for nonuse. To rebut this presumption, the claimant must establish “some fact or condition excusing the long period of nonuse, not mere expressions of hope or desire regarding future use of the water.”

In *Clark Fork*, the City of Deer Lodge’s evidence that it carried the water rights as assets on its books during the period of nonuse was not sufficient to rebut the presumption of abandonment because it failed to explain the reasons for the long period of nonuse. In *Matter of Adjudication of Musselshell River Water Rights*, 840 P.2d 577, 581-82 (Mont. 1992), “general evidence of a variety of negative factors” spanning the period of nonuse was not sufficient to rebut the presumption of abandonment because it was “conclusory in nature” and not specific to the acreage related to the claimed water rights. Similarly, in *79 Ranch*, 666 P.2d at 218, the asserted lack of funds to irrigate, unsupported by more specific evidence, was not sufficient to rebut the presumption of abandonment.

In order for BCLRA to establish the validity of its “existing right” under the Montana Water Use Act—that is, a right to the use of water that would be protected under the law prior to July 1, 1973—it must provide specific evidence of “economic, financial or legal difficulties or natural calamities” that prevented the storage and use of its claimed water right in the South Fork Reservoir. *Musselshell River*, 840 P.2d at 582 (quoting *Hallenbeck v. Granby Ditch and Reservoir Co.*, 420 P.2d 419, 426 (Colo. 1966)); see Mont. Code Ann. § 85-2-102(9). BCLRA will demonstrate difficulties similar to those established in *Hallenbeck* that have prevented BCLRA from repairing and operating the South Fork Dam and Reservoir since the 1960s: (1) dam repairs are prohibitively expensive as a result of Forest Service regulations and the Forest Service’s refusal to allow access and to maintain its trail system; (2) BCLRA has continued to operate parts of its irrigation system with provable expenditures of money and time; and (3) BCLRA has attempted to access and repair the South Fork Dam and Reservoir, as well as to maximize operation of the remaining parts of its irrigation system within Big Creek drainage.

In addition to defending its right in Water Court, BCLRA also will submit an application to the Montana DNRC for a beneficial water use permit on the South Fork Reservoir.

At a prehearing scheduling conference on October 26, 2004, final deadlines were set for the evidentiary hearing to be held on December 13-14, 2004. On December 13-14, 2004, the evidentiary hearing was held. A briefing schedule for post-hearing briefs will be issued by the Court after the transcript is completed. The transcript was received by MSLF on February 7, 2005. (Alison Roberts) (04-5533) (Mentors: Hill, Joscelyn) (Local Counsel: Joscelyn)
KELO, et al. v. City of NEW LONDON, CONNECTICUT
(Private Property Rights; Limited and Ethical Government)
(Adamicus) (Supreme Court, Connecticut, Case No. 04-108)

This case was approved by the Board of Directors on October 8, 2004. In 1997, Susette Kelo purchased and restored a small house in New London, Connecticut, in the Fort Trumbull neighborhood where the Thames River meets the Long Island Sound. Down the street from Ms. Kelo, the Dery family has lived since 1895; their son, Matt, and his family live next door. The richness and vibrancy of this neighborhood reflects the American ideal of community and the dream of homeownership.

Tragically, the City of New London is turning that dream into a nightmare. In 1998, the pharmaceutical giant Pfizer built a plant next to Fort Trumbull and the City determined that someone else could make better use of the land than the Fort Trumbull residents. The City handed over its power of eminent domain to the New London Development Corporation (NLDC), a private body, to take the entire neighborhood for private development.

The Fort Trumbull residents were determined to fight for what was rightfully theirs. They filed suit against New London on December 20, 2000, and won. The City appealed and won at the Connecticut Supreme Court. The residents then petitioned the U.S. Supreme Court for certiorari, and on September 28, 2004, their petition was granted.

Amicus briefs in support of petitioners were filed by the Rutherford Institute on November 10, 2004; America's Future Inc., et al., on November 30, 2003; the American Farm Bureau Federation, et al., on December 1, 2004; Robert Nigel, et al., on December 2, 2004; and the Cato Institute on December 2, 2003.

On December 2, 2005, MSLF filed an amicus brief on behalf itself and Defenders of Property Rights, in support of petitioners. They argued, inter alia, that the City of New London, Connecticut, lacks the legal authority to condemn Ms. Kelo's property because the condemnation is not for a "public use."

On December 2, 2004, an amicus brief in support of respondents was filed by K. Hovnanian Companies LLC.


On January 14, 2005, the record (5 boxes of materials) was received from the Supreme Court of Connecticut. On January 18, 2005, the State of Connecticut filed a motion to
participate in oral argument as amicus and for divided argument. On January 19, 2005, the New York State Urban Development Corporation filed an amicus brief.


On January 21, 2005, the petitioners filed an opposition to the State of Connecticut’s motion for leave to participate in oral argument, and on January 27, the respondents filed an opposition to the motion. Oral arguments are scheduled for February 22, 2005. (Joe Becker) (04-5546) (Mentors: Kienzle, Joscelyn)

**LOCHNESS PROPERTIES, INC. v. City of SHERIDAN, COLORADO**

(Private Property Rights; Limited and Ethical Government)
(Counsel for Lochness Properties)

This case was approved by the Board of Directors on October 8, 2004. Commercial real estate in the South Santa Fe Corridor in the southern part of the greater Denver, Colorado, area is threatened with a condemnation action that is little more than forced redistribution of that property to a private developer. The City of Sheridan plans to raze the various buildings comprising the commercial area, some of which were constructed recently, and has partnered with a development company, Miller-Weingarten, that plans to build a larger, allegedly more attractive retail and business complex on the 300-acre redevelopment parcel. Miller-Weingarten began marketing the parcel to large retailers more than a year ago.

The Fifth and Fourteenth Amendments to the U.S. Constitution allow governmental taking of private property only when just compensation is paid and when the land is taken for public use. Over time, the strict interpretation of what constitutes “public use” has deteriorated.

In *Berman v. Parker*, 348 U.S. 26 (1954), a landlord, whose department store was neither “blighted” nor constituted a public nuisance, had his property condemned because the area in which his store was located was classified as undesirable and the federal government declared that it would serve the public interest if that area were sold to private entities who would redevelop the land. Next, in *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229, 243-44 (1984), the U.S. Supreme Court upheld a Hawaii state court decision allowing, in the name of “public use,” Hawaii’s taking by eminent domain of the property of landlords solely for the purpose of sale to those landlord’s current tenants. Justice O’Connor, in her majority opinion, stated that it “is not essential that the entire community, nor even any considerable portion, directly enjoy or participate in any improvement in order for it to constitute a public use.”

On a more encouraging note, a federal district court in California recently enjoined the City of Lancaster and its redevelopment agency from condemning property on the grounds that such condemnation would violate the “public use” provision of the Takings Clause in the Fifth Amendment because its “condemnation efforts rest[ed] on nothing more than the desire to achieve the naked transfer of property from one private party to another.” *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 2001 WL 811056 (C.D.Cal. 2001). More recently, in July
2004, in *County of Wayne v. Hathcock*, the Michigan Supreme Court addressed the government's power of eminent domain and what constitutes a "public use" under the Takings Clause of the Michigan Constitution. The Court held that the County's intended use, to turning the property over to private businesses, is not a public use.

MSLF will represent Lochness Properties, Inc., when its business property is condemned and will argue that the City of Sheridan lacks the constitutional requirement of "public use." (Joe Becker) (04-5490) (Mentors: Kienzle, Joselyn)

**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 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. MSLF filed Mann’s notice of appeal on October 21, 2002, and the case was docketed in the Federal Circuit 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 the government counsel for inclusion of the government’s materials. The United States filed its response brief on February 19, 2003, and Mann filed his reply brief 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 had breached the lease by failing to provide Mr. Mann with notice prior to terminating his lease, and it reversed and remanded the case for a determination of damages. On July 10, 2003, MSLF filed a bill of costs. On October 17, 2003, the U.S. Treasury paid that bill.

On December 15, 2003, a scheduling conference was held and order issued under which discovery ends on September 24, 2004, and a joint status report is due on October 8, 2004.

On April 29, 2004, the Court, on Mann’s unopposed motion for an extension of time, issued a new schedule under which discovery closes on May 6, 2005, and a joint status report is due on May 20, 2005. (Steve Lechner) (96-3743)


(Constitutional Liberties; Equal Protection) (Counsel for Blaine County, et al.)
(U.S. District Court, Montana, Civil Action No. CV 01-91-GF-SEH)

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

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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.

On October 19, 2004, Judge Haddon ordered that a status conference be held on November 8, 2004, in Great Falls. On October 26, 2004, Blaine County moved to vacate the status conference and stay McConnell until after the Supreme Court takes action on its petition for writ of certiorari, which will be filed on December 6, 2004. On October 27, 2004, the Court granted the motion to vacate and stay and ordered Blaine County to notify the Court of the Supreme Court’s action on its petition. (Scott Detamore) (Mentors: Ruffatto, West) (01-4871)

(Access to Federal Lands)
(Counsel for John 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. Mr. 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. 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 was notified by e-mail 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. The 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, these 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 his easement and access rights; (4) impeded his “implied license to use public lands”; and (5) took his 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, McFarland decided that he could not risk wintering at the property without motorized access and moved his family to Oregon. On June 16, 2000, the Court ordered the parties to file a status report and list of stipulated facts by 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. Motions for Mr. Thode and Mr. Pendley to appear pro hac vice were filed on November 21, 2000, and the list of stipulated facts was filed on November 22, 2000. On January 5, 2001, MSLF filed a notice of intent to participate.

The administrative record was certified on June 25, 2001. A proposed case management order was filed on November 16, 2001, and then issued by the Court.

On about February 4, 2002, Suzanne Lewis, the Glacier National Park Superintendent, contacted Mr. McFarland about settling the dispute. 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.

A settlement conference set for April 3, 2002, was rescheduled for April 9, 2002. On March 26, 2002, MSLF sent the federal government 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, a 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 the first amended complaint. On May 28-31, 2002, 15 witnesses were deposed by the parties in Missoula and Kalispell. On May 30, 2002, the parties moved to extend discovery to June 14, 2002, and extend the briefing schedule by 30 days. That motion and a second motion for extension of time were approved.

On August 7, 2002, MSLF filed a motion for summary judgment and supporting pleadings and the government and defendant-intervenor filed a joint motion for summary judgment and a joint motion to dismiss for lack of subject matter jurisdiction.

On July 9, 2003, the Court denied both motions for summary judgment and granted the joint motion to dismiss. On July 22, 2003, MSLF filed a motion for reconsideration, which was denied on September 15, 2003, as without merit. Judge Molloy again stated that Mr. McFarland could not avoid the time limitations of the Quiet Title Act by bringing his action for title under the Administrative Procedure Act.

On October 1, 2003, MSLF filed McFarland’s notice of appeal. At the settlement assessment conference on December 19, 2003, it was agreed that settlement was not possible. McFarland filed his opening brief and excerpts of record on January 20, 2004; the NPS filed its response on March 22, 2004. The NPCA, incorrectly relying on the extension granted the NPS for the filing of the NPS brief, did not serve its brief until March 18, 2004, by which time the Court had issued the NPCA a deficiency notice for failing to file a brief. On March 30, 2003, the NPCA filed a motion to file its brief late, and on April 15, 2004, the Court granted the motion and ordered the brief filed. The Court ordered that McFarland file his reply brief within 14 days.

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of the date of the order, or by May 3, 2004. The docket indicates that McFarland’s brief was received, but not filed, on April 13, 2004. Apparently, the Court had not file the brief in the event that McFarland wished to submit a revised brief replying also to the NPCA’s brief. MSLF informed the Court that the brief already submitted should be filed and on April 15, 2004, it was.

On December 9, 2004, the Ninth Circuit calendared oral arguments in the case for February 10, 2005, in Seattle at 9:00 a.m. (Alison Roberts) (Mentors: Hill, Kimball) (00-4615)

**MEDELLIN v. DRETKE**

*(Amicus) (Limited and Ethical Government) (Supreme Court, Texas, Case No. 04-5928)*

Jose Ernesto Medellin, a citizen of United States of Mexico, was convicted of capital murder in Texas state court and sentenced to death. He filed a petition for *writ of habeas corpus* in U.S. District Court for the Southern District of Texas. That court denied the petition and, *sue sponte*, denied Mr. Medellin a Certificate of Appealability. The Court of Criminal Appeals affirmed the District Court’s decision and held that Mr. Medellin’s claim of a violation of the Vienna Convention on the Law of Treaties, May 22, 1696, art. 31(1), 8 I.L.M. 4 (1969) (“Vienna Convention”) was either procedurally defaulted and/or did not confer an individually enforceable right. On August 18, 2004, Mr. Medellin appealed to the U.S. Supreme Court. His petition was granted on December 10, 2004, and oral argument is set for March 28, 2005.

The Vienna Convention is a multilateral treaty governing establishment of consular relations and defining a consulate’s functions in receiving nations. In this case, both the District Court and the Court of Appeals held that Mr. Medellin’s claim that he was denied consular assistance in violation of his rights under the Vienna Convention is barred procedurally in federal court. Both courts concluded that, in failing to object to the alleged violation during trial, Mr. Medellin waived his right to assert the claim during post-conviction review. In the *habeas corpus* context, the application of this procedural default doctrine is grounded in concern of comity and federalism. Absent this rule, a federal district court would be able to do in *habeas* what the Court could not do on direct review.

Even if Mr. Medellin was not procedurally barred, he failed to show that he was harmed by lack of notification of the Mexican consulate concerning his arrest for capital murder. In order to obtain relief, he must show concrete, non-speculative harm from the denial of his consular rights. His allegations of prejudice are speculative. The police informed him of his right to legal representation prior to his confession, and he has showed no evidence that, if informed of his consular rights, he would not have waived those rights, as he did his right to counsel. Through his behavior, he failed to show prejudice resulting from the lack of adherence to the Vienna Convention.

The Supreme Court has held that ordinary procedural default rules may bar Vienna Convention claims, but Mr. Medellin argues that International Court of Justice decisions, although in conflict, should be applied. The Supreme Court has made clear that, if a precedent has direct application to a case, the lower courts should follow the case that directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.

The recent debate between Justices Scalia and Breyer on whether the Supreme Court should apply the decisions of foreign courts in interpreting the U.S. Constitution follows the
public outcry that greeted assertions in 2004 by Justice Breyer and Justice Ginsburg that the Court should look to international law for guidance. More recently, Justice O'Connor appeared to join with her two more liberal colleagues on the subject. This case thus presents a very high profile opportunity for the debate to continue in oral arguments.

In its amicus brief, due on February 28, 2005, supporting the State of Texas and Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division, MSJLF will argue that the lower court's ruling was correct and that foreign citizens should not be accorded more rights than citizens of this country. (Jayme Ship) (04-5591) (Mentor: Pos)

**MONTANA SHOOTING SPORTS ASS’N, et al. v. NORTON, et al.**

(Environmental Laws; Access to Federal Lands)

(Counsel for Montana Shooting Sports Association, et al.) (D.C. Circuit, Case No. 04-5434)

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, on that land.

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 drafted several pieces of pro-gun legislation that are now Montana Statutes, and it regularly engages in lobbying for pro-gun legislation and against 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 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.

This ban was imposed allegedly to protect the habitat of the black-footed ferret, an endangered species; 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 neither endangered nor threatened under the Endangered Species Act (ESA). Montana State law classifies these prairie dogs as a non-game species, a classification that provides them no legal protection. 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 BLM, Montana State Director of the BLM, Agent of the Malta Field Office of the BLM, and 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 of Columbia District Court 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 (Civil Action No. 1:01-CV-02011-EGS).

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 designated the administrative record. After review of the documents, MSSA provided the government with a list of concerns and objections on April 8, 2002. Although the Regional Solicitor’s Office attorney in charge of preparing the record was on maternity leave, MSLF was assured that its concerns would be addressed before the status hearing. That hearing was held on May 8, 2002, followed by another on June 11, 2002. The Administrative Record was transmitted to MSLF on July 15, 2002.


On September 29, 2004, the Court denied MSSA’s motion for summary judgment, with prejudice, and granted the BLM’s motion to dismiss. MSSA filed a notice of appeal on November 23, 2004, in D.C. District Court and the notice was transmitted to the D.C. Court of Appeals on November 26, 2004.

On November 30, 2004, the District of Columbia Circuit docketed the appeal. MSSA’s docketing statement and other initial submissions were filed on January 20, 2005.

On February 4, 2005, the government filed a motion for summary affirmance requesting that, in the interests of judicial economy, the Court affirm the ruling below without briefing and argument. MSSA’s response is due on February 22, 2005. (Jayme Ship) (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 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 partial stay and vacated the briefing schedule.

On February 12, 2001, MWA filed its motion for summary judgment. On March 29, 2001, the BLM filed its cross 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 filed a response to that motion on April 12, 2001, but on
April 11, 2001, the Court 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 summary judgment were held on October 22, 2003. On March 31, 2004, the Court denied the motions of the BLM and Macum and granted the MWA’s motion, and it ordered Macum to shut down its pipeline until it rules on a permanent injunction.

On April 9, 2004, the Court set an evidentiary hearing regarding injunctive relief. It ordered each of the parties to file, by May 14, 2004, a brief in support of its proposed scope of injunctive relief, with appropriate citations to the record. Response briefs are due on June 7, 2003, and reply briefs are due on June 21, 2004. In addition, the Court ordered Montana Wilderness Association to file any motions for costs and attorneys’ fees by June 1, 2004.

On April 13, 2004, prior to its receipt of the Court’s April 9th order, Macum served an unopposed motion to lift the preliminary injunction that enjoined Macum from operating its pipeline pending a hearing on permanent injunctive relief. The motion was lodged by the Court on April 16, 2004, and granted on April 23, 2004.

On May 14, 2004, the parties filed briefs regarding the scope of injunctive relief. They filed responses to those briefs on June 7, 2004, and replies on June 21, 2004. An evidentiary hearing regarding a permanent injunction closing Macum’s pipeline was held on July 8, 2004. The hearing was continued after the Court determined much more time was required than had been allowed for the exposition of evidence regarding permanent injunctive relief. On September 27, 2004, the Court ordered that the hearing be continued on January 14, 2005. In its order, the Court held that: (1) it is not within the Court’s authority to rescind oil and gas leases owned by parties not part of this suit; (2) the remaining issues to be decided were whether the Macum pipeline should be removed or its use restricted and whether Macum’s leases should be rescinded or restricted; and (3) because the Court has no jurisdiction over any other leases, no evidence would be taken regarding them at the January 14th hearing. The Court ordered that each of the three parties, MWA, BLM, and Macum, would have two hours during which to call witnesses and make its arguments and that each of the parties was to disclose witness lists to the other parties by January 4, 2004.

On January 14, 2005, the hearing was held. (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, with MRJV’s permission, it agreed.

MRJV’s complaint was filed on October 15, 1999, and an amended complaint was filed on December 10, 1999.


One and one-half years later, on December 6, 2002, MRJV filed an unopposed motion for oral argument, in which it stressed the importance of the case and the need for oral argument. On September 30, 2003, the Court denied the motion without prejudice. (Steve Lechner) (93-3413)

MOUNTAIN STATES LEGAL FOUNDATION v. BUSH, et al.
(Limited and Ethical Government; Access To Federal Lands and Resources)
(Appellant) (Tenth Circuit, Utah, Case No. 04-4132)

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 this lawsuit on August 8, 1997.

A new complaint including additional claims was filed on November 5, 1997 (Civil Action No. 2:97-cv-863) (co-counsel Steve Christiansen), and a case management hearing was set for December 15, 1997, to discuss the voluntary dismissal and new complaint. On December 15, 1997, it filed an amended complaint. At the hearing, Judge Green held that the
voluntary dismissal was valid and that MSLF could proceed with its new lawsuit. On February 3, 1998, MSLF’s suit was consolidated with a suit filed by the Utah Association of Counties (UAC), under that suit’s civil action number, 2:97-cv-479. Previously, on December 23, 1997, a suit filed by the State Institutional Lands Trust Administration (SITLA) (Civil Action No. 2:97-cv-492) had been consolidated with UAC’s suit.

On May 19, 1998, Governor Mike Leavitt and Interior Secretary Babbitt signed an agreement wherein they urged Congress to pass 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. The agreement would effectively remove SITLA from the lawsuit.

On June 9, 1998, the United States moved to stay all proceedings pending congressional disposition of the land exchange agreement. MSLF and UAC filed oppositions to the motion. On July 14, 1998, Magistrate Judge Ronald Boyce refused to stay the entire proceedings, granting only a stay of SITLA’s case.

On September 16, 1998, MSLF and UAC filed summary judgment motions, and on September 30, 1998, the government filed its opposition to the motions. On October 6, 1998, Magistrate Boyce continued summary judgment proceedings pending the government’s compliance with Rule 26 and its response to numerous discovery requests that had been made by MSLF and UAC since the suits were consolidated. The government filed motions to reconsider and to stay the discovery orders with the Magistrate and objections to the Magistrate’s orders with the District Court.

On November 19, 1998, Magistrate Boyce 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 the government produce its initial disclosures by December 21, 1998. On November 19, 1998, the government filed another motion to dismiss based on alleged congressional ratification of the Monument. On December 3, 1998, MSLF and UAC filed responses to the government’s objections to the Rule 56 orders. UAC filed its opposition to the motion to dismiss on December 5, 1998, and MSLF filed its opposition on December 7, 1998. On March 9, 1999, a hearing was held on the motion to dismiss and on August 11, 1999, the motion was denied.

On November 11, 1999, the government 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 government’s motion to dismiss due to congressional ratification. On November 29 and 30, 1999, respectively, UAC and MSLF filed oppositions to the motion. On January 20, 2000, Judge Benson refused, and on July 7, 2000, two judges of the Tenth Circuit declared the Circuit unwilling to overturn the 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 (hereafter, the Wilderness Society) filed a motion to intervene. On April 7, 2000, UAC filed its opposition to the motion, on April 10, 2000, MSLF filed its opposition. On April 17, 2000, the government filed its response, and on April 17, 2000, the Wilderness Society filed its reply. Following a hearing on May 25, 2000, on June 6, 2000, the Court denied the motion to intervene.
On August 2, 2000, the Wilderness Society filed a notice of appeal of the denial of intervention. Oral arguments were held on March 15, 2001, and on July 10, 2001, the Tenth Circuit reversed the lower court's decision and remanded the matter with directions that the District Court grant the application to intervene as of right. 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 (hereafter, the Wilderness Society) filed a renewed motion to intervene, which was 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 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 Magistrate Judge David Nuffer. 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.

Oral arguments were held on January 15, 2004, and on April 19, 2004, the Court granted the government's motion to dismiss and in the alternative for summary judgment and denied, in their entirety, the motions for summary judgment of plaintiffs MSLF and UAC. UAC informed MSLF that it would not appeal the decision.

On June 14, 2004, MSLF filed a notice of appeal, and on June 18, 2004, the case was docketed by the Tenth Circuit. On September 20, 2004, several weeks past the due date for completed transcripts, the Clerk of the Tenth Circuit ordered the Court Reporter to file the transcript by October 4, 2004. On October 6, 2004, the District Court advised the Tenth Circuit that the record was complete for purposes of appeal. Accordingly, MSLF's opening brief and appendix were filed on November 15, 2004. The government's response brief was due on December 20, 2004; however, on December 6, 2004, government counsel requested an extension until January 31, 2005. On December 8, 2004, the Court set all response briefs due on January 19, 2005.

On January 18, 2005, the State of Utah filed a motion for leave to file an amicus brief out of time, on January 28, 2005, and the appellees filed a joint motion for an extension of time to file their response briefs, until February 25, 2005. On January 19, 2005, the clerk submitted both motions to the court for action, and on January 26, 2005, Judges Murphy and O'Brien granted both motions. MSLF's reply is due about March 14, 2005 (17 days from the date of service of the response briefs). (Jayme Ship) (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-0250-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. 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 alleged affected area is along the Front Range of Wyoming and Colorado, from south of Douglas, Wyoming, to north of Colorado Springs,
Colorado. Use of land in this area has been restricted by FWS, and, as a result, farmers, ranchers, and other private property owners are suffering.

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*. Because the mouse cannot reliably be identified, it cannot be counted with any kind of precision and thus should not have been listed as threatened by virtue of its supposedly low population count. In fact, the Preble’s population most likely is much larger than FWS estimates.

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 FWS has designated 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, FWS is required to develop a section 4(d) plan, under which “ongoing agricultural practices” are allowed to continue for three years. In the case of the Preble’s, FWS never provided a final plan; only a 1998 draft plan. If the draft is legally operative, then its section 4(d) protections have expired; if it is not legally operative, then those protections never existed. Regardless, farmers, ranchers, and other land users in the area of critical habitat are at risk.

The various restrictions of the ESA remain in effect until the species “recovers.” FWS is required to put a recovery plan in place as soon as practicable after listing of a species. That 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. FWS has never provided a recovery plan for the Preble’s, and, even if it had, because there are no accurate methods for determining Preble’s populations, the success of the recovery cannot be determined.

FWS is also required to designate area of critical habitat in which the species is protected; it has three options in this regard. 50 C.F.R. § 424.12. First, when the species is listed, FWS may describe a geographic area as designated critical habitat. Second, FWS may admit that it does not know what constitutes critical habitat or where it is located. Third, FWS may declare that describing a geographic area of critical habitat would subject the species to even greater risk of extinction as a result of harassment or vandalism of the species or habitat. In the case of the Preble’s, FWS chose the third option for the Preble’s. Subsequently, Biodiversity Associates sued FWS to force the designation of critical habitat. 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. FWS also agreed to finalize the rule within a year of its publication.

It was believed that habitat would probably include the 100-year floodplain, and the area for 100 meters beyond the floodplain, for numerous creeks and rivers in Colorado and Wyoming, including 70-mile-long Chugwater Creek and 43-mile-long Horse Creek.
Attempts to de-list the species were also begun including scientific inquiries to refute FWS data. As early as July 1999 Congressman Barbara Cubin (WY-R) submitted a petition to FWS seeking de-listing of the species. Her petition lacked data proving the population is large enough not be threatened and merely pointed out that the methodology of FWS was so flawed that its data prove nothing. Later, a private Colorado citizen, Robert Hoff, submitted a petition to de-list.

On July 30, 2002, MSLF filed a 60-day letter of intent to sue under the ESA, partly as a result of FWS refusal to de-list. In the fall of 2002, FWS reopened the comment period until the spring of 2003. On September 26, 2003, MSLF filed a second 60-day letter of intent to sue under the ESA on behalf of the Wheatland Irrigation District and itself.

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, FWS, the Director of FWS, and the Director of Region 6 of FWS. The suit challenged the listing of the Preble’s jumping mouse and the subsequent designation of critical habitat for the mouse. On March 3, 2004, the federal defendants filed an answer.

On March 8, 2004, the Biodiversity Conservation Alliance, Center for Native Ecosystems, and Forest Guardians (hereinafter “Biodiversity Conservation Alliance”) filed a motion to intervene as defendants.

On March 22, 2004, the parties filed a joint motion to stay all proceedings pending a decision by the FWS on petitions filed on December 17, 2003, by the State of Wyoming and by the Coloradoans for Water Conservation and Development to remove the mouse from the list of threatened species based on a recent genetic and morphological study of the mouse by the Denver Museum of Nature and Science that questions the appropriateness of the mouse’s “threatened” status under the ESA. The motion proposed a schedule under which FWS would issue its initial 90-day finding on the petitions by March 22, 2004. If FWS determines that the petitioned action may be warranted, FWS would commence a review of the status of the mouse and would issue its findings within 12 months of receipt of the petitions.

On March 23, 2004, the Biodiversity Conservation Alliance filed its opposition to the joint motion to stay.

On April 8, 2004, at a telephone hearing on the joint motion to stay, Judge Johnson granted the motion to stay proceedings in the case until FWS has acted on the petitions to delist that have been filed. In early 2005, FWS opened a public comments period on the proposed delisting of the Preble's Jumping Mouse, which closes on May 3, 2005. (Chris Massey) (Mentor: Smith) (03-5380)

**NATURAL ARCH AND BRIDGE SOC., et al. v. NATIONAL PARK SERVICE, et al.**
(Constitutional Rights and Liberties; Access To Federal Lands)
(Counsel for Natural Arch and Bridge Society, et al.) (Supreme Court, Utah, Case No. 04-367)

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

The NPS provides "interpreters" at the Monument for crowd control and "to inform visitors that the monument is special, one held sacred by the Navajo . . . . The interpretive program attempts to convey reverence for the uniqueness of Rainbow Bridge, help to 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 visit the Monument, estimated at 250,000-300,000 annually. The Monument is surrounded on three sides by the Navajo reservation. For most visitors the only access 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 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 April 30, 2001, the Court heard arguments on the motions to dismiss and for summary judgment. On April 5, 2002, the Court 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 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; his motion for summary judgment was denied also as to his claim alleging 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 (Case No. 02-4099). The opening brief was filed on November 14, 2002, and the government's 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. On February 7, 2003, MSLF filed a reply brief.

Oral arguments were held on September 15, 2003, and on March 23, 2004, the Tenth Circuit affirmed the District Court's dismissal of Evelyn Johnson's claim for lack of standing and its ultimate dismissal of Earl DeWaal's claim, but for lack of standing, not on the merits of
the case as was done by the District Court. On May 7, 2004, MSLF filed a petition for rehearing en banc with the Tenth Circuit. After receipt of the petition, the Court ordered federal appellees to file a response to the petition by June 1, 2004, which they did.

On June 15, 2004, the Tenth Circuit denied DeWaal and Johnson’s petition for rehearing en banc. On June 28, 2004, the U.S. District Court for the District of Utah filed and docketed the mandate in the case, pursuant to the Tenth Circuit’s order.

On September 13, 2004, MSLF filed a petition for writ of certiorari on behalf of DeWaal and Johnson. The government’s response was initially due on October 17, 2004, but, after two requests for extension of time by the government, their opposition was filed on January 3, 2005. DeWaal’s reply brief was filed on January 12, 2005. (Jayme Ship) (96-3871) (Mentor: Pos)

**PANHANDLE PETROLEUM AND ROYALTY OWNERS ASS’N v. OKLAHOMA TAX COMMISSION**

(Limited and Ethical Government; Equal Protection) (Counsel for PPROA)
(U.S. District Court, Oklahoma (W.D.), Civil Action No. CIV-04-1128-C)

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. Persons who have an Oklahoma address are not subject to this withholding provision. Also excluded are the United States, the State of Oklahoma and any of its subdivisions, federally recognized Indian nations and tribes; nonprofit [501(c)(3)] organizations, and royalty 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, and the withheld monies must be remitted quarterly to the Oklahoma Tax Commission (OTC).

On September 10, 2004, MSLF filed suit in U.S. District Court for the Western District of Oklahoma on behalf of the Panhandle Petroleum and Royalty Owners Association (PPROA) against the OTC. The PPROA is challenging the state withholding requirement for out-of-state residents, asserting that it violates the privileges and immunities clause, the interstate commerce clause, and the Equal Protection Clause. On October 4, 2004, the OTC filed a motion to dismiss for lack of jurisdiction, and on October 22, 2004, PPROA filed its response. On October 25, 2004, the OTC moved for permission to file a reply to PPROA’s response, which was granted on October 28, 2004. On November 4, 2004, the OTC filed its reply (Joe Becker) (Mentor: Haas) (03-5342)

**RAPANOS, et ux, et al. v. UNITED STATES**

(Private Property Rights; Limited and Ethical Government)
(Amicus) (Supreme Court, Michigan, Case No. 04-1043)

On February 4, 2005, the Board of Directors approved the filing of an amicus brief in this case. Petitioners John A. Rapanos and his wife Judith, through their wholly owned companies,
own various parcels of land in Bay, Midland, and Saginaw Counties, Michigan, that Mr. Rapanos attempted to develop for commercial use. Though his property is about 20 miles from the nearest navigable waterway, the United States asserted jurisdiction over the property under the Clean Water Act ("CWA"). Mr. Rapanos was charged with illegally discharging fill material into protected wetlands at these sites between 1988 and 1997.

Criminal charges were brought simultaneously with the instant civil action. In July 1994, the District Court declared a mistrial in Mr. Rapanos’ criminal trial. The proceedings were moved to Flint, Michigan, and on March 7, 1995, the jury in the second trial returned a guilty verdict on two counts. U.S. v. Rapanos, 895 F.Supp. 165, 166 (E.D. Mich. 1995). Following trial, the District Court granted Mr. Rapanos’ motion for a new trial, finding that the court had allowed improperly the United States to pursue a line of questioning that was prejudicial to the defendant. The U.S. Court of Appeals for the Sixth Circuit determined, however, that the line of questioning was not improper and reversed the District Court’s grant of a new trial and remanded the case for sentencing. The District Court sentenced Mr. Rapanos to three years probation and ordered him to pay a $185,000 fine. On appeal, the Sixth Circuit affirmed the conviction but remanded for resentencing. U.S. v. Rapanos, 235 F.3d 256, 261 (6th Cir. 2000).

The U.S. Supreme Court granted Mr. Rapanos’ request for a writ of certiorari, vacating and remanding the order of the Sixth Circuit in light of the Court’s decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). Rapanos v. U.S., 533 U.S. 913 (2001). Following remand from the Supreme Court, the Sixth Circuit remanded the case to the District Court for further consideration. The District Court set aside the conviction, finding that the United States lacked jurisdiction in the wake of the Supreme Court’s ruling in SWANCC. U.S. v. Rapanos, 190 F.Supp.2d 1011 (E.D. Mich. 2002). On appeal, the Sixth Circuit reversed the order of the District Court, reinstated the previous conviction and remanded to the District Court for resentencing. U.S. v. Rapanos, 339 F.3d 447, 454 (6th Cir. 2003). The Sixth Circuit determined that, despite the Supreme Court’s decision in SWANCC, the United States retained jurisdiction over the wetlands at issue by virtue of the CWA. In 2004, the Supreme Court denied Rapanos’ petition for a writ of certiorari regarding the criminal proceedings.

The United States initiated this civil action in February 1994, confining its scope to only one site and naming only Mr. Rapanos as a defendant. In June 1996, the United States added Mrs. Rapanos to the complaint, as well as Prodo, Inc., a company owned by Mr. Rapanos. In February 1998, the United States amended its complaint to add allegations concerning two more sites and another of Mr. Rapanos’ companies.

On March 22, 2000, the District Court found that Mr. Rapanos had filled area of protected wetlands at three sites. The Court concluded that the federal government had established jurisdiction over Mr. Rapanos’ property under the CWA; that is, those filled area met the three criteria for wetlands, i.e., vegetation, soils, and hydrology.

On appeal, Mr. Rapanos argued that the District Court erred in holding that his property is wetlands, and therefore subject to federal jurisdiction under the CWA because it is adjacent to navigable waters of the United States and has a surface connection to those waters. Rejecting Mr. Rapanos’ arguments, the Sixth Circuit determined that, in order for federal jurisdiction to be invoked over Mr. Rapanos’ property as wetlands, the property must bear some connection to navigable waters or interstate commerce. U.S. v. Rapanos, et al., 376 F.3d 629, 635 (6th Cir.

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2004). The Sixth Circuit held specifically that the requirement for CWA jurisdiction over "adjacent waters" is a "significant nexus between the wetlands and navigable waters [] which can be satisfied by the presence of a hydrological connection," no matter how distant or infrequent the connection. *Id.* at 639.

Mr. Rapanos' petition for rehearing *en banc* was denied on November 2, 2004. On January 28, 2005, Mr. Rapanos filed a petition for *writ of certiorari* seeking (1) to resolve the conflict between the Sixth Circuit's precedent and that of the Fifth Circuit interpreting the U.S. Supreme Court's decision in *SWANCC*; and (2) a determination of whether the CWA, as applied to adjacent wetlands, exceeds the Commerce Clause authority of Congress. MSLF's *amicus* brief is due on March 4, 2005. (Chris Massey) (03-5395)

**RICHARDSON v. ANDREA E. TUTTLE, DIRECTOR, CALIFORNIA DEP’T OF FORESTRY AND FIRE PROTECTION, et al.**
(Limited and Ethical Government, Private Property Rights) (Counsel for Harold Richardson) (California Superior Court, Sacramento County, Case No. 04CS00286)

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 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 submitted a revised THP, together with information 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 were conducted 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 the 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. 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. On June 23, 2003, the RPF responded.

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 “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 which 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 Board’s demands. On January 27, 2004, the Department again denied the THP.


On March 8, 2004, MSLF filed a petition for writ of mandate (“petition”) and complaint for unlimited relief (“complaint”) on behalf of Mr. Richardson (“petitioner”) in California Superior Court, County of Sacramento. Mr. Richardson challenges the decision of the Department and the Board (jointly “respondents”) disapproving the THP for his timber holdings and seeks either a permit to harvest his holdings pursuant to the THP or just compensation.

Service of the petition and complaint was accepted by the Department on April 5, 2004, and the Board on April 12, 2004. (Hereafter, the defending parties will be jointly referred to as “the State.”) On April 30, 2004, the parties filed a proposed order and stipulation regarding the State’s response to the petition, and the Court issued that order the same day. Pursuant to the order, on April 30, 2004, Mr. Richardson filed a notice to the State to prepare the administrative record and make a copy of it available to him no later than 60 days from the State’s receipt of the notice, or on or about June 29, 2004. The State’s response to the petition and answer to the complaint will be due within 30 days of receipt of a copy of the record by Mr. Richardson; that is, on about July 29, 2004.

The record was served on July 6, 2004, and the State’s answer filed on August 5, 2004. MSLF will set a hearing date for Spring 2005 with the Court Clerk and issue a notice of hearing to the parties. (Joe Becker) (Mentor: Haas; Local Counsel: Burton Stanley) (04-5403)

ROTH, et al. v. UNITED STATES
(Private Property Rights; Access to Federal Lands)
(Counsel for Roth) (Ninth Circuit, Montana, Case No. 04-35296)

On October 5, 2001, the Board of Directors approved the filing of a quiet title action on behalf of Stephen and Jean Roth arguing that the Roths have 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 refused to renew the special-use permit that the Roths have had for many years. It demanded that the Roths sign either a new special-use permit, which requires payment of annual fees, or a ditch bill easement, under which they relinquish their claim to a right-of-way under the Acts of 1866 and 1891. It issued a legal memorandum, devoid of any legal authority, finding that: (1) because there is insufficient evidence to show that the dam was constructed in the early 1890s, the Roths have no right-of-way under the Act of 1866; (2) the Tamarack Lake Dam does not have pre-FLPMA easement status; and (3) for the Roths to maintain a right-of-way pursuant to either Act, they must proceed with a quiet title action.

On March 11, 2002, MSLF filed a quiet title action on behalf of the Roths (Civil Action No. 02-cv-44). On March 12, 2002, the Court issued a scheduling order for preliminary matters including a case management plan.

On May 15, 2002, the United States served its answer. On August 2, 2002, the parties filed a proposed case management plan, and on August 13, 2002, the Court issued the case management plan under which discovery must be completed by February 7, 2003; the Roths’ motion for summary judgment is due on March 10, 2003; and the government’s motion for summary judgment and its response to the Roths’ motion are due on April 11, 2003. On November 26, 2002, Chief Judge Molloy reassigned the case, for litigation of all proceedings, to Magistrate Judge Leif B. Erickson.

On March 10, 2003, MSLF filed the Roths’ motion for summary judgment and related pleadings. That motion was denied without prejudice because it lacked the required statement about contacting opposing counsel, and 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 that motion and filed the the motion for summary judgment. On April 11, 2003, the government filed a cross-motion for summary judgment and a response to the Roths’ motion for summary judgment. On June 2, 2003, MSLF filed the Roths’ response to the government’s motion and their reply to the government’s response. On June 17, 2003, the government filed its reply. On December 10, 2004, oral arguments were held.

On December 12, 2003, Magistrate Judge Erickson granted the Roths’ motion for partial summary judgment and denied the United States’ cross-motion for summary judgment. He granted the Roths 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. On March 29, 2004, the government filed a notice of appeal.

On April 9, 2004, the Ninth Circuit docketed the appeal and issued a case scheduling order under which the government’s opening brief was due on July 15, 2004. On April 23, 2004, the Ninth Circuit issued an order that the appeal had been selected for consideration for inclusion in the Circuit’s Mediation Program. A settlement assessment conference (telephone) was scheduled for May 28, 2004, then reset and held on June 1, 2004.


On July 7, 2004, because the U.S. Attorney could not be contacted, the conference was rescheduled for July 20, 2004. At that conference, the U.S. Attorney indicated that further
consultation with the Department of Justice was required, and thus a fifth assessment conference was scheduled for July 28, 2004, but subsequently cancelled.

On August 13, 2004, at the request of the U.S. Attorney the briefing schedule was extended by 45 days, with the government’s opening brief due on October 15, 2004. On that same date, a settlement conference attended by Mr. Roth, Ms. Koehler, and the government attorneys was held in Missoula, Montana. After the conference, the U.S. Attorney informed MSLF that he had requested another extension of the briefing schedule so that settlement discussions could continue.

On September 27, 2004, an amended briefing schedule was issued with the government’s opening brief and excerpts of record due on December 15, 2004; the Roths’ response brief on January 14, 2005; and the government’s optional reply 14 days after service of the response brief. On October 20, 2004, a settlement conference was scheduled for December 8, 2004, but the briefing schedule left intact. The December conference was rescheduled and held on November 22, 2004. At that conference, another conference was scheduled for January 7, 2005, and the government’s opening brief reset to February 22, 2005, with the Roths’ brief due 30 days after service of the government’s brief, on March 24, 2005.

On January 19, 2005, the Court set a pre-briefing conference for February 17, 2005, at 10:00 P.S.T. The government’s opening brief is due on April 15, 2005, the Roths’ response on May 16, 2005, and the optional reply on about June 3, 2005. (Alison Roberts) (Local Counsel: Ward Shanahan) (01-4845)

**SANTANIELLO, et al. v. MANHEIM TOWNSHIP SCHOOL DISTRICT AND PENNSYLVANIA DEPARTMENT OF EDUCATION**

(Limited and Ethical Government)

(Counsel for Michael E. Santaniello and others) (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, William J. Albright, John C. Delgrange, Michael E. Santaniello, Richard A. Armellino, Jr., and Emmanuel E. Murry 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.

On July 22, 2004, the Manheim Township school board met to approve construction plans for the new high school. The approved plans were approved by the Pennsylvania Department of Education for approval. An administrative appeal of that decision was filed with the Department of Education by local attorneys for Despard and others. That decision, if negative, must be appealed to the Secretary of Education within 10 days after its issuance. The Secretary’s decision is considered final, and after it is issued litigation can occur.

Because of a conflict, Thomas Despard has withdrawn from participation in this case. Michael E. Santaniello is now primary contact. (Jayme Ship) (03-5390)

**SIERRA CLUB v. EL PASO GOLD MINES, INC.**

(Environmental Laws) *(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. 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 merely a passive property owner that had never engaged in mining activities on its property. Notwithstanding, the District Court held El Paso 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. 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.

On August 5, 2003, the Clerk granted MSLF’s motion for leave to file an amicus brief and granted appellees an overlong answer brief if they wish. On August 15, 2003, the Sierra Club filed a deficient response brief and an acceptable appendix. On August 18, 2003, it filed a corrected brief.

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

On September 18, 2003, El Paso filed its optional reply brief. On October 7, 2003, the Sierra Club filed a motion to strike the reply brief, to which El Paso responded. On October 21, 2003, both the motion and response were referred to the merits panel. Oral arguments were held on May 5, 2004, and a decision is pending.

On January 11, 2005, the three-judge panel issued an order of abatement until April 11, 2005, for the State of Colorado and El Paso to either settle the matter or lift the stay and resume proceedings in the administrative matter before the Colorado Water Quality Control Division ALJ. (Steve Lechner) (Mentor: Pos) (01-4931)

SOUTHERN UTAH WILDERNESS ALLIANCE v.
DABNEY, et al., and UTAH SHARED ACCESS ALLIANCE, et al.
(ACCESS TO FEDERAL LANDS AND RESOURCES)
(Counsel for Defendant-Intervenors/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 most motorized access in those areas covered by the Backcountry Management Plan for Canyonlands National Park and the Orange Cliffs Unit of Glen Canyon National Recreation Area. On December 7, 1995, MSLF filed a motion to
intervene on behalf of the Utah Trail Machine Association, et al. (UTMA), which wishes to keep public roads open.

SUWA and the NPS filed motions for summary judgment, and 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, the NPS and UTMA prevailed on all issues except that Judge Kimball ruled that vehicle use on Salt Creek Canyon Road beyond Peekaboo Spring would permanently impair that part of the Park. On September 23, 1998, Judge Kimball enjoined the NPS from allowing vehicular traffic on the Salt Creek Jeep Trail between Peekaboo Spring and Angel Arch.

On November 23, 1998, MSLF appealed the closure of the Salt Creek Jeep Trail. Oral arguments were held on January 19, 2000, and on August 15, 2000, the Tenth Circuit reversed the District Court's decision and remanded the case to the District Court. On October 23, 2000, the NPS, in defiance of the Tenth Circuit, closed Salt Creek Road beyond Peekaboo Campsite to motorized vehicles (Closure Order I).

On November 17, 2000, the Court ordered all parties to brief the intent of the Tenth Circuit regarding proceedings on remand.

On December 18, 2000, SUWA moved to file a first amended Complaint. On January 30, 2001, a hearing on the motion was held, and on February 1, 2001, the case was stayed pending resolution of the R.S. 2477 issue. The Court agreed that San Juan County and the State of Utah should be added as defendants, and it granted SUWA's motion to file a first amended Complaint. On March 5, 2001, USA-ALL (formerly UTMA) filed its answer, together with a cross-claim challenging legality of the closure of Salt Creek Road beyond Peekaboo Campsite.

On April 19, 2001, SUWA filed a motion for preliminary injunction closing Salt Creek Road. On April 27, 2001, the Court stayed indefinitely proceedings on the motion.

On July 13, 2001, the NPS filed the administrative record regarding the use of motorized vehicles in Salt Creek Canyon. On August 2, 2001, SUWA deposed NPS employee(s) regarding 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, which was granted.

On June 12, 2002, the NPS issued a draft EA on access to Salt Creek Canyon. Following public comment, on September 26, 2002, the NPS issued a FONSI on the EA, and on October 10, 2002, it closed Salt Creek Canyon Road (Closure Order II).

Meanwhile, on August 19, 2002, San Juan 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. The NPS and SUWA filed responses arguing that the Court lacked jurisdiction to decide the R.S. 2477 issue, to which the County and State replied that if the Court lacked jurisdiction to decide the issue then the County and State should be dismissed from the case. Following a hearing on the motions on December 18, 2002, the Court held, on January 15, 2003, that it did lack 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 moved to dismiss the stay of February 1, 2001, and for leave to file a first amended cross claim challenging the legality of the NPS closure of Salt Creek Road beyond Peekaboo Campsite. The motions were granted on May 27, 2003.

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February 2005
On August 11, 2003, the NPS published notice of a proposed rule to prohibit motorized vehicles in Salt Creek Canyon above Peekaboo Campsite. USA-ALL filed comments on the proposed rule on October 9, 2003.

On March 8, 2004, a status and scheduling conference was held. On April 30, 2004, the NPS will file the administrative record regarding closure of Salt Creek Canyon. On about June 30, 2004, the United States will publish a final rule regarding closure of the Canyon, and on July 30, 2004, the parties will file a proposed schedule.

The Final Rule, published on June 14, 2004, closed Salt Creek Canyon to motor vehicles above Peekaboo campsite. On July 12, 2004, the Court issued a scheduling order for litigation of USA-ALL’s cross-claim. On July 30, 2004, the federal defendants supplemented the existing administrative record for the Finding of No Significant Impact, Middle Salt Creek Canyon Access Plan, with the administrative record for the Final Rule amending National Park Service regulations to prohibit motor vehicles in Salt Creek Canyon above Peekaboo Campsite.

On August 13, 2004, USA-ALL filed an amended cross-claim. On September 17, 2004, the National Park Service filed its answer, and on September 20, 2004, SUWA filed its answer. On October 18, 2004, USA-ALL filed a motion that the Court instruct the NPS to provide several thousand comments that were made during the public comment period. SUWA filed a response to that motion on October 27, 2004.

On November 30, 2004, USA-ALL filed its opening brief. Response briefs were due on January 31, 2005; however, on January 28, 2005, the NPS filed an unopposed motion for extension of time for the filing of response briefs by all parties, which motion the Court granted. Response briefs now are due on February 14, 2005, and USA-ALL’s reply is due on March 14, 2005. (Alison Roberts) (Mentor/Local Counsel: Pos) (95-3707)

**THRALL, et al. v. VENEMAN, et al.**

(Private Property Rights) (Counsel for Kathy Thrall, et al.)

(Sixth Circuit, Michigan (W.D.), Case Nos. 98-1153/1204)

On March 13, 1996, MSLF filed a complaint on behalf of Kathy Stupak-Thrall and others regarding the use of Crooked Lake by various riparians. On March 24, 1997, MSLF filed an amended complaint, and on March 31, 1997, it 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 the plaintiffs or by their guests.

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 (denial appealed and affirmed), moved to intervene in the appeal (Case No. 1204). Both cases were stayed while the map survey appeal was considered and status reports were filed with the Court every six months.

On October 3, 2003, a decision in the map survey appeal was issued, and shortly thereafter, a mediation conference in the Forest Service appeal held on October 29, 2003.

On November 7, 2003, a briefing schedule was issued, but on November 17, 2003, Thomas V. Church (a landowner on Crooked Lake) and the Upper Peninsula Environmental

Case Update
February 2005
Coalition (UPEC), et al. (hereinafter, UPEC), again moved to intervene. On December 1, 2003, a new briefing schedule was issued.

On December 3, 2003, MSLF filed its opposition to the motion to intervene and on December 8, 2003, the government filed its response. The movants replied to MSLF’s opposition on December 12, 2003, and to the government’s response on December 18, 2003.

On January 16, 2004, a third briefing schedule was issued, but on February 26, 2004, the Court ordered the case in abeyance pending pre-argument conference work and it ordered the government to file a status report by May 3, 2004, and regularly thereafter.

On March 18, 2004, a three-judge panel denied the motion to intervene as untimely for all movants except Thomas Church. The panel recognized that the movants and the government might have different stakes in the case but stated that there was no indication that, in addressing the merits of its appeal, the government would not vigorously defend the regulation struck down by the district court. In regard to movants’ desire to intervene to participate in settlement negotiations, as well as briefing and arguing the merits, the panel stated that the movants would not have the right to prevent a settlement by the parties.

On January 7, 2005, the Sixth Circuit mediator lifted the stay in the appeal and issued a briefing schedule. The proof copy of the government’s opening brief is due on February 7, 2005; the proof copy of Thrall’s response brief is due on March 14, 2005; and the proof copy of the optional reply brief is due on March 31, 2005.

On February 3, 2005, the Court vacated the briefing schedule and ordered the case held in abeyance and appellant to file a status report by April 18, 2005. (Steven Lechner) (91-3022)

UNITED STATES v. BLAINE COUNTY, MONTANA, et al.
(Constitutional Liberties; Equal Protection)
(Counsel for Blaine County, et al.) (Supreme Court, Montana, Case No. 04-775)

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, and a pretrial conference was held on January 20, 2000.

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 was 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 extension of time in which to file motions for summary judgment. The bench trial, originally scheduled to begin on April 30, 2001, in Great Falls, was rescheduled to begin on June 18, 2001, in Missoula, and last only one week.


On February 27, 2001, the ACLU moved to intervene as plaintiffs on behalf of several individuals and the Fort Belknap Community Council. 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 replied 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 to strike 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 held 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, in Great Falls.

On June 1, 2001, Judge Pro held that the ACLU had failed to show either that their request for intervention was timely or that their interests would not be adequately represented by the United States. He 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, a process that would further delay the trial and prejudice the parties. He denied 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 but stated, however, that Secretary Norton was not a named party in the 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 its intervention. On June 26, 2001, the Ninth Circuit issued the case schedule (Case No. 01-35611), and on July 3, 2001, the ACLU moved to expedite its appeal. On July 20, 2001, the Ninth Circuit denied the motion to expedite. The ACLU filed its opening brief and excerpts of record on October 1, 2001, and on November 13, 2001, Blaine County filed its response and supplemental excerpts. The ACLU filed its reply 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. The case is reported separately 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 the motion; however, 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 had been seeking. He also ordered the exchange of final witness and exhibits lists and exhibits by October 2, 2001, and he ordered the parties to confer regarding objections to exhibits by October 4, 2001. Unresolved objections to exhibits were to be filed, in writing, at the start of trial.

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February 2005
On September 27, 2001, the parties filed trial briefs, findings of fact and conclusions of law, and witness lists. Trial was held October 9-11 and 15-18, 2001. On January 9, 2002, post-trial briefs were exchanged and sent to the Court and Judge Pro.

On March 21, 2002, Judge Pro issued a disappointing Findings of Fact and Conclusions of Law. He held that Blaine County’s at-large system of electing Commissioners violated Section 2 of the Voting Rights Act and he enjoined Blaine County from conducting future elections for Commissioner under that system. He ordered Blaine County to develop, in cooperation with the United States, and file with the Court by April 26, 2002, an election plan for the Board of Commissioners that remedies the violation.

On April 2, 2002, the ACLU, for itself and several Native Americans, filed a motion to intervene in the redistricting phase.

On April 4, 2002, the Ninth Circuit 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.

At a hearing on April 16, 2002, Judge Pro granted the ACLU’s motion to intervene in the redistricting phase. After the hearing, 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 of Judge Pro’s March 21, 2002, decision, despite its belief that the time to appeal would run from the date that the redistricting plan was approved by the Court. On May 21, 2002, the Ninth Circuit docketed the appeal and issued a full briefing schedule.

On June 4, 2002, a telephone hearing was held concerning the redistricting and election plan devised by Blaine County. Over objections by the government and the intervenors, the plan was approved. The plan 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 merits phase of the case.

On July 16, 2002, Blaine County filed a motion to stay the commissioner elections set for September 19, 2002. Responses to that motion were filed on July 23, 2002, and at a telephone hearing on July 25, 2002, Judge Pro denied the motion to stay.

On July 12, 2002, Blaine County filed a notice of appeal of the case as a whole, including the District Court’s approval of a redistricting plan. On August 1, 2002, Blaine County filed an uncontested motion to dismiss its first 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 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 were filed, the appeal would be deemed dismissed with prejudice.

Court denied the motion for stay. 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.

On January 14, 2003, Blaine County filed a shortened opening brief and six volumes of excerpts of record. On January 21, 2002, the Clerk notified MSLF that its excerpts were deficient because two of the six volumes were 30 pages longer than the 300-page volume limit. (The volumes had been divided such that a full day’s trial transcript was in a single volume.) The corrected 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 had been admitted to the District Court case only for purposes of the remedy, which remedy Blaine County is not appealing. [When McConnell, et al., had appealed the District Court’s refusal to admit them to the merits portion of the case, the Ninth Circuit upheld the lower court’s ruling.] On February 28, 2003, McConnell, et al., filed a response to Blaine County’s motion to strike.

The government filed its response brief on March 19, 2003, and on April 21, 2003, Blaine County filed its reply. On November 4, 2003, oral arguments were held.

On April 7, 2004, the Ninth Circuit panel upheld the District Court decision. Blaine County filed a petition for rehearing en banc on May 24, 2004. Shortly thereafter, Commissioner Don Swenson overwhelming won the primary election for Commissioner, which, in mostly Democratic Blaine County, is the election.


On September 7, 2004, the Ninth Circuit denied Blaine County’s petition for rehearing en banc, and on September 15, 2004, it issued the mandate in the case.

Blaine County filed a petition for writ of certiorari on December 6, 2004. The government’s response was due on February 7, 2005; however, the government requested and was granted an extension until March 9, 2005, to file its response. Blaine County’s reply is due on March 21, 2005.

On February 4, 2005, plaintiff-intervenors Joseph McConnell, et al., filed a brief in opposition. These intervenors had been admitted to the District Court case only for purposes of remedy, a decision upheld by the Ninth Circuit. Subsequently, the Ninth Circuit granted Blaine County’s motion to strike when these intervenors attempted to file a brief in the proceedings at the Ninth Circuit, in that the proceedings were an appeal only of the merits of the case, not the remedy. Blaine County’s petition again only involves the merits of the case, and Blaine County
will file a motion to strike McConnell, et al.’s, brief in opposition. (Scott Detamore) (Mentors: Ruffatto, West) (99-4534)

**UNITED STATES v. ENO**

(Access To Federal Lands and Resources; Private Property Rights)
(Counsel for 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. Donald Eno in any claims contest. In 1927, the Federal Government issued a power site withdrawal in the Plumas National Forest in northern California in accordance with the 1910 Pickett Act (repealed 1976), which allows for a temporary withdrawal of public land from settlement, location, sale, or entry for consideration of the land as a power site. The Mining Claims Rights Restoration Act, passed in 1955, allows entry to lands these reserved lands for the location and patent of mining claims and for mining, development, and utilization of those mineral resources. Pursuant to the Act, the locator of a placer claim may not conduct mining operations for 60 days following the filing of a notice of location. Within this time, the Secretary of the Interior must notify the locator of the government’s intent to hold a public hearing before an administrative law judge (P.L. 359 hearing). Mining operations then are suspended until the hearing is held and an appropriate order issued.

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

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

By letter dated September 12, 1996, the California State Office of the BLM notified Mr. Eno that the Secretaries of the Interior and Agriculture intended to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land within the claim, but no hearing date was set.
On August 5, 1997, the U.S. Forest Service filed an application to withdraw an area of 40 acres in the Plumas National Forest from location and entry under the Mining Laws, subject to valid existing rights, so as to protect the Soda Rock area. The area overlaps exactly the Hound Dog placer mining claim. Notice of application and requests for comments and/or public meeting were published on September 16, 1997, in the Federal Register. On August 31, 1999, the BLM issued a Withdrawal of National Forest System Land for the Soda Rock Special Interest Area from location and entry. The area withdrawn contains the 40 acres in the Plumas National Forest. The order was issued pursuant to Section 204 of FLPMA and subject to valid existing rights.

On December 7, 2000, Mr. Eno was notified that his case had been referred to the Sacramento Field Office of Hearings and Appeals for hearing and decision, but no hearing date was set (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, Mr. 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 (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. It also changed the name of the appellee in the case from Burton to Eno. On February 27, 2004, the government filed its statement of reasons, and on April 21, 2004, Mr. Eno filed a response. A decision is pending. (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

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

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

On May 9, 2000, the Air Tour Providers filed a petition for review challenging the Final Rule. On May 30, 2000, the Air Tour Providers filed a motion for stay and emergency relief pending 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), 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 October 26, 2001.

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., filed its opening brief on November 30, 2001. On February 1, 2002, the United States filed its response; on February 28, 2002, 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 regarding the D.C. Circuit's denial of USATA petition for review of the Flight Caps Rule because only one of its clients, AirStar Helicopters, wished to do so and not all of its other clients in the case 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, on December 13, 2002, Pacific Legal Foundation filed a petition for writ of certiorari on behalf of AirStar (case 02-931). On April 21, 2003, the petition was denied.]

MSLF continues to represent all of its 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. In June 2004 MSLF was advised that efforts at alternative dispute resolution (ADR) will be undertaken by the Federal Aviation Administration, the National Park Service, and various interested parties. MSLF will not participate in the ADR process, although individual air tour operators may do so and have so been notified. (Joe Becker) (Mentors: Sullivan, Wilson) (98-4373)

**UNNAMED LOCAL GOVERNMENTS v. U.S. FOREST SERVICE**

(Access to Federal Lands; Limited and Ethical Government; Environmental Laws)

(Counsel for local governments) (U.S. District Court, Colorado)

This case was approved by the Board of Directors on June 4, 2004. The final revised Land and Resource Management Plan ("LRMP") for the Medicine Bow National Forest in southeastern Wyoming was released on January 16, 2004. Rick Cables, Rocky Mountain Regional Forester, selected Alternative D from the Final Environmental Impact Statement. The Plan is a revision of the 1985 LRMP for the Medicine Bow National Forest. The revision process began in the year 2000 and culminated with the Record of Decision signed by the Regional Forester on December 29, 2003.

During the revision process, particularly following the release of the Draft Plan and associated Environmental Impact Statement ("EIS"), members of local communities realized that their interests were not being considered by the Forest Service. Thereafter, certain local government entities obtained "cooperating agency" status, with the right to participate in the planning process in accordance with a Memorandum of Understanding between the parties. This coalition of local governments and timber industry interests hired consultants and

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prepared comprehensive comments as well as a complete forest management alternative that was consistent with federal law and locally approved land use plans.

The Forest Service arbitrarily dismissed the coalition’s management alternative and failed to analyze it properly in the Plan and associated Final Environmental Impact Statement (“FEIS”). Although the coalition’s alternative recognized the dependence of small local communities on the Medicine Bow’s resources in general, water yield issues were a primary focus of the alternative, supported by quality scientific evidence provided by the consultants. The coalition’s alternative demonstrated the interaction between management of fuels for the prevention of catastrophic fires and the management of water on the Medicine Bow National Forest. Documents provided by the coalition established that active and scientifically sound fuel and timber management provides an appropriate yield of timber, increases the water yield of the Medicine Bow, prevents catastrophic fires, and increases biodiversity. The local government coalition sought to increase water yield from the Medicine Bow to protect municipal watersheds, reduce fuels leading to catastrophic wildfire, and enhance habitat for endangered species both in the Medicine Bow and downstream.

The Forest Service dismissed water yield as a significant management goal. In accordance with regional office instructions “to eliminate water yield (MA 5.21) as a management prescription option,” it designated no areas as Water Yield Management Areas. Citing Coalition for Sustainable Resources v. United States Forest Service, 259 F.3d 1244 (10th Cir. 2001), a lawsuit brought by MSLF, the Forest Service stated that “[d]esires to maximize water yield from Forest management activities are largely driven by the desire to increase timber harvest and promote recovery of endangered species dependent on instream flows in the Platte River ‘in a manner which avoids interference with private property.’” FEIS 2-21. Thus, the Forest Service elected to ignore a basic purpose of national forests without sound scientific support for its decision.

MSLF will represent local governments in southern Wyoming and perhaps an affected timber industry association in an action under the APA challenging the final, revised Forest Plan for the Medicine Bow National Forest. MSLF will argue that the final plan violates the National Forest Management Act, Multiple Use and Policy Act, and National Environmental Policy Act, as well as various federal regulations, as a result of the Forest Service’s failure to properly consider the input of local governments in accordance with law. (Chris Massey) (Mentors: Hill, Mead) (03-5358)

**UNNAMED MONTANA RESIDENT(S) v. STATE OF MONTANA**

(Private Property Rights, Limited and Ethical Government, Equal Protection)

(Counsel for Montana residents) (U.S. District Court, Montana)

This case was approved by the Board of Directors on February 6, 2004. Montana Code, Section 87-1-304, 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. It will rely heavily on Morton v. Mancari, 417 U.S. 535 (1974), which explicitly considers whether laws that 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 misjudged 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 STUDENT(S) v. WESTERN UNIVERSITY(S)**
(Equal Protection) (U.S. District Court, California, Montana, California, Utah, and/or Oregon)

Because no student indicated an interest in challenging the legality of these exclusionary programs, approval for this case was revoked at the February 4, 2005, meeting of the Board of Directors. (Joe Becker) (03-5327)

**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. On October 13, 1999, President Clinton issued a directive to the Secretary of Agriculture instructing the U.S. Forest Service (Forest Service) to develop regulations for the National Forest System (NFS) 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, the Forest Service published a Notice of Intent to complete an Environmental Impact Statement (EIS) outlining alternatives for the protection of roadless areas. In May 2000, a draft EIS was issued and on May 10, 2000, regulations were proposed. On November 13, 2000, the final EIS was issued. On January 12, 2001, the Record of Decision and final rule were issued, to become effective on March 13, 2001. The final rule prohibited, with significant exceptions, new roads in inventoried roadless areas and most timber harvests in roadless areas, it did allow cutting under certain circumstances. These same prohibitions also
applied to the Tongass National Forest, but in the Tongass certain road and harvest activities already in place could go forward.

The final rule (Roadless Rule) was more restrictive than either the proposed rule or the preferred alternative. It imposed, effective immediately, national- and Service-wide limitations on road construction and reconstruction in inventoried roadless areas throughout the National Forest System and imposed prohibitions on timber harvesting in those areas. It allowed the cutting and sale of timber from inventoried roadless areas only in limited situations.

As soon as the Record of Decision was issued, numerous lawsuits were filed, including: State of Wyoming v. USDA, Civil Action No. 01-cv-00086-CAB (D. Wyo.); Kootenai Tribe of Idaho v. Veneman, Civil Action No. CV-01-10-N (D. Idaho); Communities for a Great Northwest v. Veneman, Civil Action No. 1:00-cv-01394 (D.D.C.); American Forest & Paper Ass’n v. Veneman, Civil Action No. 01-cv-00871 (D.D.C.); State of Alaska v. United States Department of Agriculture, Civil Action No. A01-039CV (D. Alaska); State of Utah v. United States Forest Service, Civil Action No. 2:01CV00277B (D. Utah); and Billings County v. Veneman, Civil Action No. A1-01-045.

On May 18, 2001, the State of Wyoming filed suit against the Department of Agriculture 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, Judge Brimmer permanently enjoined implementation of the Roadless Rule, holding that, in its “mad dash to complete the Roadless Initiative before President Clinton left office,” the Forest Service complied only pro forma with NEPA and had violated both NEPA and the Wilderness Act. He held that promulgation of the Roadless Rule violated NEPA in that: (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.

Judge Brimmer held that through promulgation of the Roadless Rule the Forest Service had created 58.5 million acres of de facto wilderness, in violation of the Wilderness Act. He declined to rule on the State’s National Forest Management Act and Multiple Use and Sustained Yield Act claims.

On July 21, 2003, various environmental groups (hereinafter, the Wyoming Outdoor Council) appealed Judge Brimmer’s decision (Case No. 03-8058). On September 29, 2003, the State of Wyoming filed a motion to dismiss the appeal.

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On October 3, 2003, MSLF was authorized by the Board of Directors to file an amicus brief on behalf of itself and Communities for a Great Northwest, Lincoln County, Montana, and Montana Coalition of Forest Counties (hereinafter, MSLF), asserting that the Roadless Rule was promulgated in violation of the NEPA and that it administratively created de facto wilderness, not using procedures set forth in the Wilderness Act.

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 them until November 6, 2003, to file a response to the motion to dismiss.

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

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

On November 13, 2003, the United States filed an amicus brief supporting 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 its 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 amicus brief of the United States and to file an overlong response. The Court referred all pleadings related to MSLF’s amicus brief to the panel selected to hear the motion to dismiss.

On November 25, 2003, the Wyoming Outdoor Council filed an opposition to Wyoming’s motion to dismiss, and on December 8, 2003, Wyoming replied. On December 24, 2003, the United States filed supplemental authority to its amicus brief.

On May 11, 2004, the Court ordered that Wyoming’s motion to dismiss and all related briefing be submitted to the merits panel, together with briefing on the merits. It ordered the Wyoming Outdoor Council to file its opening brief and appendix by June 21, 2004.

On June 9, 2004, the Wyoming Outdoor Council filed an unopposed motion for extension of time until July 1, 2004, to file its opening brief. On July 1, 2004, the Wyoming Outdoor Council filed its brief and appendix, which on July 7, 2004, were ruled deficient by the Clerk.


On July 14, 2004, the United States filed supplemental authority. During that week, the Bush Administration withdrew the roadless rule and issued a notice for proposed rulemaking for roads and roadless areas on federal lands, in particular National Forest lands. Also, on July 14, 2004, the State of Wyoming requested and was granted, on July 15, 2004, an extension of time.
until August 19, 2004, to file its response. On July 27, 2004, the State of Wyoming filed a motion to declare the appeal moot and dismiss the case, a motion to stay briefing, and supplemental authority. On July 30, 2004, the Outdoor Council filed its response to the motion to dismiss, and on August 2, 2004, its response to the motion to stay briefing, together with a request that briefing be resumed.


On October 7, 2004, the Tenth Circuit issued an order reserving judgment on the State of Wyoming’s motion to dismiss, which motion will be submitted to the merits panel for determination. It also denied the State’s motion to toll briefing and ordered the State to file its response brief within 30 days of its order, or on November 8, 2004, which it did.

*Amicus* briefs in support of the State’s position were filed by the United States; Forest Service Employees for Environmental Ethics; American Forest and Paper Association; State of Idaho; MSLF; Colorado Mining Association, Utah Mining Association, Wyoming Mining Association, and Western Business Roundtable; Blue Ribbon Coalition; Idaho State Snowmobile Association and American Council of Snowmobile Associations; Wyoming Association of Conservation Districts, Wyoming Farm Bureau Federation, Wyoming Stock Growers Association, Petroleum Association of Wyoming, Billings County (North Dakota), and Rocky Mountain Region of People for the U.S.A.; and State of Utah.

Wyoming Outdoor Council’s reply was filed on December 10, 2004. (Alison Roberts) (03-5315)

**WYOMING SAWMILLS, INC. v. U.S. FOREST SERVICE, et al.**

(Constitutional Rights; Access To Federal Lands and Resources)

(Counsel for Wyoming Sawmills, Inc.) (Tenth Circuit, Wyoming, Case No. 02-8009)

This case was approved by the Board of Directors on February 6, 1998. Wyoming Sawmills, Inc., 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 1980s, it received 80-100 percent of its timber from the Bighorn National Forest. In the early 1990s 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 since 1990 the Bighorn Forest has sold an average of only 2.4 MMBF per year.

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 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 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 abrogates the Forest Service’s authority to special interest groups and 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 near the Medicine Wheel arguing chiefly that the HPP represents an unconstitutional establishment of religion and that the consultation process used to formulate the HPP violated the Federal Advisory Committee Act. The government filed its answer on April 22, 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. On September 27, 1999, Wyoming Sawmills filed a response to the motion to dismiss. Additional briefs were filed by both sides on October 12, 1999, and Wyoming Sawmills filed an amended Complaint with a motion to amend.

At a hearing on October 18, 1999, Wyoming Sawmills’ motion to amend its Complaint was denied. On October 26, 1999, Wyoming Sawmills filed a brief concerning issues raised at the hearing.

On December 6, 2001, the Court granted the government’s motion to dismiss. Wyoming Sawmills filed a notice of appeal on January 30, 2002. A telephone mediation conference was held on April 2, 2002, and 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 were accessed only using roads in the HPP.


On November 1, 2002, the National Congress of American Indians and National Trust for Historic Preservation and the Becket Fund for Religious Liberty and “various Christian, Jewish
and Muslim organizations" filed amicus briefs in support of appellees. Wyoming Sawmills filed a reply, and on May 6, 2003, oral arguments were held.

On September 7, 2004, the Forest Service filed supplemental authority in the case, and on September 14, 2004, MSLF filed supplemental authority.

On September 20, 2004, the Tenth Circuit affirmed the District Court's opinion. On November 4, 2004, MSLF filed a petition for rehearing en banc on behalf of Wyoming Sawmills, and on December 3, 2004, the Court denied the petition, without polling the Court. A petition for writ of certiorari, if filed, would be due on March 2, 2005. (Chris Massey) (Mentor: Runft) (97-4019)
BOARD OF LITIGATION

Stephen C. Balkenbush, Esq.
Thorndal, Armstrong, Delk, Balkenbush and Eisinger
6590 South McCarran Boulevard, Suite B
Reno, NV  89509-6122
(775) 786-2882; FAX (775) 786-8004; e-mail: sbalkenbush@thorndal.com

L. Michael Bogert, Esq.
Counsel to the Governor
State Capital
700 West Jefferson
Boise, ID  83720
(208) 334-2100; FAX (208) 334-2175; e-mail: mbogert@gov.state.id.us

Dale Cockrell, Esq.
Christensen, Moore, Cockrell, Cummings and Axelberg
Two Medicine Building
160 Heritage Way
Kalispell, MT  59904-0370
(406) 751-6003; FAX (406) 756-6522; e-mail: dcockrell@cmccalaw.com

John M. Daly, Esq.
Daly Law Associates, P.C.
510 South Gillette Avenue
Gillette, WY  82716-4204
(307) 682-5141; FAX (307) 682-7051; e-mail: wyolaw@vcn.com

Maurice O. Ellsworth, Esq.
Perry and Associates, P.C.
P.O. Box 637
Boise, ID  83701
(208) 338-1001; FAX (208) 338-8400; e-mail: moe@perrylawpc.com

David A. Garcia, Esq.
9301 Indian School Road, NE, Suite 103
Albuquerque, NM  87112
(505) 293-0212; FAX (505) 293-0219; e-mail: lowthorpe@msn.com
Board of Litigation
Page Two

Samuel D. Haas, Esq.
Thompson and Knight, LLP
175 Calle Ventoso West
Santa Fe, NM 87506
(505) 988-5864; FAX (505) 988-5865; e-mail: samhaas@msn.com

David G. Hill, Esq.
Berg Hill Greenleaf and Ruscetti
1712 Pearl Street
Boulder, CO 80302
(303) 402-1600; FAX (303) 402-1601; e-mail: dgh@bhgrlaw.com

Daniel A. Jensen, Esq.
Parr Waddoups Brown Gee and Loveless
185 South State Street, Suite 1300
Salt Lake City, UT 84111
(801) 532-7840; FAX (801) 532-7750; e-mail: daj@pwlaw.com

Alan L. Joselyn, Esq.
Gough, Shanahan, Johnson and Waterman
P.O. Box 1715
Helena, MT 59624-1715
(406) 442-8560; FAX (406) 442-8783; e-mail: alj@gsjw.com

John K. Keller, Esq.
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
Columbus, OH 43215
(614) 464-6389; FAX (614) 719-4794; e-mail: jkkeller@vssp.com

Paul M. Kienzle III, Esq.
Scott and Kienzle, P.A.
201 Third Street NW, Suite 1570
Albuquerque, NM 87103
(505) 246-8600; FAX (505) 246-8682; e-mail: PaulKienzle@aol.com

David P. Kimball III, Esq.
Gallagher and Kennedy, P.A.
2575 East Camelback Road
Phoenix, AZ 85016-4240
(602) 530-8221; FAX (602) 530-8500; e-mail: dpk@gknet.com
Board of Litigation
Page Three

Max Main, Esq.
Bennett, Main and Gubbrud, P.C.
618 State Street
Belle Fourche, SD  57717-1489
(605) 892-2011; FAX (605) 892-4084; e-mail: bellelaw@bellelaw.com

Katherine L. Mead, Esq.
Mead and Mead
P.O. Box 1809
Jackson, WY 83001
(307) 733-0166; FAX (307) 733-7590; e-mail: meadlaw@wyoming.com

Lee E. Miller, Esq.
Burns, Figa and Will, P.C.
6400 South Fiddlers Green Circle, Suite 1030
Englewood, CO 80111
(303) 796-2626; FAX (303) 296-2777; e-mail: lmiller@bfw-law.com

Michael R. Montero, Esq.
Lemons, Grundy and Eisenberg
6005 Plumas Street, Suite 300
Reno, NV 89509-6000
(775) 786-6868; FAX (775) 786-9716; e-mail: mrm@lge.net

Krista L. Mutch, Esq.
Director, Government and Public Relations
Western Gas Resources, Inc.
1099 18th Street, Suite 1200
Denver, CO 80202-5603
(303) 452-5603; FAX (303) 252-6150; e-mail: kmutch@westerngas.com

Holland and Hart
555 – 17th Street, Suite 3200
Denver, CO 80202-3979
(303) 295-8291; FAX (303) 713-6263; e-mail: todonnell@hollandhart.com

Hal J. Pos, Esq.
Parsons Behle and Latimer
P.O. Box 45898 (84145)
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
(801) 532-1234; FAX (801) 536-6111; e-mail: hpos@pblutah.com
Steven Ruffatto, Esq.
Crowley, Haughey, Hanson, Toole and Dietrich
P.O. Box 2529
Billings, MT 59103-2529
(406) 252-3441; FAX (406) 256-8526; e-mail: sruffatto@crowleylaw.com

John L. Runft, Esq.
Runft and Steele Law Offices, PLLC
1020 West Main Street, Suite 400
Boise, ID 83702
(208) 333-8506; FAX (208) 343-3246; e-mail: jlrunft@runftlaw.com

Bruce M. Smith, Esq.
Moore, Smith, Buxton and Turcke
225 North 9th Street, Suite 420
Boise, ID 83702
(208) 331-1800; FAX (208) 331-1202; e-mail: bms@msbtlaw.com

Burton J. Stanley, Esq.
600 Laurel Drive
Sacramento, CA 95864-5665
(916) 485-5782; FAX (916) 485-0441; e-mail: burtstanley@prodigy.net

Mark D. Stubbs, Esq.
Filmore Spencer, LLC
3301 North University Avenue
Provo, UT 84604
(801) 426-8200; FAX (801) 426-8208; e-mail: mstubbs@fillmorespencer.com

Patrick Sullivan, Esq.
Winston and Cashatt
1900 Seafirst Financial Center
West 601 Riverside
Spokane, WA 99201-0695
(509) 838-6131; FAX (509) 838-1416; e-mail: psullivan@winstoncashatt.com

William J. Thomson, Esq.
Dray, Thomson and Dyekman, P.C.
204 East 22nd Street
Cheyenne, WY 82001
(307) 634-8891; (307) 634-8902; e-mail: bill.thomson@draylaw.com
Fred R. Wagner, Esq.
Beveridge and Diamond, P.C.
1350 I Street, NW, Suite 700
Washington, DC 20005-3311
(202) 789-6041; FAX (202) 789-6190; e-mail: fwagner@bdlaw.com

David W. West, Esq.
9249 North Deer Trail Road
Maricopa, AZ 85239-4917
(602) 263-7891; FAX (520) 568-2944

Stewart R. Wilson, Esq.
Wilson and Barrows, Ltd.
442 Court Street
Elko, NV 89801
(775) 738-7271; FAX (775) 738-5041; e-mail: s.wilson@wilsonandbarrows.com
BOARD OF DIRECTORS

Mr. Steven K. Bosley
825 Pinehurst Court
Louisville, CO 80027
(303) 604-2313; FAX (303) 604-2313; e-mail: skboz@earthlink.net

Mr. Peter A. Botting
President and Chief Executive Officer
W.A. Botting Company
20300 Woodinville-Snohomish Road, NE
P.O. Box 1200
Woodinville, WA 98072
(425) 483-7500; FAX (425) 483-7610; e-mail: pete@wabotting.com

Mr. Stephen M. Brophy
President
Page Land & Cattle Co.
1715 West Northern, Suite 104
Phoenix, AZ 85021
(602) 870-4800; FAX (602) 870-9636; email: sbrophy@pagelandco.com

Mr. George G. Byers
5901 West Lehigh Avenue, #12
Denver, CO 80235
(303) 987-3875; e-mail: gbyers11@comcast.net

Ms. Cynthia M. Chandley
Ryley Carlock and Applewhite
One North Central Avenue, Suite 1200
Phoenix, AZ 85004-4417
(602) 258-7701; FAX (602) 257-6951; e-mail: cchandley@rcalaw.com

The Honorable Helen Chenoweth-Hage
Pine Creek Ranch
Monitor Valley
P.O. Box 513
Tonopah, NV 89049
(775) 482-4187; cell (775) 482-4184; e-mail: helenhage@directway.com
Mr. Demar Dahl  
Demar Dahl Company, LLC  
40 East Center Street, Suite 22 (89408)  
P.O. Box 266  
Fallon, NV 89407  
(775) 423-4870; FAX (775) 428-2898; e-mail: demar@phonewave.net

Mr. Patrick P. Davison  
Davison LLC  
P.O. Box 7195  
Billings, MT 59103-7195  
(406) 256-1011; FAX (406) 259-3932; e-mail: patdavison1@qwest.net

Peter K. Ellison, Esq.  
Ellison Ranching Company  
7515 South 2340 East  
Salt Lake City, UT 84121  
(801) 531-2000; e-mail: ellisonutah@msn.com

Mr. John R. Gibson  
Chairman, President and Chief Executive Officer  
American Pacific Corporation  
3770 Howard Hughes Parkway, Suite 300  
Las Vegas, NV 89109  
(702) 735-2200; FAX (702) 794-2429; e-mail: jogibson@APFC.com

Mr. James P. Graham  
Chairman, President and Owner  
Palo Petroleum, Inc.  
5944 Luther Lane, Suite 900  
Dallas, TX 75225  
(214) 691-3676; e-mail: jgraham@palopetro.com

Mr. Thomas M. Hauptman  
President  
T-K Production Company  
2812 First Avenue North, Suite 408 (59101)  
P.O. Box 2235  
Billings, MT 59103-2235  
(406) 259-8480; FAX (406) 259-2124; cell (406) 698-1442; e-mail: hauptman@aol.com
**Board of Directors**
Page Three

Dallas P. Horton, DVM, MS
Horton Feedlot and Research Center
134 Oak Avenue
Eaton, CO 80615
(970) 454-3000; FAX (970) 454-2432; e-mail: hortoncattle@aol.com

Mr. Peter W. Hummel
President
Eagle Exploration, Inc.
P.O. Box 10350
Reno, NV 89510
(775) 786-4000; FAX (775) 786-4888; e-mail: pwheagleoil@aol.com

Mr. Jerry D. Jordan
President
Jordan Energy, Inc.
795 Old Woods Road
Columbus, OH 43235-1248
(614) 885-4828; FAX (614) 573-6399; e-mail: jjmaw@yahoo.com

Mr. John F. Kane
Kane Cattle Company
110-1/2 East Frank Phillips (74003)
P.O. Box 729
Bartlesville, OK 74005
(918) 336-4900; FAX (918) 336-4902; e-mail: jfkane@kanecattle.com

Ms. Karen D. Kennedy
Kennedy Oil
700 West 6th Street
Gillette, WY 82716
(307) 686-1081; FAX (307) 682-6060; e-mail: kennedywipa@vcn.com

Mr. Ronald M. Krump
Founder and Chairman of the Board
Krupp Construction, Inc.
825 Steneri Way
Sparks, NV 89431
(775) 358-5679; FAX (775) 358-1346; home (775) 853-5043
Mr. Duke R. Ligon  
Senior Vice President and General Counsel  
Devon Energy Corporation  
20 North Broadway  
Oklahoma City, OK 73102-8260  
(405) 552-4604; FAX (405) 228-4299; duke.ligon@dvn.com

Mr. David L. McClure  
President  
Montana Farm Bureau  
530 Trestle Lane  
Lewistown, MT 59457  
(406) 538-9874; FAX (406) 538-9874 (call first); e-mail: dmclure@lewistown.net

Ms. Myra Monfort-Runyan  
4376 Woody Creek Lane  
Fort Collins, CO 80524  
(970) 472-5145; FAX (970) 622-0330; e-mail: mmonfort@aol.com

Mr. David Allen New  
Vice President, Timberland Resources  
Boise Cascade Corporation  
1111 West Jefferson Street  
Boise, ID 83702  
(208) 384-6140; FAX (208) 384-7699; e-mail: davenew@bc.com

John R. Pitts, Esq.  
Akin Gump Strauss Hauer and Feld, LLP  
300 West 6th Street  
Austin, TX 78701  
(512) 499-6200; FAX (512) 499-6290; e-mail: jpitts@akingump.com

Mr. Frank S. Priestley  
President  
Idaho Farm Bureau  
3473 South 3200 East  
Franklin, ID 83237-5019  
(208) 646-2424; FAX (208) 646-2696; e-mail: fpriestley@idahofb.org
Board of Directors
Page Five

Mr. David B. Rovig
Rovig Minerals, Inc.
510 First Citizens Bank Building
Billings, MT 59101
(406) 245-9520; FAX (406) 245-7719; e-mail: rovigminerals@imt.net

Mr. Steve Schalk
President
Arapahoe Drilling Company, Inc.
P.O. Box 26687
Albuquerque, NM 87125
(505) 881-6649; FAX (505) 881-1070

Mr. Mark S. Sexton
President and Chief Executive Officer
Evergreen Energy Company
1000 Writer Square, 1512 Larimer Street
Denver, CO 80202
(303) 339-4665; FAX (303) 339-4666; e-mail: msexton@evgenenergy.com

Mr. Don Shawcroft
Vice President
Colorado Farm Bureau
25001 South Highway 285
Alamosa, CO 81101
e-mail: dshawcroft@colofb.com

Mr. L. Jerald Sheffels
9523 Douglas Road East
Wilbur, WA 99185
(509) 647-2213; FAX (509) 647-2066; e-mail: jerry@sheffels.com

Mr. Conley P. Smith
Independent Oil and Gas Operator
1000 Writer Square, 1512 Larimer Street
Denver, CO 80202
(303) 339-4666; FAX (303) 339-4672; cell: (303) 918-0555

Mr. Don L. Sparks
Chairman
Discovery Operating, Inc.
800 North Marienfeld, Suite 100
Midland, TX 79701-3382
(432) 683-5203; FAX (432) 687-1930; e-mail: dsparkediscoveyoperator.com
Board of Directors
Page Six

Ms. Debra W. Struhsacker
Vice President, U.S. Governmental and Regulatory Affairs
Kinross Gold USA, Inc.
3610 Big Bend Lane
Reno, NV  89509
(775) 823-8533; FAX (775) 829-1666; e-mail: debra.struhsacker@kinross.com

Dr. James V. Taranik
Regents Professor
Mackay School of Earth Sciences and Engineering
Mail Stop 168
University of Nevada
Reno, NV 89557-0138
(775) 784-6987 ext. 234; FAX (775) 784-1766; e-mail: jtaranik@ mines.unr.edu

Mr. Diemer True
Partner
True Companies
895 West Rivercross Road (82601)
P.O. Drawer 2360
Casper, WY  82602
(307) 237-9301; FAX (307) 266-0373; e-mail: diemertrue@truecos.com

Mr. Terry T. Uhling
Senior Vice President, Secretary and General Counsel
J.R. Simplot Company
9999 Main Street, Suite 1300 (83702)
P.O. Box 27
Boise, ID  83707-0027
(208) 389-7317; FAX (208) 389-7464; e-mail: terry.uhling@simplot.com

Mr. Paul T. von Gontard
Melody Hereford Ranch
P.O. Box 949
Jackson, WY  83001
(307) 733-3374; FAX (307) 733-1116; e-mail: pvg@pvgmr.com

Mr. R. Bruce Whiting
4602 East Thomas Road
Phoenix, AZ  85018
(602) 952-6999; FAX (602) 952-6972; e-mail: bruce@brucewhiting.com
Board of Directors
Page Seven

Mr. Frank Yates, Jr.
President
MYCO Industries, Inc.
105 South 4th Street (88210)
P.O. Box 840
Artesia, NM 88210-0840
(505) 748-4410; FAX (505) 748-4586; e-mail: mgtdpt@ypcnm.com