Form 990
Return of Organization Exempt From Income Tax

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

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

A For the 2006 calendar year, or tax year beginning

B Name of organization

C MOUNTAIN STATES LEGAL FOUNDATION

D Employer identification number

84-0736725

E Telephone number

303-292-2021

F Accounting method

X Accrual

G Website

WWW.MOUNTAINSTATESLEGAL.ORG

H Are there other organizations related to your organization?

No

I Group Exemption Number

N/A

J Organization type

X 501(c)(3)

K Check here if the organization is not a 509(a)(3) supporting organization and its gross receipts are not more than $50,000. A return is not required, but if the organization chooses to file a return, be sure to file a complete return

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

2,617,269

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

1 Contributions, gifts, grants, and similar amounts received

a Contributions to donors (not included on line 1a)

2,436,842

b Direct public support (not included on line 1a)

c Indirect public support (not included on line 1a)

d Government contributions (grants) (not included on line 1a)

2,436,842

e Total (add lines 1a through 1d) (cash $ 2,436,842. Noncash 3,636.)

1e 2,436,842

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

25,225

3 Membership dues and assessments

4 Interest on savings and temporary cash investments

44,501

5 Dividends and interest from securities

6a Gross rents

6b Less rental expenses

6c Net rental income or (loss) Subtract line 6b from line 6a

7 Other investment income (describe )

7

8 Gross amount from sales of assets other than inventory

(A) Securities

(B) Other

3,959

4,078

-119

STMT 1 STMT 2

8d -10,197

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

10 Gross sales of inventory, less returns and allowances

10a

10b Less cost of goods sold

11 Other revenue (from Part VII, line 103)

12 Total revenue (lines 1a through 11, 1b, 1c, 10c, and 11)

13 Program services (from line 4 of Part V, column (C))

14 Management and general (from line 4 of Part V, column (C))

15 Fundraising (from line 9 of Part V, column (C))

16 Payments to affiliates (attach schedule)

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

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

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

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

21 Net assets or fund balances at end of year. Combine lines 18, 19, and 20

SEE STATEMENT 3

2006 Open to Public Inspection

OMB No. 1545-0047

Form 990 (2006)

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

LHA

01-18-07
<table>
<thead>
<tr>
<th>Do not include amounts reported on line 6b, 8b, 9b, 10b, or 16 of Part I</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>22a Grants paid from donor advised funds (attach schedule)</td>
<td>225,000</td>
<td>191,250</td>
<td>11,250</td>
<td>22,500</td>
</tr>
<tr>
<td>(cash $ 0, noncash $ 0)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22b Other grants and allocations (attach schedule)</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(cash $ 0, noncash $ 0)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>23 Specific assistance to individuals (attach schedule)</td>
<td>23</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24 Benefits paid to or for members (attach schedule)</td>
<td>24</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>25a Compensation of current officers, directors, key employees, etc listed in Part V-A STMT 5</td>
<td>648,091</td>
<td>497,664</td>
<td>50,064</td>
<td>100,363</td>
</tr>
<tr>
<td>25b Compensation of former officers, directors, key employees, etc listed in Part V-B</td>
<td>33,701</td>
<td>24,966</td>
<td>3,177</td>
<td>5,558</td>
</tr>
<tr>
<td>25c Compensation and other distributions, not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)</td>
<td>142,658</td>
<td>97,728</td>
<td>18,503</td>
<td>26,427</td>
</tr>
<tr>
<td>25 Salaries and wages of employees not included on lines 25a, b, and c</td>
<td>62,200</td>
<td>47,912</td>
<td>4,667</td>
<td>9,621</td>
</tr>
<tr>
<td>26c Professional fundraising fees</td>
<td>813,769</td>
<td>610,327</td>
<td></td>
<td>203,442</td>
</tr>
<tr>
<td>27 Pension plan contributions not included on lines 25a, b, and c</td>
<td>31,843</td>
<td>25,474</td>
<td>6,369</td>
<td></td>
</tr>
<tr>
<td>28 Employee benefits not included on lines 25a - 27</td>
<td>952</td>
<td>790</td>
<td>162</td>
<td></td>
</tr>
<tr>
<td>29 Payroll taxes</td>
<td>51,414</td>
<td>39,081</td>
<td>8,004</td>
<td>4,329</td>
</tr>
<tr>
<td>30 Accounting fees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>31 Legal fees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>32 Supplies</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33 Telephone</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>34 Postage and shipping</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>35 Occupancy</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>36 Equipment rental and maintenance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>37 Printing and publications</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>38 Travel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39 Conferences, conventions, and meetings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40 Interest</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>41 Depreciation, depletion, etc (attach schedule)</td>
<td>299,077</td>
<td>174,708</td>
<td>27,959</td>
<td>96,410</td>
</tr>
<tr>
<td>a</td>
<td>2,587,741</td>
<td>1,776,094</td>
<td>147,121</td>
<td>664,526</td>
</tr>
<tr>
<td>b</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d</td>
<td></td>
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<td></td>
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<tr>
<td>e</td>
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<tr>
<td>f</td>
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<tr>
<td>g</td>
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<td>h</td>
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<td>i</td>
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<td></td>
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</tr>
<tr>
<td>j</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total functional expenses Add lines 22a through 43g (Organizations completing columns (B)-(D), carry these totals to lines 13-15)</td>
<td></td>
<td></td>
<td></td>
<td></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 $ N/A, (ii) the amount allocated to Program services $ N/A, (iii) the amount allocated to Management and general $ N/A, and (iv) the amount allocated to Fundraising $ N/A.
Form 990 (2006)  

**Part III | Statement of Program Service Accomplishments (See the instructions)**

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.

<table>
<thead>
<tr>
<th>What is the organization's primary exempt purpose?</th>
<th>Program Service Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PUBLIC INTEREST LAW FIRM</strong></td>
<td>(Required for 501(c)(3) and (4) orgs. and 4947(a)(1) trusts, but optional for others)</td>
</tr>
</tbody>
</table>

All organizations must describe their exempt purpose achievements in a clear and concise manner. State the number of clients served, publications issued, etc. Discuss achievements 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.)

<table>
<thead>
<tr>
<th>a</th>
<th>LEGAL ACTIVITIES—PUBLIC INTEREST LAW FIRM. SEE SCHEDULE 1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Grants and allocations $ ) If this amount includes foreign grants, check here □</td>
</tr>
<tr>
<td>b</td>
<td></td>
</tr>
<tr>
<td>c</td>
<td>(Grants and allocations $ ) If this amount includes foreign grants, check here □</td>
</tr>
<tr>
<td>d</td>
<td></td>
</tr>
<tr>
<td>e</td>
<td>Other program services (attach schedule)</td>
</tr>
<tr>
<td>f</td>
<td>Total of Program Service Expenses (should equal line 44, column (B), Program services) □</td>
</tr>
</tbody>
</table>

Form 990 (2006)
### Part IV Balance Sheets (See the instructions)

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

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>45</td>
<td>Cash - non-interest-bearing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>Savings and temporary cash investments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47</td>
<td>Accounts receivable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47a</td>
<td>Less: allowance for doubtful accounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>47b</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47c</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>48</td>
<td>Pledges receivable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>48a</td>
<td>Less: allowance for doubtful accounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>48b</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>48c</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>49</td>
<td>Grants receivable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>50a</td>
<td>Receivables from current and former officers, directors, trustees, and key employees</td>
<td></td>
<td></td>
</tr>
<tr>
<td>50b</td>
<td>Receivables from other disqualified persons (as defined under section 4958(f)(11)) and persons described in section 4958(c)(3)(B)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51a</td>
<td>Other notes and loans receivable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51b</td>
<td>Less: allowance for doubtful accounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51c</td>
<td></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></td>
<td></td>
</tr>
<tr>
<td>54a</td>
<td>Investments - publicly-traded securities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>54b</td>
<td>Investments - other securities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55a</td>
<td>Investments - land, buildings, and equipment: basis</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55b</td>
<td>Less: accumulated depreciation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>55c</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>56</td>
<td>Investments - other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>57a</td>
<td>Land, buildings, and equipment: basis</td>
<td></td>
<td></td>
</tr>
<tr>
<td>57b</td>
<td>Less: accumulated depreciation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>57c</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>58</td>
<td>Other assets, including program-related investments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>59</td>
<td>Total assets (must equal line 74). Add lines 45 through 58</td>
<td></td>
<td></td>
</tr>
<tr>
<td>60</td>
<td>Accounts payable and accrued expenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>61</td>
<td>Grants payable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>62</td>
<td>Deferred revenue</td>
<td></td>
<td></td>
</tr>
<tr>
<td>63</td>
<td>Loans from officers, directors, trustees, and key employees</td>
<td></td>
<td></td>
</tr>
<tr>
<td>64a</td>
<td>Tax-exempt bond liabilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>64b</td>
<td>Mortgages and other notes payable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>65</td>
<td>Other liabilities (describe ▶ ENDOWMENT FUND)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>66</td>
<td>SEE STATEMENT 9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>67</td>
<td>68</td>
<td>Total liabilities. Add lines 60 through 65</td>
<td></td>
</tr>
<tr>
<td>69</td>
<td>Organizations that follow SFAS 117, check here ▶ and complete lines</td>
<td></td>
<td></td>
</tr>
<tr>
<td>67</td>
<td>Unrestricted</td>
<td></td>
<td></td>
</tr>
<tr>
<td>68</td>
<td>Temporarily restricted</td>
<td></td>
<td></td>
</tr>
<tr>
<td>69</td>
<td>Permanently restricted</td>
<td></td>
<td></td>
</tr>
<tr>
<td>70</td>
<td>Capital stock, trust principal, or current funds</td>
<td></td>
<td></td>
</tr>
<tr>
<td>71</td>
<td>Paid-in or capital surplus, or land, building, and equipment fund</td>
<td></td>
<td></td>
</tr>
<tr>
<td>72</td>
<td>Retained earnings, endowment, accumulated income, or other funds</td>
<td></td>
<td></td>
</tr>
<tr>
<td>73</td>
<td>Total net assets or fund balances</td>
<td>Add lines 67 through 69 or lines 70 through 72</td>
<td></td>
</tr>
<tr>
<td>(Column A) must equal line 19 and column (B) must equal line 21</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>74</td>
<td>Total liabilities and net assets/fund balances. Add lines 66 and 73</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

![Image of the table content](image)
FORM 990
MOUNTAIN STATES LEGAL FOUNDATION
84-0736725

**Part IV-A** Reconciliation of Revenue per Audited Financial Statements With Revenue per Return (See the instructions)

a Total revenue, gains, and other support per audited financial statements

b Amounts included on line a but not on Part I, line 12:

1 Net unrealized gains on investments

2 Donated services and use of facilities

3 Recoveries of prior year grants

4 Other (specify):

Add lines b1 through b4

b1 121,966.

b2

b3

b4

b 121,966.

c Subtract line b from line a

c 2,603,113.

d Amounts included on Part I, line 12, but not on line a:

1 Investment expenses not included on Part I, line 6b

d1

2 Other (specify):

d2

Add lines d1 and d2
d 0.

e Total revenue (Part I, line 12). Add lines c and d
e 2,603,113.

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

a Total expenses and losses per audited financial statements

b Amounts included on line a but not on Part I, line 17:

1 Donated services and use of facilities

2 Prior year adjustments reported on Part I, line 20

3 Losses reported on Part I, line 20

4 Other (specify):

Add lines b1 through b4

b1

b2

b3

b4

b 0.

c Subtract line b from line a

c 2,587,741.

d Amounts included on Part I, line 17, but not on line a:

1 Investment expenses not included on Part I, line 6b

d1

2 Other (specify):

d2

Add lines d1 and d2
d 0.

e Total expenses (Part I, line 17). Add lines c and d
e 2,587,741.

**Part V-A** Current Officers, Directors, Trustees, and Key Employees (List each person who was an officer, director, trustee, or key employee at any time during the year even if they were not compensated) (See the instructions)

<table>
<thead>
<tr>
<th>(A) Name and address</th>
<th>(B) Title and average hours per week devoted to position</th>
<th>(C) Compensation (If not paid, enter -0-)</th>
<th>(D) Contributions to employee benefit plans &amp; deferred compensation plans</th>
<th>(E) Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>PETER A. BOTTING</td>
<td>CHAIRMAN</td>
<td>5.00</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>20300 WOODINVILLE-SNOHOMISH RD., NE WOODINVILLE, WA 98072</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WILLIAM PERRY PENDLEY</td>
<td>PRESIDENT</td>
<td>40.00</td>
<td>225,000.</td>
<td>0.</td>
</tr>
<tr>
<td>27453 MILDRED LANE</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EVERGREEN, CO 80439</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>STEPHEN M. BROPHY</td>
<td>TREASURER</td>
<td>5.00</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>10265 W CAMELBACK RD., STE. 104 PHOENIX, AZ 85037</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>KAREN KENNEDY</td>
<td>VICE CHAIRMAN</td>
<td>5.00</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>700 WEST 6TH STREET</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>GILLETTE, WY 82716</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JAMES TARANIK</td>
<td>SECRETARY</td>
<td>5.00</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>MAIL STOP 168, UNIVERSITY OF NEVADA RENO, NV 89557</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SEE ATTACHED</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
Part V-A  Current Officers, Directors, Trustees, and Key Employees (continued)

75 a  Enter the total number of officers, directors, and trustees permitted to vote on organization business at board meetings ▶ 33

b  Are any officers, directors, trustees, or key employees listed in Form 990, Part V-A, or highest compensated employees listed in Schedule A, Part I, or highest compensated professional and other independent contractors listed in Schedule A, Part II-A or II-B, related to each other through family or business relationships? If "Yes," attach a statement that identifies the individuals and explains the relationship(s)

75b  X

c  Do any officers, directors, trustees, or key employees listed in Form 990, Part V-A, or highest compensated employees listed in Schedule A, Part I, or highest compensated professional and other independent contractors listed in Schedule A, Part II-A or II-B, receive compensation from any other organizations, whether tax exempt or taxable, that are related to the organization? See the instructions for the definition of "related organization." If "Yes," attach a statement that includes the information described in the instructions

75c  X

d  Does the organization have a written conflict of interest policy?

75d  X

Part V-B  Former Officers, Directors, Trustees, and Key Employees That Received Compensation or Other Benefits

(if any former officer, director, trustee, or key employee received compensation or other benefits (described below) during the year, list that person below and enter the amount of compensation or other benefits in the appropriate column. See the instructions.)

<table>
<thead>
<tr>
<th>(A) Name and address</th>
<th>(B) Loans and Advances</th>
<th>(C) Compensation (if not paid, enter -0-)</th>
<th>(D) Contributions to employee benefit plans &amp; deferred compensation plans</th>
<th>(E) Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>NONE</td>
<td></td>
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</tbody>
</table>

Part VI  Other Information (See the instructions)

76  Did the organization make a change in its activities or methods of conducting activities? If "Yes," attach a detailed statement of each change

    76  X

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

    77  X

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

    78a  X

b  If "Yes," has it filed a tax return on Form 990-T for this year?

    78b  N/A

79  Was there a liquidation, dissolution, termination, or substantial contraction during the year? If "Yes," attach a statement

    79  X

80a  Is the organization related (other than by association with a statewide or nationwide organization) through common membership, governing bodies, trustees, officers, etc., to any other exempt or nonexempt organization?

    80a  X

b  If "Yes," enter the name of the organization ▶ N/A and check whether it is □ exempt or □ nonexempt

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

    81a  0

b  Did the organization file Form 1120-POL for this year?

    81b  X
Part VI  Other Information (continued)

82  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?
   a  Yes  No  X
   b  If "Yes," you may indicate the value of these items here. Do not include this amount as revenue in Part I or as an expense in Part II.
      (See instructions in Part III.)

83  Did the organization comply with the public inspection requirements for returns and exemption applications?
   a  Yes  No  X
   b  Did the organization comply with the disclosure requirements relating to quid pro quo contributions?

84  Did the organization solicit any contributions or gifts that were not tax deductible?
   a  Yes  No  X
   b  If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?

85  501(c)(4), (5), or (6) organizations
   a  Were substantially all dues nondeductible by members?
      N/A  X  N/A
   b  Did the organization make only in-house lobbying expenditures of $2,000 or less?
      N/A  X  N/A

86  501(c)(7) organizations
   a  Enter a description of initiation fees and capital contributions included on line 12
      N/A  N/A
   b  Gross receipts, included on line 12, for public use of club facilities
      N/A  N/A

87  501(c)(12) organizations
   a  Gross income from members or shareholders
      N/A  N/A
   b  Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.)
      N/A  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?
   a  Yes  No  X
   b  At any time during the year, did the organization, directly or indirectly, own a controlled entity within the meaning of section 512(b)(13)? If "Yes," complete Part XI
      X

89  501(c)(3) organizations
   a  Enter. Amount of tax imposed on the organization during the year under section 4911, 4912, 4955, and 0.
      0  N/A
   b  501(c)(3) and 501(c)(4) organizations
      Did the organization engage in any section 4958 excess benefit transaction during the year or did it become aware of an excess benefit transaction from a prior year?
      Yes  No  X

90  List the states with which a copy of this return is filed
   SEE STATEMENT 10

91  The books are in care of
   THE FOUNDATION  Telephone no  303-292-2021
   Located at  2596 SOUTH LEWIS WAY LAKewood CO  80227
   ZIP + 4  80227  Yes  No  X

   a  Number of employees employed in the pay period that includes March 12, 2006
      15

   b  At any time during the calendar year, did the organization have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)?
      If "Yes," enter the name of the foreign country
      N/A

See the instructions for exceptions and filing requirements for Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts.
Part VI | Other Information (continued)

- At any time during the calendar year, did the organization maintain an office outside of the United States? Yes | No X

If "Yes," enter the name of the foreign country N/A

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 (See the instructions.)

Note: Enter gross amounts unless otherwise indicated.

<table>
<thead>
<tr>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
<th>(E)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Program service revenue.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a PUBLICATIONS</td>
<td></td>
<td></td>
<td></td>
<td>25,225.</td>
</tr>
<tr>
<td>b</td>
<td></td>
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<tr>
<td>c</td>
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<tr>
<td>Medicare/Medicaid payments</td>
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<td>Fees and contracts from government agencies</td>
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<tr>
<td>Membership dues and assessments</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Interest on savings and temporary cash investments</td>
<td>14</td>
<td>44,501.</td>
<td></td>
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<tr>
<td>Dividends and interest from securities</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net rental income or (loss) from real estate</td>
<td>a debt-financed property</td>
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<td></td>
<td>b not debt-financed property</td>
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<td>e</td>
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<tr>
<td>Net rental income or (loss) from personal property</td>
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<tr>
<td>Other investment income</td>
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<tr>
<td>Gain or (loss) from sales of assets other than inventory</td>
<td>03</td>
<td>-10,197.</td>
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<td>Net income or (loss) from special events</td>
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<tr>
<td>Gross profit or (loss) from sales of inventory</td>
<td></td>
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<tr>
<td>Other revenue:</td>
<td>a MISCELLANEOUS</td>
<td>8.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b MAILING LIST RENTAL</td>
<td>13</td>
<td>106,734.</td>
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<tr>
<td>0.</td>
<td>141,038.</td>
<td>25,233.</td>
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<tr>
<td>Total (add line 104, columns (B), (D), and (E))</td>
<td>▶ 166,271.</td>
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</tr>
</tbody>
</table>

Part VIII | Relationship of Activities to the Accomplishment of Exempt Purposes (See the instructions.)

Line No. Explain how each activity for which income is reported in column (E) of Part VII contributed importantly to the accomplishment of the organization's exempt purposes (other than by providing funds for such purposes)

103 MISCI INCOME PROVIDED FUNDS TO MEET EXEMPT PURPOSE

Part IX | Information Regarding Taxable Subsidiaries and Disregarded Entities (See the instructions.)

Name, address, and EIN of corporation, partnership, or disregarded entity | Percentage of ownership interest | Nature of activities | Total income | End-of-year assets
--- | --- | --- | --- | ---
N/A | | | | |

Part X | Information Regarding Transfers Associated with Personal Benefit Contracts (See the instructions.)

(a) Did the organization, during the year, receive any funds, directly or indirectly, to pay premiums on a personal benefit contract? Yes X No

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

Note: If "Yes" to (b), file Form 8870 and Form 4720 (see instructions)
### Part XI Information Regarding Transfers To and From Controlled Entities

Complete only if the organization is a controlling organization as defined in section 512(b)(13)

#### 106 Did the reporting organization make any transfers to a controlled entity as defined in section 512(b)(13) of the Code? If “Yes,” complete the schedule below for each controlled entity.

<table>
<thead>
<tr>
<th></th>
<th>(A) Name, address, of each controlled entity</th>
<th>(B) Employer Identification Number</th>
<th>(C) Description of transfer</th>
<th>(D) Amount of transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
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<td>b</td>
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<td>c</td>
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</tr>
</tbody>
</table>

**Totals**

#### 107 Did the reporting organization receive any transfers from a controlled entity as defined in section 512(b)(13) of the Code? If “Yes,” complete the schedule below for each controlled entity.

<table>
<thead>
<tr>
<th></th>
<th>(A) Name, address, of each controlled entity</th>
<th>(B) Employer Identification Number</th>
<th>(C) Description of transfer</th>
<th>(D) Amount of transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
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<tr>
<td>b</td>
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<tr>
<td>c</td>
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</tr>
</tbody>
</table>

**Totals**

#### 108 Did the organization have a binding written contract in effect on August 17, 2006, covering the interest, rents, royalties, and annuities described in question 107 above?

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

**Signature of officer**

**Date**

**Preparer's signature**

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

**EIN**

**Date**

**Check if self-employed**

**Preparer's SSN or PTIN (See Gen. Inst.)**

**Phone no.**

---

Form 990 (2006)
**Organization Exempt Under Section 501(c)(3)**

**Supplementary Information (See separate instructions.)**

**Part I**

**Compensation of the Five Highest Paid Employees Other Than Officers, Directors, and Trustees**

(See page 2 of the instructions. List each one. If there are none, enter "None ")

<table>
<thead>
<tr>
<th>Name and address of each employee paid more than $50,000</th>
<th>Title and average hours per week devoted to position</th>
<th>Compensation</th>
<th>Contributions to employee benefit plans &amp; deferred compensation</th>
<th>Expense account and other allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td>STEVEN J. LECHNER 9830 XAVIER CT., WESTMINSTER, CO 8003</td>
<td>SENIOR 40.00</td>
<td>115,000.</td>
<td>14,519.</td>
<td></td>
</tr>
<tr>
<td>J. SCOTT DETAMORE 12610 W. BAYAUD #3, LAKewood, CO 80222</td>
<td>STAFF ATTORNEY 40.00</td>
<td>82,292.</td>
<td>23,475.</td>
<td></td>
</tr>
<tr>
<td>JANICE K. ALVARADO 1375 S UTICA STREET, DENVER, CO 80219</td>
<td>ASSISTANT TO THE PRE 40.00</td>
<td>55,000.</td>
<td>16,445.</td>
<td></td>
</tr>
<tr>
<td>JOSEPH BECKER 2674 S PATTON COURT, DENVER, CO 80210</td>
<td>STAFF ATTORNEY 40.00</td>
<td>57,933.</td>
<td>8,158.</td>
<td></td>
</tr>
<tr>
<td><strong>Total number of other employees paid over $50,000</strong></td>
<td><strong>4</strong></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

**Part II-A**

**Compensation of the Five Highest Paid Independent Contractors for Professional Services**

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

<table>
<thead>
<tr>
<th>Name and address of each independent contractor paid more than $50,000</th>
<th>Type of service</th>
<th>Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>EBERLE AND ASSOCIATES 1420 SPRING HIL ROAD SUITE 490, MCLEAN, VA 22102</td>
<td>FUNDRAISING</td>
<td>122,760.</td>
</tr>
<tr>
<td>JANICE V. CHASE CPA 5404 STONEMOOR DRIVE, PUEBLO, CO 81005</td>
<td>ACCOUNTING</td>
<td>58,500.</td>
</tr>
</tbody>
</table>

| **Total number of others receiving over $50,000 for professional services** | **2** |

**Part II-B**

**Compensation of the Five Highest Paid Independent Contractors for Other Services**

(List each contractor who performed services other than professional services, whether individuals or firms. If there are none, enter "None. See page 2 of the instructions.)

<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><strong>NONE</strong></td>
<td></td>
<td></td>
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</tbody>
</table>

| **Total number of other contractors receiving over $50,000 for other services** | **0** |
Part III Statements About Activities

(See page 2 of the instructions)

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

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

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

   a. Sale, exchange, or leasing of property?
   b. Lending of money or other extension of credit?
   c. Furnishing of goods, services, or facilities?
   d. Payment of compensation (or payment or reimbursement of expenses if more than $1,000)? SEE PART V-A, FORM 990

2a. X
2b. X
2c. X
2d. X

3. a. Did the organization make grants for scholarships, fellowships, student loans, etc.? (If "Yes," attach an explanation of how the organization determines that recipients qualify to receive payments.)
   b. Did the organization have a section 403(b) annuity plan for its employees?
   c. Did the organization receive or hold an easement for conservation purposes, including easements to preserve open space, the environment, historic land areas or historic structures? If "Yes," attach a detailed statement
   d. Did the organization provide credit counseling, debt management, credit repair, or debt negotiation services?

3a. X
3b. X
3c. X
3d. X

4. a. Did the organization maintain any donor advised funds? If "Yes," complete lines 4b through 4g. If "No," complete lines 4f and 4g
   b. Did the organization make any taxable distributions under section 4966?
   c. Did the organization make a distribution to a donor, donor advisor, or related person?
   d. Enter the total number of donor advised funds owned at the end of the tax year
   e. Enter the aggregate value of assets held in all donor advised funds owned at the end of the tax year
   f. Enter the total number of separate funds or accounts owned at the end of the year (excluding donor advised funds included on line 4d) where donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts
   g. Enter the aggregate value of assets in all funds or accounts included on line 4f at the end of the tax year

4a. X
4b. X
4c. X
4d. 0
4e. 0
4f. 0
4g. 0
### Part IV Reason for Non-Private Foundation Status

I certify that the organization is not a private foundation because it is (Please check only ONE applicable box.)

- [ ] A church, convention of churches, or association of churches Section 170(b)(1)(A)(i)
- [ ] A school Section 170(b)(1)(A)(ii) (Also complete Part V)
- [ ] A hospital or a cooperative hospital service organization Section 170(b)(1)(A)(iii)
- [ ] A federal, state, or local government or governmental unit Section 170(b)(1)(A)(iv)
- [ ] A medical research organization operated in conjunction with a hospital Section 170(b)(1)(A)(v) Enter the hospital's name, city, and state ▶
- [ ] 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)

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

- [ ] A community trust Section 170(b)(1)(A)(vii) (Also complete the Support Schedule in Part IV-A)

- [ ] An organization that normally receives 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 Section 509(a)(2) (Also complete the Support Schedule in Part IV-A)

- [ ] An organization that is not controlled by any disqualified persons (other than foundation managers) and otherwise meets the requirements of section 509(a)(3) Check the box that describes the type of supporting organization
  - [ ] Type I
  - [ ] Type II
  - [ ] Type III-Functionally Integrated
  - [ ] Type III-Other

**Provide the following information about the supported organizations.** (See page 7 of the instructions)

<table>
<thead>
<tr>
<th>(a) Name(s) of supported organization(s)</th>
<th>(b) Employer identification number (EIN)</th>
<th>(c) Type of organization (described in lines 5 through 12 above or IRC section)</th>
<th>(d) Is the supported organization listed in the supporting organization's governing documents?</th>
<th>(e) Amount of support</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Yes</td>
<td>No</td>
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</tbody>
</table>

Total |

- [ ] An organization organized and operated to test for public safety Section 509(a)(4) (See page 7 of the instructions)
### 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.

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2005</th>
<th>(b) 2004</th>
<th>(c) 2003</th>
<th>(d) 2002</th>
<th>(e) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 Gifts, grants, and contributions received (Do not include unusual grants. See line 28)</td>
<td>3,165,291</td>
<td>1,898,140</td>
<td>2,036,203</td>
<td>1,998,697</td>
<td>9,098,331</td>
</tr>
<tr>
<td>16 Membership fees received</td>
<td></td>
<td></td>
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<td></td>
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</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>40,411</td>
<td></td>
<td></td>
<td></td>
<td>40,411</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>28,952</td>
<td>12,169</td>
<td>10,503</td>
<td>15,527</td>
<td>67,151</td>
</tr>
<tr>
<td>19 Net income from unrelated business activities not included in line 18</td>
<td></td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>20 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf</td>
<td></td>
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<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></td>
<td></td>
<td></td>
<td></td>
<td>SEE STATEMENT 11</td>
</tr>
<tr>
<td>23 Total of lines 15 through 22</td>
<td>3,234,724</td>
<td>1,910,402</td>
<td>2,057,176</td>
<td>2,023,045</td>
<td>9,225,347</td>
</tr>
<tr>
<td>24 Line 23 minus line 17</td>
<td>3,194,313</td>
<td>1,910,402</td>
<td>2,057,176</td>
<td>2,023,045</td>
<td>9,184,936</td>
</tr>
<tr>
<td>25 Enter 1% of line 23</td>
<td>32,347</td>
<td>19,104</td>
<td>20,572</td>
<td>20,230</td>
<td></td>
</tr>
</tbody>
</table>

#### Organizations described on line 10 or 11

- a Enter 2% of amount in column (e), line 24 | 26a | 183,699 |
- b Prepare a list for your records to show the name and amount contributed by each person (other than a governmental unit or publicly supported organization) whose total gifts for 2002 through 2005 exceeded the amount shown in line 26a |
- c Do not file this list with your return. Enter the total of all these excess amounts | 26b | 648,354 |
- d Total support for section 509(a)(1) test. Enter line 24, column (e) | 26c | 9,184,936 |
- e Add Amounts from column (e) for lines 18 to 22 | 26d | 734,959 |
- f Public support (line 26c minus line 26d total) | 26e | 8,449,977 |
- g Public support percentage (line 26e (numerator) divided by line 26e (denominator)) | 26f | 91.9982% |

#### 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" and do not file this list with your return. Enter the sum of such amounts for each year. N/A (2005) | (2004) | (2003) | (2002) |
- 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 11b, 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 (2005) | (2004) | (2003) | (2002) |
- c Add Amounts from column (e) for lines 15 to 20 | 27c | N/A |
- d Add Line 27a total and line 27b total | 27d | N/A |
- e Public support (line 27c total minus line 27d total) | 27e | N/A |
- f Total support for section 509(a)(2) test. Enter amount on line 23, column (e) | 27f | N/A |
- g Public support percentage (line 27e (numerator) divided by line 27f (denominator)) | 27g | N/A |
- h Investment income percentage (line 18, column (e) (numerator) divided by line 27f (denominator)) | 27h | N/A |

#### Unusual Grants:

For an organization described in line 10, 11, or 12 that received any unusual grants during 2002 through 2005, 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
### Part V Private School Questionnaire

(To be completed ONLY by schools that checked the box on line 6 in Part IV)

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>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>
</tr>
<tr>
<td>30</td>
<td>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>
</tr>
<tr>
<td>31</td>
<td>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?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If &quot;Yes,&quot; please describe, if &quot;No,&quot; please explain (If you need more space, attach a separate statement)</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Does the organization maintain the following</td>
<td></td>
</tr>
<tr>
<td>a</td>
<td>Records indicating the racial composition of the student body, faculty, and administrative staff?</td>
<td>32a</td>
</tr>
<tr>
<td>b</td>
<td>Records documenting that scholarships and other financial assistance are awarded on a racially nondiscriminatory basis?</td>
<td>32b</td>
</tr>
<tr>
<td>c</td>
<td>Copies of all catalogues, brochures, announcements, and other written communications to the public dealing with student admissions, programs, and scholarships?</td>
<td>32c</td>
</tr>
<tr>
<td>d</td>
<td>Copies of all material used by the organization or on its behalf to solicit contributions?</td>
<td>32d</td>
</tr>
<tr>
<td></td>
<td>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>
</tr>
<tr>
<td>33</td>
<td>Does the organization discriminate by race in any way with respect to</td>
<td></td>
</tr>
<tr>
<td>a</td>
<td>Students' rights or privileges?</td>
<td>33a</td>
</tr>
<tr>
<td>b</td>
<td>Admissions policies?</td>
<td>33b</td>
</tr>
<tr>
<td>c</td>
<td>Employment of faculty or administrative staff?</td>
<td>33c</td>
</tr>
<tr>
<td>d</td>
<td>Scholarships or other financial assistance?</td>
<td>33d</td>
</tr>
<tr>
<td>e</td>
<td>Educational policies?</td>
<td>33e</td>
</tr>
<tr>
<td>f</td>
<td>Use of facilities?</td>
<td>33f</td>
</tr>
<tr>
<td>g</td>
<td>Athletic programs?</td>
<td>33g</td>
</tr>
<tr>
<td>h</td>
<td>Other extracurricular activities?</td>
<td>33h</td>
</tr>
<tr>
<td></td>
<td>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>
</tr>
<tr>
<td>34 a</td>
<td>Does the organization receive any financial aid or assistance from a governmental agency?</td>
<td>34a</td>
</tr>
<tr>
<td>b</td>
<td>Has the organization's right to such aid ever been revoked or suspended?</td>
<td>34b</td>
</tr>
<tr>
<td></td>
<td>If you answered &quot;Yes&quot; to either 34a or b, please explain using an attached statement</td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>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>35</td>
</tr>
</tbody>
</table>
**Part VI-A** | Lobbying Expenditures by Electing Public Charities  
(See page 10 of the instructions)  
(To be completed ONLY by an eligible organization that filed Form 5768) 

Check ⬤ a. if the organization belongs to an affiliated group  
Check ⬤ b. if you checked "a" and "limited control" provisions apply

### Limits on Lobbying Expenditures
(The term "expenditures" means amounts paid or incurred)

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

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

### 4-Year Averaging Period Under Section 501(h)
(Some organizations that made a section 501(h) election do not have to complete all of the five columns below. See the instructions for lines 45 through 50 on page 13 of the instructions)

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2006</th>
<th>(b) 2005</th>
<th>(c) 2004</th>
<th>(d) 2003</th>
<th>(e) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>45 Lobbying nontaxable amount</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>46 Lobbying ceiling amount (150% of line 45(e))</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47 Total lobbying expenditures</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>48 Grassroots nontaxable amount</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>49 Grassroots ceiling amount (150% of line 48(e))</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>50 Grassroots lobbying expenditures</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Part VI-B** | Lobbying Activity by Nonelecting Public Charities  
(For reporting only by organizations that did not complete Part VI-A) (See page 13 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

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

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

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

N/A

623151  
01-18-07
**Part VII | Information Regarding Transfers To and Transactions and Relationships With Noncharitable Exempt Organizations**  
(See page 13 of the instructions)

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

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d</td>
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</tbody>
</table>

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

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
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</tbody>
</table>

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?

<p>| | | |</p>
<table>
<thead>
<tr>
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<tbody>
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</tbody>
</table>

If "Yes," complete the following schedule

<p>| | | |</p>
<table>
<thead>
<tr>
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</thead>
<tbody>
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</tr>
</tbody>
</table>

---

Schedule A (Form 990 or 990-EZ) 2006

Mountain States Legal Foundation 84-0736725 Page 7

Form 990 or 990-EZ 2006
<table>
<thead>
<tr>
<th>Asset No</th>
<th>Description</th>
<th>Date Acquired</th>
<th>Method</th>
<th>Life</th>
<th>Unadjusted Cost Or Basis</th>
<th>Bus % Excl</th>
<th>Reduction In Basis</th>
<th>Basis For Depreciation</th>
<th>Accumulated Depreciation</th>
<th>Current Sec 179</th>
<th>Current Year Deduction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BUILDINGS</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>BUILDING</td>
<td>112901SL</td>
<td></td>
<td>40.0016</td>
<td>1,397,718.</td>
<td>139,585.</td>
<td>1,258,133.</td>
<td>128,350.</td>
<td>0.</td>
<td>31,433.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>* 990 PAGE 2 TOTAL</td>
<td></td>
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<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>6</td>
<td>LAND</td>
<td>112901L</td>
<td></td>
<td></td>
<td>154,705.</td>
<td></td>
<td>154,705.</td>
<td></td>
<td>0.</td>
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<td></td>
<td>* 990 PAGE 2 TOTAL</td>
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<tr>
<td></td>
<td>FURNITURE &amp; FIXTURES</td>
<td></td>
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<tr>
<td>4</td>
<td>FURNITURE AND FIXTURES</td>
<td>VARIESSL</td>
<td>12.0016</td>
<td></td>
<td>139,146.</td>
<td></td>
<td>139,146.</td>
<td>85,579.</td>
<td>5,386.</td>
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<tr>
<td></td>
<td>FURN &amp; FIXTURES</td>
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<tr>
<td></td>
<td>2006 ADDITIONS</td>
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<tr>
<td>16</td>
<td>FURNITURE AND FIXTURES</td>
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<td>12.0016</td>
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<td>610.</td>
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<td>610.</td>
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<td>23.</td>
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</tr>
<tr>
<td></td>
<td>* 990 PAGE 2 TOTAL</td>
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<td></td>
<td>FURNITURE &amp; FIXTURES</td>
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<td>* 990 PAGE 2 TOTAL</td>
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</tr>
<tr>
<td></td>
<td>MACHINERY &amp; EQUIPMENT</td>
<td></td>
<td></td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>7</td>
<td>OFFICE EQUIPMENT</td>
<td>VARIESSL</td>
<td>12.0016</td>
<td></td>
<td>107,179.</td>
<td></td>
<td>107,179.</td>
<td>55,565.</td>
<td>9,806.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>OFFICE EQUIPMENT 2004</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>9</td>
<td>ADDITIONS</td>
<td>VARIESSL</td>
<td>5.00</td>
<td>16</td>
<td>5,991.</td>
<td></td>
<td>5,991.</td>
<td>1,804.</td>
<td>1,140.</td>
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<tr>
<td>15</td>
<td>OFFICE EQUIPMENT 2005</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>ADDITIONS</td>
<td>VARIESSL</td>
<td>5.00</td>
<td>16</td>
<td>2,913.</td>
<td></td>
<td>2,913.</td>
<td>235.</td>
<td>582.</td>
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<tr>
<td></td>
<td>2006 ADDITIONS OFFICE</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>EQUIPMENT</td>
<td>VARIESSL</td>
<td>5.00</td>
<td>16</td>
<td>22,649.</td>
<td></td>
<td>22,649.</td>
<td>2,972.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(D) - Asset disposed
* ITC, Section 179, Salvage, Bonus, Commercial Revitalization Deduction, GO Zone
<table>
<thead>
<tr>
<th>Asset No</th>
<th>Description</th>
<th>Date Acquired</th>
<th>Method</th>
<th>Life</th>
<th>Line No</th>
<th>Unadjusted Cost Or Basis</th>
<th>Bus % Excl</th>
<th>Reduction In Basis</th>
<th>Basis For Depreciation</th>
<th>Accumulated Depreciation</th>
<th>Current Sec 179</th>
<th>Current Year Deduction</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>* 990 PAGE 2 TOTAL MACHINERY &amp; EQUIPMENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>138,732</td>
<td>0</td>
<td>0</td>
<td>138,732</td>
<td>57,604</td>
<td>0</td>
<td>14,500</td>
</tr>
<tr>
<td></td>
<td>* 990 PAGE 2 TOTAL - OTHER</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>138,732</td>
<td>0</td>
<td>0</td>
<td>138,732</td>
<td>57,604</td>
<td>0</td>
<td>14,500</td>
</tr>
<tr>
<td></td>
<td>1 LIBRARY</td>
<td>VARIES150DB15.0017</td>
<td>32,185</td>
<td>9,715</td>
<td>43</td>
<td>32,185</td>
<td>9,715</td>
<td>9,715</td>
<td>9,715</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>12 (D) LOAN FEES</td>
<td>VARIES</td>
<td>60M 43</td>
<td></td>
<td></td>
<td>41,900</td>
<td>0</td>
<td>0</td>
<td>41,900</td>
<td>41,900</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>* 990 PAGE 2 TOTAL OTHER</td>
<td></td>
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<td>41,900</td>
<td>0</td>
<td>0</td>
<td>41,900</td>
<td>41,900</td>
<td>0</td>
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<tr>
<td></td>
<td>* 990 PAGE 2 TOTAL - OTHER</td>
<td></td>
<td></td>
<td></td>
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<td>41,900</td>
<td>0</td>
<td>0</td>
<td>41,900</td>
<td>41,900</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>* GRAND TOTAL 990 PAGE 2 DEPR &amp; AMORT</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1,873,776</td>
<td>139,585</td>
<td>1,734,191</td>
<td>313,559</td>
<td>0</td>
<td>51,414</td>
<td>0</td>
</tr>
</tbody>
</table>

(D) - Asset disposed

* ITC, Section 179, Salvage, Bonus, Commercial Revitalization Deduction, GO Zone
<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>10 SHARES MARSHALL &amp; ILLSLEY</td>
<td>407.</td>
<td>442.</td>
<td>0.</td>
<td>-35.</td>
</tr>
<tr>
<td>35 SHARES MERRILL LYNCH</td>
<td>3,103.</td>
<td>3,158.</td>
<td>0.</td>
<td>-55.</td>
</tr>
<tr>
<td>10 SHARES MARSHALL &amp; ILLSLEY</td>
<td>449.</td>
<td>478.</td>
<td>0.</td>
<td>-29.</td>
</tr>
<tr>
<td>TO FORM 990, PART I, LINE 8</td>
<td>3,959.</td>
<td>4,078.</td>
<td>0.</td>
<td>-119.</td>
</tr>
</tbody>
</table>
## FORM 990

**GAIN (LOSS) FROM SALE OF OTHER ASSETS**

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>DATE ACQUIRED</th>
<th>DATE SOLD</th>
<th>METHOD ACQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>OFFICE EQUIPMENT</td>
<td>VARIOUS</td>
<td>VARIOUS</td>
<td>PURCHASED</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>NAME OF BUYER</th>
<th>GROSS SALES PRICE</th>
<th>COST OR OTHER BASIS</th>
<th>EXPENSE OF SALE</th>
<th>DEPREC</th>
<th>NET GAIN OR (LOSS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>TO FM 990, PART I, LN 8</td>
<td>26,929.</td>
<td>26,929.</td>
<td>0.</td>
<td>16,851.</td>
<td>-10,078.</td>
</tr>
<tr>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

## FORM 990

**OTHER CHANGES IN NET ASSETS OR FUND BALANCES**

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNREALIZED GAIN</td>
<td>121,966.</td>
</tr>
<tr>
<td>TOTAL TO FORM 990, PART I, LINE 20</td>
<td>121,966.</td>
</tr>
</tbody>
</table>

## 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>11,354.</td>
<td>11,354.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PROFESSIONAL SERVICE</td>
<td>76,462.</td>
<td>54,819.</td>
<td>18,273.</td>
<td>3,370.</td>
</tr>
<tr>
<td>INSURANCE</td>
<td>25,548.</td>
<td>24,178.</td>
<td>1,370.</td>
<td></td>
</tr>
<tr>
<td>LIBRARY MAINTENANCE</td>
<td>32,119.</td>
<td>32,119.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LITIGATION EXP LESS</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>REIMBURSEMENT</td>
<td>15,228.</td>
<td>15,228.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WEBSITE MAINT</td>
<td>10,799.</td>
<td>8,099.</td>
<td>1,620.</td>
<td>1,080.</td>
</tr>
<tr>
<td>LITIGATION OUTSIDE</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ATTORNEYS</td>
<td>3,723.</td>
<td>3,723.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SUBSCRIPTIONS</td>
<td>2,778.</td>
<td>2,500.</td>
<td>278.</td>
<td></td>
</tr>
<tr>
<td>DIRECT MAIL</td>
<td>89,012.</td>
<td></td>
<td></td>
<td>89,012.</td>
</tr>
<tr>
<td>OFFICE EXPENSE</td>
<td>26,120.</td>
<td>20,896.</td>
<td>5,224.</td>
<td></td>
</tr>
<tr>
<td>FUNDRAISING EXPENSE</td>
<td>1,153.</td>
<td></td>
<td>1,153.</td>
<td></td>
</tr>
<tr>
<td>MISCELLANEOUS</td>
<td>4,781.</td>
<td>1,792.</td>
<td>1,194.</td>
<td>1,795.</td>
</tr>
<tr>
<td>TOTAL TO FM 990, LN 43</td>
<td>299,077.</td>
<td>174,708.</td>
<td>27,959.</td>
<td>96,410.</td>
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**STATEMENT(S) 2, 3, 4**
### OFFICER COMPENSATION ALLOCATION

**FORM 990**

**PART II, LINE 25A**

<table>
<thead>
<tr>
<th>NAME OF OFFICER, ETC.</th>
<th>COMPENSATION</th>
<th>EMPLOYEE BEN. PLANS</th>
<th>EXPENSE ACCOUNTS</th>
<th>TOTALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>WILLIAM PERRY PENDLEY</td>
<td>225,000.</td>
<td></td>
<td></td>
<td>225,000.</td>
</tr>
<tr>
<td>A. PROGRAM SERVICES</td>
<td>191,250.</td>
<td></td>
<td></td>
<td>191,250.</td>
</tr>
<tr>
<td>B. MANAGEMENT AND GENERAL</td>
<td>11,250.</td>
<td></td>
<td></td>
<td>11,250.</td>
</tr>
<tr>
<td>C. FUNDRAISING</td>
<td>22,500.</td>
<td></td>
<td></td>
<td>22,500.</td>
</tr>
</tbody>
</table>

**TOTAL PROGRAM SERVICES**

191,250.

**TOTAL MANAGEMENT AND GENERAL**

11,250.

**TOTAL FUNDRAISING**

22,500.

**TOTAL OFFICER, ETC., COMPENSATION INCLUDED ON PART II, LINE 25A**

225,000.

### NON-GOVERNMENT SECURITIES

**FORM 990**

**STATEMENT 6**

<table>
<thead>
<tr>
<th>SECURITY DESCRIPTION</th>
<th>COST/FMV</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>0.</td>
<td>0.</td>
<td>0.</td>
<td></td>
</tr>
<tr>
<td>BONDS</td>
<td>FMV</td>
<td></td>
<td></td>
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<td></td>
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</table>

**TO FORM 990, LINE 54A, COL B**

0.
### Government Securities

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>COST/FMV</th>
<th>U.S. GOVERNMENT</th>
<th>STATE AND LOCAL GOV'T</th>
<th>TOTAL GOV'T SECURITIES</th>
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</thead>
<tbody>
<tr>
<td>Bonds</td>
<td></td>
<td>143,657.</td>
<td></td>
<td>143,657.</td>
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<tr>
<td><strong>TOTAL TO FORM 990, LINE 54A, COL B</strong></td>
<td></td>
<td>143,657.</td>
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<td>143,657.</td>
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### 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>
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<tbody>
<tr>
<td>Buildings</td>
<td>1,397,718.</td>
<td>159,783.</td>
<td>1,237,935.</td>
</tr>
<tr>
<td>Furniture &amp; Fixtures</td>
<td>140,721.</td>
<td>91,186.</td>
<td>49,535.</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>138,732.</td>
<td>72,104.</td>
<td>66,628.</td>
</tr>
<tr>
<td>Other</td>
<td>32,185.</td>
<td>32,185.</td>
<td>0.</td>
</tr>
<tr>
<td><strong>TOTAL TO FORM 990, PART IV, LN 57</strong></td>
<td>1,864,061.</td>
<td>355,258.</td>
<td>1,508,803.</td>
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</table>

### Other Liabilities

<table>
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<tr>
<th>DESCRIPTION</th>
<th>AMOUNT</th>
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</thead>
<tbody>
<tr>
<td>Endowment Fund Payable</td>
<td>33,190.</td>
</tr>
<tr>
<td>Pension Fund Payable</td>
<td>32,398.</td>
</tr>
<tr>
<td>Capital Lease Obligation</td>
<td>14,317.</td>
</tr>
<tr>
<td><strong>TOTAL TO FORM 990, PART IV, LINE 65, COLUMN B</strong></td>
<td>79,905.</td>
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</tbody>
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### List of States Receiving Copy of Return

**States:**

AR, ME, MI, MN, MS, NM, NY, NC, OK, OR, PA, SC, TN, VA, WA, CO, KY, UT
<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>2005 AMOUNT</th>
<th>2004 AMOUNT</th>
<th>2003 AMOUNT</th>
<th>2002 AMOUNT</th>
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</thead>
<tbody>
<tr>
<td>UNCLAIMED FUNDS</td>
<td>0.</td>
<td>0.</td>
<td>0.</td>
<td>3,821.</td>
</tr>
<tr>
<td>PROP TAX REIMBURSEMENT</td>
<td>0.</td>
<td>0.</td>
<td>824.</td>
<td>0.</td>
</tr>
<tr>
<td>INSURANCE REIMBURSEMENT</td>
<td>0.</td>
<td>0.</td>
<td>9,646.</td>
<td>0.</td>
</tr>
<tr>
<td>OTHER</td>
<td>70.</td>
<td>93.</td>
<td>0.</td>
<td>5,000.</td>
</tr>
<tr>
<td><strong>TOTAL TO SCHEDULE A, LINE 22</strong></td>
<td><strong>70.</strong></td>
<td><strong>93.</strong></td>
<td><strong>10,470.</strong></td>
<td><strong>8,821.</strong></td>
</tr>
</tbody>
</table>
BOARD OF DIRECTORS

Mr. Peter A. Botting
President and Chief Executive Officer
W.A. Botting Company
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Page Two

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Ron and Susan Krump Foundation  
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President  
Montana Farm Bureau  
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President  
Idaho Farm Bureau  
3473 South 3200 East  
Franklin, ID 83237-5019  
(208) 646-2424; FAX (208) 646-2696; e-mail: fpriestley@idahofb.org

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2812 First Avenue North, Suite 510  
Billings, MT 59101  
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President  
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Albuquerque, NM 87107  
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Chairman and Chief Executive Officer  
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Denver, CO 80206  
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Colorado Farm Bureau  
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Denver, CO 80202  
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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: dsparks@discoveryoperating.com

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Environmental Permitting & Government Relations Consultant
3610 Big Bend Lane
Reno, NV 89509
(775) 823-8533; FAX (775) 829-1666; e-mail: dstruhsacker@sbcglobal.net

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Regents Professor
Mackay School of Earth Sciences and Engineering
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CASE UPDATE
As of January 15, 2007

ACCESS FUND v. U.S. DEPARTMENT OF AGRICULTURE
(Constitutional Rights; Access To Federal Lands and Resources)
(Amcus) (Ninth Circuit, Nevada, No. 05-15585)
(Climbers challenge Forest Service closure of Cave Rock as sacred to American Indians)

This case was approved by the Board of Directors on June 3, 2005. Cave Rock is a basalt plug rising 300 feet above the shores of Lake Tahoe on federal land along U.S. Highway 50. The United States Forest Service has jurisdiction to manage Cave Rock. In 1998, the Forest Service began developing a long-term management plan to address conflicts between two user groups at the site, the international rock-climbing community and the Washoe Tribe of American Indians. Although climbers have been climbing year-round at Cave Rock from the mid-1960's, the Washoe Tribe views Cave Rock as a “Washoe sacred site” and “a place of accumulated spiritual power,” 64 Fed. Reg. 3678, 3680 (Jan. 25, 1999), and believes that climbing desecrates the sanctity of the site.

In its attempt to determine the proper protection of values associated with Cave Rock, the Forest Service consulted with the rock-climbing community, the Washoe Tribe, and other interested parties to produce a plan to balance the various user-group interests and permit a limited amount of climbing. For three years the site was under multiple-use management utilizing Alternative 2 of the Draft Environmental Impact Statement (“Draft EIS”).

In November 2002, the new Forest Supervisor, Mary Gustafson, ignored the previous years of work and consultation and introduced a new alternative, Alternative 6, into the Final Environmental Impact Statement (Final EIS”). Alternative 6 called for an immediate ban of all climbing at Cave Rock. Alternative 6 had not been part of the earlier scoping or the Draft EIS. Unlike all of the alternatives in the Draft EIS, Alternative 6 prohibited immediately all recreational rock climbing.

On August 8, 2003, the Forest Service issued a Record of Decision (“ROD”) amending Cave Rock’s Forest Plan and providing new direction for its management. A Forest Order was issued prohibiting all climbing and ordering the removal of all climbing bolts and other safety hardware. Boating, hiking, and picnicking were still allowed. As a result of this action, the Access Fund filed an administrative appeal with the Pacific Southwest Regional Forester for review of the climbing ban. In response to the administrative decision to uphold the climbing ban, on December 15, 2003, the Access Fund filed suit in U.S. District Court for the District of Nevada asking the court to overturn the ruling. On January 28, 2005, the district court denied the Access Fund’s motion for summary judgment and granted the Forest Service’s motion for summary judgment. On April 8, 2005, the Access Fund’s appeal was docketed by the Ninth Circuit, and on April 12, 2005, the Access Fund filed a motion for stay pending appeal in the Ninth Circuit.
The Access Fund’s opening brief on the merits was filed on August 15, 2005, and on
August 25, 2005, MSLF filed an *amicus* brief in support of the Access Fund. On September 29,
2005, the federal government filed its response brief.

On October 12, 2005, the Washoe Tribe filed a motion for permission to file an *amicus*
brief and the Court lodged the Tribe’s brief. The motion was forwarded to the panel. On
October 14, 2004, the Access Fund filed its reply brief.

Oral arguments are scheduled for February 15, 2007, in San Francisco. (Ron Opsahl)
(05-5668)

**ALLIANCE FOR THE WILD ROCKIES v. KIMBELL**
(Environmental Law) (Counsel for Boulder River Watershed Ass’n,
Clydehurst Christian Camp, Jeff Essman, Don Bray) (D. Mont., No. 06cv63)
(Localons defend Forest Service timber harvest plan to prevent and lessen severity of wildfires)

This case was approved by the Board of Directors on June 2, 2006. On April 24, 2006,
after unsuccessful administrative appeals, two environmental groups—the Alliance for the Wild
Rockies and the Native Ecosystems Council—filed suit against Abigail Kimbell, Regional
Forester, the U.S. Forest Service and the U.S. Fish and Wildlife Service (“FWS”) challenging
the Main Boulder Fuels Reduction Project (“Project”), a plan to reduce fuel loads in a narrow
strip of Forest Service lands. The suit alleges violations of several environmental and natural
resource statutes, including the National Environmental Policy Act (“NEPA”), the National
Forest Management Act (“NFMA”), and the Endangered Species Act (“ESA”).

The Project was developed with extensive input from adjacent private homeowners, the
local watershed association, and State, county and local officials and groups and local
environmental organizations have approved the current plan. Under the Project, the Forest
Service intends to reduce fuel loads through several targeted approaches—thinning large-
diameter green conifers, selectively harvesting insect- or disease-damaged conifers, cutting
small-diameter conifers, slashing trees encroaching into meadows or aspen stands, prescribed
burning in meadows and the understory of treated stands, and piling and removing or burning
downed woody debris.

The Project area includes a narrow strip of non-wilderness land approximately 1/2 mile
wide and 24 miles long that projects into the Absaroka Beartooth Wilderness Area. The Main
Boulder River corridor is served currently by a single, in some places one-lane, dirt road. In past
evacuations, the Boulder River Road has become exceedingly congested, resulting in significant
delays in evacuating residents and recreationists as well as delaying firefighters’ deployment to
fire lines.

With an increase in recreational usage and a documented history of human-caused fire
starts, a preplanned fuels reduction project in the Boulder River corridor would reduce the
chances of accidental ignitions. Moreover, in the event of a fire, the modifications to the volume
and arrangement of fuels would reduce fire intensity and rate of spread, providing the time
necessary to evacuate recreationists and residents and allow firefighters to respond more quickly
to emergency situations.
Additionally, a local, quasi-governmental association provides grant monies to local landowners to conduct similar fuels reduction projects on private lands. Thus, the Project represents a vital component of a watershed-wide fuels reduction effort, the loss of which would effectively defeat private landowners’ efforts to protect their homes and properties from excessive fire risk.

On June 15, 2006, MSLF filed a motion to intervene as defendants on behalf of the Boulder River Watershed Association, the Clydehurst Christian Camp, Jeff Essman, and Donald A. Bray ("the Association") arguing that the Forest Service should be allowed to conduct timber thinning operations consistent with good forestry management practices in an attempt to prevent future forest fires and asserting that the Forest Service violated environmental and natural resource statutes in adopting the Main Boulder River Fuels Reduction Project and that the FWS violated the ESA by concurring with the Forest Service’s biological assessment concerning endangered and threatened species in the Project area.

On July 17, 2006, the government filed its answer to the Alliance’s complaint.

On August 1, 2006, the Court granted the Association’s motion to intervene as defendants by permission, holding that, because a private party cannot be a defendant in a NEPA compliance action, it could not intervene as a matter of right. On August 3, 2006, the Court filed the Association’s answer.

On August 2, 2006, Sweet Grass County moved to intervene as defendants either as a matter of right or, alternatively, by permission. On August 7, 2006, the motion was granted.

Plaintiffs’ motion for summary judgment was filed on October 10, 2006. In that filing, the Alliance, for the first time, introduced a NEPA claim. On October 24, 2006, the Alliance filed a motion to amend its complaint. Therefore, that same date, the government and the Association filed a motion for extension of time from November 3, 2006, until November 13, 2006, to file their responses to the motion for summary judgment and their cross-motions for summary judgment.

On October 31, 2006, the Alliance’s motion to amend their complaint was granted and the complaint filed, and the government/Association motion for extension of time was also granted. On November 1, 2006, Sweet Grass County filed its answer to the amended complaint.

On November 13, 2006, the Association filed their answer to the Alliance’s amended complaint and a cross-motion for summary judgment, and brief in support of thereof and in opposition to the Alliance’s motion for summary judgment. Also, on November 13, 2006, the government filed its cross-motion for summary judgment and brief in support thereof and in opposition to the Alliance’s motion for summary judgment.

The Alliance’s response/reply was due on December 8, 2006. On December 11, 2006, the Alliance filed its response/reply out of time and without a motion either for extension of time or to file out of time. On December 12, 2006, the Association filed a motion to strike the Alliance’s response/reply as not timely filed and, pursuant to Local Rule 7.1(i), to deem the Alliance’s failure to file within the prescribed time as an admission that the motion is well taken. The Alliance filed no response to that motion.

On December 21, 2006, the Association filed its reply brief in support of its cross-motion for summary judgment. Following an extension of time to file its reply, on January 5, 2007, the government filed its reply brief. That same date the government filed a motion to strike portions
of two declarations attached to the Association’s cross-motion for summary judgment, arguing that the case is limited to the administrative record and these portions of the declarations (essentially all substance of the declarations) do not fit within that limitation. On January 8, 2007, the Court granted the motion to strike. (Ron Opsahl) (Mentor: Ruffatto) (06-5924)

ALLRED v. COMMISSIONERS, BOULDER COUNTY
BOARD OF COUNTY COMMISSIONERS
(Limited and Ethical Government; Private Property Rights)
(Counsel for McKay and Velma Allred) (Colorado state court)
(Landowner fights county’s unilateral merger of their lots, which prevents their full use of each)

This case was approved by the Board of Directors on October 7, 2005. On August 31, 1954, McKay and Velma Allred bought the North ½ of Lots 7 and 8, Longs View subdivision, a newly platted subdivision in Boulder County. They are the original and only owners since this property was subdivided. Their intent was to build on this lot with access from 76th Street (the side street) rather than Eggelston Drive, which faces the lots. They were given assurances by the County of Boulder that this was acceptable and received a permit to build their home. The home was built across the North ½ of Lots 7 and 8. On January 17, 1958, with a second deed, they purchased the South ½ of Lots 7 and 8 and Lot 6. These lots are contiguous to the first lots. There has been no change in ownership since receipt of the original deeds. In January 1960, the Allreds purchased Lot 3 from a neighbor, Felix Dunbar. This Lot is contiguous to Lot 7, Longs View.

In early 2000, when the Allreds approached Boulder County to determine the status of Lot 3, they were told that it was a separate buildable lot, and during June 2000 the Allreds sold Lot 3 and the purchaser obtained a building permit and built a home on this lot.

Earlier this year, the Allreds approached Boulder County for a written determination as to whether Lots 6, 7, and 8 were also buildable lots. On July 21, 2005, Boulder County issued a written determination that Lots 6, 7, and 8 are now one legal building site because deed merger, tax merger, and physical improvements combined the lots into one parcel under Boulder County Land Use Code 18-121(A)(4).

The Allreds, with the assistance of MSLF and a real estate developer, will apply for an Exemption Plat that would allow for three building sites: Lot 6, the North ½ of Lots 7 and 8, and the South ½ of Lots 7 and 8. The provisions of 18-121(A)(4) also provide that “Any subdivided lot combined under this subsection (4) may be considered to be a separate building lot only if the Board of County Commissioners in its discretion approves an exemption plat under Article 9 of this Code.”

If Boulder County denies this exemption plat the Allreds will file suit in Colorado state court alleging that the county’s action constitutes a violation of substantive due process under the United States Constitution, a violation of equal protection under the United States Constitution, and a regulatory taking under the Colorado and United States Constitutions. (Joe Becker) (Mentor: Hill) (05-5763)
BIG CREEK LAKES RESERVOIR ASS’N v. UNITED STATES
(Private Property Rights; Access to Public Lands)
(Counsel for Big Creek Lakes Reservoir Ass’n) (U.S. District Court, Montana, No. 04cv39)
(Ranchers seek access to their dam, reservoir, and ditches, which lie on federal land)

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.

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 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. No expert reports were filed, and discovery closed on April 29, 2005.

Big Creek’s motion for summary judgment was filed on June 24, 2005. On July 21, 2005, in Big Creek’s related case in Montana state water court, the Master’s Report was issued in which the Master held that Big Creek’s claim had been abandoned through a 21-year period of non-use. Objections to the report were filed on August 5, 2005.

On July 25, 2005, the government filed its cross-motion for summary judgment, memorandum in support, and statement of facts and its response to Big Creek’s motion for summary judgment. On August 22, 2005, Big Creek filed its response to the federal government’s cross-motion for summary judgment and its reply to the government’s response to Big Creek’s motion for summary judgment. On September 13, 2005, the government filed its reply to Big Creeks’ response to its cross-motion for summary judgment.

On March 30, 2006, the Court, sua sponte, stayed the District Court case pending the Ninth Circuit’s decision in Roth. (Ron Opsahl) (Mentor: Ruffatto; Local Counsel: Joscelyn) (03-5273)

**CABOOSE MINING CO. v. U.S. FOREST SERVICE**

(Access to Private Property; Limited and Ethical Government)

(Counsel for Caboose Mining) (U.S. District Court, Montana)

(Miner with patented mining claims fights Forest Service for access to his valuable property)

The Board of Directors approved this case on February 3, 2006. Frank Antonioli and other members of his family own Caboose Mining Company, which holds a patented APA lode mining claim dating back almost 100 years. The claim is in the Rock Creek drainage within the Lolo National Forest of western Montana. On May 18, 2005, Mr. Antonioli filed an Application for Transportation and Utility Systems and Facilities with the U.S. Forest Service. In his application, Mr. Antonioli asked for permission to rebuild an old access road to access his property so that he can perform exploration on his claim. The construction would consist of rebuilding approximately 3,000-4,000 feet of road and constructing an additional 1,000 feet of new road.

On August 4, 2005, the Forest Service rejected Mr. Antonioli’s application stating that the proposed road construction was not justified on the basis of what is known of the nature and extent of mineral resources on the land. The Forest Service geologists stated that there are no mineral indications on the property. When Mr. Antonioli asked if samplings had been performed by the Forest Service, the Forest Service responded that none of the outcropping or visual signals indicated that mineralization was present in the area so no sampling was done. Instead of granting road access, the Forest Service is requiring that Mr. Antonioli perform a prospecting program to define geologically favorable targets. This program could include geological mapping, sampling of float, mine dumps and outcrops, a geochemical soil survey, and a geophysical program. The Forest Service claims that it is reasonable and feasible to conduct these activities without road construction. The Forest Service also stated that there was concern for the road because part of it would be within in the Sliderock Proposed Wilderness Area.

On September 12, 2005, Mr. Antonioli filed an appeal of the August 4, 2005, letter from the Forest Service denying permission to construct/rebuild the road. On October 18, 2005, the
Forest Service responded to Mr. Antonioli, stating that it was not treating his letter as an appeal because its August 4, 2005, action did not constitute a "denial decision" regarding the proposed access. Instead, the Forest Service claimed that it was simply documenting its determination that Mr. Antonioli’s proposal for road access was not warranted at that particular time because the proposed road construction is: (1) inconsistent with the Lolo National Forest Plan guidance management of the area; (2) inconsistent or incompatible with the purposes for which the lands are managed or with other uses; and (3) not in the public interest.

On November 3, 2005, Mr. Antonioli responded, again stating his intentions and plans for the property and this time addressing the Regional Forester. On January 11, 2006, the Regional Forester upheld the Forest Service’s previous decisions and encouraged Mr. Antonioli to explore any possibilities with the local rangers pertaining to the sale or exchange of his property.

Montana Wilderness Association v. United States Forest Service, 655 F.2d 951 (9th Cir. 1981), the Ninth Circuit found that the phrase “National Forest System,” as used in § 3210(a), encompasses national forests in the entire United States, not just those in Alaska. ANILCA grants all inholders in the United States a statutory right of access across national forest system lands. This right of access is not unconditional but subject to regulation by the Forest Service. Fitzgerald v. United States, 932 F.Supp. 1195, 1201 (D. Ariz. 1996). Adequate access is defined as a route and method of access to non-federal land that provides for reasonable use and enjoyment of the non-federal land and that minimizes damage or disturbance to the National Forest System lands and resources.

MSLF represents Mr. Antonioli and Caboose Mining Company in the administrative process and eventual lawsuit against the Forest Service to gain access to his patented mining claim. Caboose Mining will assert that by withholding access to its patented mining claim and unreasonably delaying the processing of its access requests the Forest Service is failing to comply with ANILCA.

On October 25, 2006, the Forest Service received Mr. Antonioli’s applications for road easements to provide access to his mining claims. (Josh McMahon) (05-5812) (Mentor: Joscelyn)

**CANNON v. RUMSFELD**

(Limited and Ethical Government)

(Counsel for Cannons) (U.S. District Court, Utah, No. 05cv922)

(Family seeks recompense for use of its land as bomb site by U.S. government in WWII)

This case was approved by the Board of Directors on June 3, 2005. The Cannon family owns 89½ patented mining claims (1,425 acres) immediately south of the Army Dugway Proving Grounds in west-central Utah. In 1945, during World War II, the U.S. Army and Jesse Fox Cannon (the former owner of the land) entered into a contract that allowed the Army to test explosive munitions in a corner of the Mr. Cannon’s property near the Yellow Jacket patented mining claim. This Army testing project was named “Project Sphinx.” The testing was performed on mineshafts in an effort to simulate Japanese cave fortifications. Contrary to terms
of the contract, the Army bombed all of the patented claims and also used non-explosive munitions including phosgene and mustard agent (chemical munitions) and some possible defoliants. In total, the Army utilized more than 3,000 rounds of ammunition, 12,000 pounds of conventional bombs, and 23 tons of chemical weapons. Although the contract provided that within 60 days from the end of testing the Army would restore the property to the same condition as prior to the bombing, the Army did no reclamation and it used the property, without permission, until the 1960s.

Jesse Fox Cannon made a claim against the Army for $300,000, a claim the Army denied. The cost of reclaiming only the patented mining claims on the Yellow Jacket Range is estimated at about $12 million, not including subsurface reclamation. No cost estimate for reclaiming the entire site (the “Cannon property”) has been made.

The Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-6987, applies to the cleanup of military wastes and unexploded ordinances. Chemical agent wastes are regulated as listed hazardous wastes by the State of Utah as P999 and F999 wastes. P999 waste includes the various chemical agents, including the mustard and lewisite agents, reportedly used on the Cannon property. F999 waste includes residues, breakdown products, and decontamination solutions associated with chemical agents. The mine tunnels on the Cannon property are known, documented solid waste management units under RCRA.

Other than a 1996 Engineering Evaluation/Cost Analysis (“EE/CA”), as of June 2005 the United States had taken no action to clean up the Cannon property. The property is one of more than 2,700 properties listed in the Formerly Used Defense Site (“FUDS”) program and, as such, is subject to Department of Defense cleanup authority. A U.S. Army Corps of Engineers representative stated in Court that the property is scheduled for cleanup beginning in 2008-2010, subject to Congressional funding. Since its inception the FUDS program has been under funded, at about $2 million per year; the total cost of completing the program is estimated to be about $19 billion.

On April 7, 1998, Margaret and Allan Cannon presented the Army with a damage claim for injury to their mining interests. On December 11, 1998, they filed a Federal Tort Claims Act (“FTCA”) suit in the U.S. District Court for the District of Utah for a minimum of $8 million, but filed no environmental law claims. Shortly thereafter, the Army summarily denied the Cannons’ administrative claim. In the district court case the United States filed a motion to dismiss for lack of subject matter jurisdiction. That motion was denied and the Court concluded that the contamination for the Army’s weapons testing was a continuing trespass and nuisance. At this time, Douglas Cannon was granted intervention status. The District Court awarded Margaret and Allan Cannon $166,000. The United States appealed and the Tenth Circuit reversed and dismissed the action for lack of subject matter jurisdiction. In its decision, the Tenth Circuit expressed empathy for the Cannon’s situation, stating, in closing, that “The FTCA provides only for an award of monetary damages. We express no opinion on the possible availability of injunctive relief to remedy the situation.”

Section 7002(a)(1)(A)-(B) of the Resource Conservation and Recovery Act (“RCRA”) contains two remedial provisions that provide rights of action for private citizens seeking to clean up contaminated sites. 42 U.S.C. §§ 6972(a)(1)(A)-(B). The section 7002 RCRA citizen suit provision makes available injunctive relief but does not provide a private right of action for cleanup costs or for economic, compensatory, or punitive damages.

Case Update
As of January 15, 2007
To prevail in a section 7002(a)(1)(B) claim, a private plaintiff must demonstrate that the solid or hazardous wastes may present an “imminent and substantial endangerment” to human health and the environment. A private plaintiff must further establish that defendants “contributed to” the environmental contamination. The chemical waste agents and unexploded ordinances on the Cannon property arguably present an “imminent and substantial endangerment” to human health and the environment, and the Army clearly “contributed to” the environmental contamination that has caused the “imminent and substantial endangerment.”

On July 21, 2005, the Cannons filed a 90-day notice of endangerment and intent to file suit with the Administrator of the Environmental Protection Agency and the other potential defendants and with the State of Utah, as required by statute prior to filing a citizen suit against the United States under § 7002 (a)(1)(A)&(B) of RCRA.

On November 4, 2005, the Cannons filed a complaint against Donald Rumsfeld, Secretary of Defense; U.S. Department of Defense; U.S. Department of the Army; and United States of America seeking injunctive relief under § 7002(a)(1)(A)-(B) of RCRA for violations under RCRA on the Cannon property and for contributing to an imminent and substantial endangerment to human health and the environment. On January 9, 2006, the United States filed its answer. On January 11, 2006, the Court set the initial pretrial conference for March 15, 2006, and ordered the parties to file an attorney planning meeting report and proposed scheduling order by February 15, 2006.

On March 6, 2006, the Court vacated the initial pretrial conference set for March 15, 2006, and issued a scheduling order under which the Cannons are to move to amend their complaint and/or add parties by March 31, 2006; the United States is to file its dispositive motion by April 28, 2006; the Cannons are to file a response brief within 30 days after service of the motion (~June 1, 2006); and the United States is to file a reply brief within 14 days of service of the response brief (on ~June 19, 2006). Within 30 days after the Court rules on the United States’ dispositive motion, the parties are to file a new attorney planning meeting report and proposed scheduling order.

On March 29, 2006, the Cannons submitted a first amended complaint adding a claim under the APA for legal wrongs suffered by the Cannons by Defendants’ failure to complete administrative action on the Property; adding more detail to the claims under the Solid Waste Disposal Act, 42 U.S.C. §§ 6972 (a)(1)(A), (B); and adding more detail to the prayer for relief. The complaint was filed by the Court on March 31, 2006. On April 14, 2006, the government amended its answer.

The government was granted two separate extensions of time to file its dispositive motion, and on May 26, 2006, the government filed a motion for summary judgment and supporting documents. The government failed to include documents referred to in the summary judgment pleadings, and the Cannons filed a motion for extension of time to conduct limited discovery related to those documents.

On July 12, 2006, the Court granted that motion, stating that the Cannons can conduct discovery related to documents expressly referred to in the government’s motion and in the declaration of Gerald Vincent and documents relied upon by Mr. Vincent in making his declaration and depose Mr. Vincent. As the result of delays in the production of these documents and the rescheduling of the Mr. Vincent’s deposition, the Cannons’ response to the government’s motion for summary judgment was rescheduled several times.
On December 1, 2006, the Cannons filed, under seal, their response to the government’s motion for summary judgment. On December 22, 2006, the government filed its reply brief. Oral arguments on the motion for summary judgment are scheduled for March 1, 2007, at 2:30. (Josh McMahon) (Mentor/Local Counsel: Pos) (05-5621)

**CARLTON CREEK IRRIGATION COMPANY v. UNITED STATES**
(Private Property Rights; Access to Public Lands)
(Counsel for Carlton Creek Irrigation) (U.S. District Court, Montana, No. 04cv152)
(Ranchers seek access to their dam, reservoir, and ditches, which lie on federal land)

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.

On March 18, 2005, the Court granted MSLF’s unopposed motion for extension of time to complete discovery. Expert reports are due on May 30, 2005, and expert rebuttal reports on June 28, 2005; discovery and supplementation closes on August 29, 2005.
On October 25, 2005, Carlton Creek filed its motion for summary judgment. The government’s cross-motion for summary judgment was filed on November 29, 2005. On December 19, 2005, Carlton Creek filed its response to the government’s cross-motion. On January 17, 2006, the government filed its reply to Carlton Creek’s response. (Ron Opsahl) (Mentor: Ruffatto) (04-5423)

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

(Freedom of Enterprise)

(Counsel for Cholla Ready Mix) (U.S. District Court, Arizona)

(Family fights bar to its use of its aggregate mine that American Indians say is sacred)

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.
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 (Case No. 04-952). 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 was filed on March 28, 2005. On April 18, 2005, Cholla’s petition for writ of certiorari was denied.

MSLF will file, on behalf of Cholla, a petition to delist the Butte as a National Historic Site as soon as an expert can be located who is willing to testify on behalf of the delisting. (Ron Opsahl) (Mentor: Wilson) (01-4919)

COALITION FOR EQUAL RIGHTS v. OWENS
(Constitutional Law; Private Property Rights)
(Counsel for Coalition for Equal Rights and Shari Warren, db/a Spirit Keeper)
(Tenth Circuit, Colorado, No. 06-1511)
(Business group and tavern owner challenge constitutionality of statewide smoking ban)

This case, a challenge to Colorado’s statewide smoking ban, was approved by the Board of Directors on June 2, 2006. In March 2006, Governor Bill Owens signed House Bill 1175, which will, as of July 1, 2006, ban smoking in public places statewide. This law repeals portions of statutes governing the control of smoking and creates the “Colorado Clean Indoor Air Act.” It prohibits smoking in indoor areas, with certain exemptions including casinos, a lounge at Denver International Airport, businesses having three employees or less, private homes and residences, automobiles if not used for child care or public transportation of children, limousines under private hire, up to 25 percent of rooms of a hotel or motel, retail tobacco businesses, and the outdoor area of any business. For exempt places of employment, the employer must provide a smoke-free work area if requested by an employee. The owner or manager of any place not specified or exempt may prohibit smoking or provide smoking and nonsmoking areas. Local governments may adopt and enforce smoking regulations that are at least as strict as the provisions of the Act. Violation of any provision of the Act is a class 2 petty offense, punishable by a fine as high as $200 for the first violation, $300 for a second, and $500 for each additional violation within a calendar year.

In addition, the Act establishes the following practices as unlawful, and as such, creates protected activities as a foundation by which a person may file discriminatory retaliation claims: (1) retaliation against an employee who requests that the Act be enforced or who reports a violation of the Act is a discriminatory or unfair employment practice; (2) refusing to show, sell, transfer, rent, lease, or otherwise make unavailable housing to any person in retaliation for requesting that the Act be enforced or for reporting a violation of the Act is an unfair housing practice; and (3) withholding from or denying public accommodation for requesting that the Act be enforced or for reporting a violation of the Act is a discriminatory practice.

On June 15, 2006, MSLF filed suit on behalf of Coalition for Equal Rights, a group of bar and tavern owners, and its members and Shari Warren, db/a Spirit Keeper in Black Forest, Colorado (jointly “the Coalition”), against Governor Bill Owens and other state officials and the
State of Colorado (No. 06cv1145). The suit asserts that the Act, which bans smoking in one
tavern in the name of health protection yet allows smoking in larger and/or similarly situated
businesses, violates equal protection and due process under the United States Constitution and
the Colorado State Constitution.

On the same date, the Coalition also filed a motion for temporary restraining order
(“TRO”) and/or preliminary injunction and supporting documents. On June 19, 2006, a status
conference was held at which the Court set a hearing on the TRO request for June 23, 2006. The
Court also indicated that, absent objection, it would hold the trial on the merits and hearing for
final injunctive action together, on an expedited schedule. The Court ordered the Colorado
Attorney General, who represents the State Defendants, to file a response to the Coalition’s
motion for TRO by early a.m. on June 22, 2006.

On June 21, 2006, the Coalition filed a first amended complaint and motion to join
defendants after the Colorado AG suggested that without adding the 22 Colorado District
Attorneys to the lawsuit that it would be liable to be dismissed. In filing the motion to join the
Coalition stated that it did not necessarily admit to the AG’s claim. Several hours after the
motion to join was filed, the Court granted the motion. Late on June 21, 2006, the State
Defendants filed a motion to dismiss them from the Coalition’s motion for TRO, arguing that the
State Defendants have no implementation or enforcement role vis-à-vis the Act.

On June 22, 2006, the Coalition filed a response to the State Defendants’ motion to
dismiss and the State Defendants filed a response to the Plaintiffs’ motion for TRO.

On June 23, 2006, the Court issued a written order denying State Defendants’ motion to
dismiss. That same a hearing on the Coalition’s request for temporary restraining order was held
and the TRO was denied.

A status conference to discuss the remainder of the case was held on June 29, 2006, at
which the Court determined that the case could be decided on cross motions for summary
judgment and that a trial or evidentiary hearing was not needed. Opening briefs by both sides are
due on August 11, 2006, cross responses are due on August 25, 2006, and cross replies are due
on September 13, 2006.

On July 11, 2006, the Coalition served initial disclosures on all defendants. On July 26,
2006, the State Defendants and the District Attorneys filed a motion for extension of time, which
was granted on July 27, 2006, under which motions for summary judgment are due on August

On August 21, 2006, the complaint was personally served on District Attorney William
Thibeaut of Pueblo. Mr. Thibeaut is the only District Attorney not being represented by the
Denver District Attorney’s General Counsel. He refused to waive service and thus his complaint
was delivered by process server. Mr. Thibeaut’s answer is due on September 11, 2006.

On August 25, 2006, the Coalition filed their motion for summary judgment and the State
and District Attorneys (except for William Thibeaut, Jr.) filed a joint motion for summary
judgment or, in the alternative, to dismiss. Response briefs are due on September 15, 2006, and
reply briefs are due on September 25, 2006.

On September 5, 2006, Mr. Thibeaut filed a motion for extension of time until September
25, 2006, to file an answer or other responsive pleading. This motion was granted on September
6, 2006.
On September 15, 2006, the Coalition filed its response to the State and the District Attorneys' joint motion for summary judgment, and the State and the District Attorneys (except Mr. Thibeut) filed their response to the Coalition's motion for summary judgment. On September 25, 2006, the Coalition filed its reply to the State and the District Attorneys' joint response to the Coalition's motion for summary judgment, and the State and the District Attorneys (except Mr. Thibeut) filed their reply to the Coalition's response to the State and the District Attorneys' joint motion for summary judgment.

On September 25, 2006, William Thibeut filed his answer to the Coalition's amended complaint.

On September 27, 2006, corrected versions of the Coalition's response and reply, which had been filed on September 15 and 25, 2006, respectively, were filed to correct an error in case citation. The motion to file these amended pleadings was unopposed and was granted on September 29, 2006.

On October 6, 2006, William Thibeut, District Attorney for Pueblo County, filed his response to the Coalition's motion for summary judgment in which he stated that he supports the Coalition's motion and does not intend to enforce the ordinance. On October 19, 2006, the Court issued a decision denying the Coalition's motion for summary judgment and granting the State and District Attorneys' cross-motion for summary judgment.

The Coalition and Spirit Keeper filed their notice of appeal on November 20, 2006. They filed their docketing statement and transcript order form on December 6, 2006, and on December 8, 2006, the district court certified that the record was complete. The Coalition's opening brief and appendix are due on January 17, 2007. (Joe Becker) (06-5920)

**COLORADO v. McCRAKEN**

(Private Property Rights)

(Counsel for Joel and Justina McCracken) (Logan County District Court, No. 05cv238)

(Division of Wildlife seeks to bar family from building a residence on private property)

This case was approved by the Board of Directors on March 31, 2006. Joel and Justina McCracken purchased 115 acres of land at 11075 County Road 370, Sterling, Colorado 80751, in December 2004. More than half of the 115 acres falls under a sprinkler, and the McCrackens had intended to use that part of the land for growing wheat and alfalfa. The part of the land not under the sprinkler abuts the South Platte River, and the McCrackens had intended to use that part of the land to graze cattle. On about 1 acre of the latter portion the McCrackens planned to build a home, which construction was almost completed in March 2006.

At the time they purchased the land, the McCrackens were aware of an easement on the land held for the public in trust by the Colorado Division of Wildlife ("DOW"). The easement provides, in relevant part: "1. A permanent public easement and access for public fishing and hunting and other outdoor recreation... 3. Grantee agrees to the exclusion of big game hunting except when permission is granted by the Grantor during authorized seasons." The easement, covering 581 acres, was granted on February 27, 1967, by Lewis and Berneice Knudson in exchange for $11,780, about 1/11th of the value of the property at the time. Mr. Knudson later sold the property to Garnie Johnson, who subdivided the land and sold it to four other people, including the McCrackens. One of the landowners built a large house in 1974 without any
objection from the DOW. Another landowner built a home in 1993, again without any objection from the DOW.

Recognizing that an easement encumbered the property, prior to buying the land the McCrackens called and notified Larry Biddle and Brad Cameron at the DOW that if they purchased it the land they intended to use it to build a home. Shortly after purchasing the land, Justina McCracken received a telephone call from Mike Etl, for the DOW. Mr. Etl reviewed each term of the easement with Mrs. McCracken, emphasizing the McCrackens' responsibility under the easement. At no time did Mr. Etl mention any home-building restriction. Then, to be certain of their legal position, the McCrackens consulted a private attorney who assured them that the easement did not preclude them from building a home.

Feeling confident that the easement would not limit their ability to construct a home on their property, the McCrackens obtained a building permit and secured financing to begin construction. Construction commenced on October 7, 2005, and within a month, the floors were poured, the exterior framed, and the windows ordered.

On November 10, 2005 the McCrackens received a phone call from the DOW informing them that their home interfered with the right of the public to hunt, pursuant to the easement, on the McCrackens’ land. As a result, the DOW would be seeking a preliminary injunction and a temporary restraining order to stop construction and to tear down the partially built house. The DOW also would be seeking a permanent injunction preventing any home building in the future.

On November 16, 2005, Judge Hoyer of the Logan County District Court denied the relief sought by the DOW because there was no “danger of any real, immediate, or irreparable injury which could be prevented by injunctive relief.” The Court concluded that the DOW would not suffer any irreparable harm if the McCrackens were allowed to keep their home until after a trial on the merits could determine the true meaning of the easement. The McCrackens were aware that if they continued building their home, it was possible that they could ultimately lose their investment.

After a series of negotiations with the DOW failed, the DOW told the McCrackens that it intended to seek the permanent injunction. In its representation of the McCrackens MSLF will argue that the plain language and intent of the easement does not preclude the McCrackens from constructing a home on their property and that even if the Court finds that the easement prohibits such construction the laches doctrine estops the DOW from enforcing the easement.

On May 1, 2006, MSLF entered an appearance in the case. On July 21, 2006, the parties exchanged initial disclosures. Discovery continued throughout the summer and fall of 2006.

On December 7, 2006, the DOW filed a summary judgment motion to address certain questions of law and asserting that there are no facts in dispute. The McCrackens’ response was filed on December 15, 2006.

On January 8, 2007, the DOW filed its reply in support of its motion for summary judgment. Draft witness and exhibit lists are to be exchanged by January 11, 2007, the trial management order filed by January 19, 2007, pretrial motions filed no later than January 17, 2006, and trial briefs filed by February 6, 2007. The trial has been set for February 20-21, 2007. (Joel Spector) (06-5821)
COMMON CAUSE/GEORGIA v. COX
(Constitutional Rights, Equal Protection) (Amicus)
(Eleventh Circuit, Georgia, No. 05-15784, remand to N. District, Georgia, No. 05cv201)
(Georgia General Assembly’s attempt to prevent illegal voting is challenged by the ACLU)

This case was approved by the Board of Directors on December 5, 2005. In early 2005, the General Assembly of Georgia adopted HB 244, a law requiring voters to present a government-issued photo identification card to poll workers prior to casting their vote. The law gave registered voters who did not possess a photo ID two alternative ways to exercise their vote. A voter could obtain a photo ID from the State, in many cases free of charge, and thereafter vote in person or a voter could exercise their right to vote without photo ID via absentee ballot.

Plaintiffs, Common Cause/Georgia and others, characterize the photo ID requirement as an effort by the Republican-dominated Georgia House and Senate to suppress voting by the poor, the elderly, the infirm, African-American, Hispanic and other minority voters and allege that the law places an undue burden on these groups because obtaining a photo ID from the State is a time-consuming, inconvenient and potentially expensive process. They also allege that the law is an unconstitutional poll tax.

In its defense, the State of Georgia argues that the Constitution does not guarantee the right to vote in person and that the law is a proper exercise of the State’s power to regulate elections and verify the identity of the in-person voter. It notes that a voter is not necessarily required to pay a fee to obtain a photo ID and that a voter who is unable or desires not to obtain a photo ID may still vote an absentee ballot by mail. It also argues that the law is not a poll tax because payment of a fee to obtain a photo ID is not a precondition to voting. A voter may avoid payment of the fee either by obtaining a photo ID free of charge or by voting via absentee ballot.

On October 18, 2005, U.S. District Court Judge Harold L. Murphy granted Common Cause’s motion for preliminary injunction holding that the photo ID requirement was an undue burden upon the right to vote as well as a poll tax. The Court explained that “absentee voting [was] simply not a realistic alternative to voting in person that is reasonably available for most voters who lack a photo ID” and that the availability of absentee voting “[did] not relieve the burden on the right to vote caused by the photo ID requirement.” It held that the law was a poll tax because (1) it placed a material requirement upon a voter solely because of his refusal to pay for a photo ID and (2) because absentee voters may be “unaware of their eligibility to vote via absentee ballot or because the voters are unable to navigate the absentee voting process successfully.”

On October 21, 2005, the State of Georgia appealed the District Court’s decision to the Third Circuit enjoining enforcement of Georgia’s photo ID statute. The State’s motion to stay the preliminary injunction staying the photo ID law was denied.


On January 31, 2006, Common Cause filed a motion for remand for further proceedings appropriate in light of the enactment of SB 84, which passed the State Senate 32-22 and the State House 111-60.
On January 26, 2006, Governor Sonny Perdue signed SB 84 into law requiring Board of Registrar offices in each of the State’s 159 counties to issue photo ID cards for voting purposes, free of charge. Voter ID cards are also available through the Department of Driver Services (DDS) Customer Services Centers, as well as through DDS mobile licensing SB 84.

On February 1, 2006, the State filed a response to the motion to remand, and on February 3, 2006, Common Cause filed its reply. On February 9, 2006, the Court granted the motion for remand. On April 21, 2006, the State informed the Court that the Department of Justice had “precleared” SB 84. That same date, the Court granted Common Cause’s motion to file an amended complaint, and on April 26, 2006, the complaint was filed.

On May 5, 2006, the Court issued an scheduling order that, within 10 days of the Department of Justice “preclearing” the implementing regulations for SB 84, plaintiffs can file a motion for preliminary injunction. Defendants’ response to the motion is due 10 days thereafter.

On May 9, and 10, 2006, amended answers were filed, and the Georgia Secretary of State filed a motion to dismiss the amended complaint. On May 25, 2006, Common Cause filed a response to the motion, together with a motion requesting the court certify certain questions of state law to the Georgia Supreme Court. On June 8, 2006, the Secretary of State filed a response to that motion and a reply to Common Cause’s response to the Secretary’s motion to dismiss.

On June 29, 2006, the Court dismissed counts one and three of Commons Cause’s second amended complaint and those portions of counts two, five, and six that challenge the 2005 photo ID act. On June 30, 2006, the Court issued a scheduling order for Common Cause’s motion for temporary restraining order.

Following that order, Common Cause filed its motion for temporary restraining order on July 5, 2006, the State filed its response on July 10, 2006. A hearing on the motion was held on July 12, 2006, at which the Court orally granted the preliminary injunction with respect to the July 18, 2006, primary elections and indicated it would revisit the issue with respect to the November 2006 general elections. On July 14, 2006, the Court filed its written decision granting the preliminary injunction. It also denied as moot the State’s motion to dismiss.

On September 5, 2006, the Court convened a phone conference of the parties to discuss the direction of the case and the Court’s previous order of July 14, 2006. The Court directed Common Cause to file a motion regarding the voter ID law relative to the need for a hearing prior to the State special elections.

On September 28, 2006, all proceedings, including discovery, were stayed pending resolution of the appeal of a related state case in Fulton County Superior Court to the Georgia State Supreme Court (Governor Perdue v Lake, No. S07A0525). The State filed its opening brief in that case on January 8, 2007. (Liz Galloway) (05-5792)

**COMMUNITIES FOR A GREAT NORTHWEST v. U.S. ARMY CORPS OF ENGINEERS**

(Environmental Law, Endangered Species Act)

(Counsel for CGNW) (U.S. District Court, Montana or District of Columbia)

(Community fights Corps of Engineers’ plan to flood town to “save” endangered fish)

On June 2, 2006, the Board of Directors approved two alternative courses of action on behalf of Communities for a Great Northwest (CGNW) regarding the release of waters from
Libby Dam purportedly to protect endangered fish species. A public comment period ended May 30, 2006, and shortly the Corps of Engineers will issue a Record of Decision formally adopting a selected alternative. MSLF’s course of action will be determined by which alternative the Corps selects. If the Corps chooses an alternative allowing unsafe release from Libby Dam purportedly to protect endangered fish species CGNW will challenge the Environmental Impact Statement and Record of Decision. If the Corps adopts a safer alternative that would protect endangered fish without creating an undue risk to private property or impairing water quality standards, environmentalmost likely will challenge that choice, in a suit against the U.S. Fish and Wildlife Service (“FWS”) that has already been filed, in which case CGNW will either intervene as a defendant or file an amicus curiae brief supporting the Corps’ choice.

In order to provide reservoir and flow conditions for anadromous and resident fish listed as threatened or endangered under the ESA, the U.S. Army Corps of Engineers is reevaluating operations at Libby and Hungry Horse Dams. In November 2005, it released a Draft EIS that evaluated several flow regimes, including both standard and variable flows at rates of 25,000 cubic feet per second (cfs) and 35,000 cfs. In the Draft EIS, the Corps identified its preferred alternative for Libby Dam, LV1 (Libby Dam, variable flow, option 1), which provided for variable flows of up to powerhouse capacity of 25,000 cfs.

In its April 2006 Final EIS, the Corps identified a new preferred alternative that requires flow rates of up to 35,000 cfs for as much as 14 days per year, 10,000 cfs above the capacity of the powerhouse. As a result, any flow above powerhouse capacity would necessarily flow over the dam’s spillways, resulting in violations of Montana’s water quality standards and requiring structural modifications of the dam.

Although Libby Dam is structurally incapable of supporting flows at a rate of 10,000 cfs above powerhouse capacity without violating Montana’s water quality standards and potentially causing a significant detrimental impact to aquatic life in the Kootenai River, the FWS recommended that the Corps allow a spillage of up to 10,000 cfs in at least three of the next ten years. The Corps adopted that recommendation in its Final EIS.

The Center for Biological Diversity and others have filed suit in the U.S. District Court for the District of Montana against the FWS challenging the Biological Opinion that was produced during consultations between the Corps and the FWS. The environmental groups claim that the FWS recommendation does not provide enough protections for listed species. If the Corps selects its safer alternative, which is based in part of the FWS recommendation, it is likely that the environmental groups will add claims against the Corps in their ongoing case against the FWS.

On July 5, 2006, MSLF sent a 60-day of intent to sue to the Secretaries of Interior and Commerce and officials of the U.S. Fish and Wildlife Service, Bureau of Reclamation, NOAA Fisheries, and U.S. Army Corps of Engineers. (Ron Opsahl) (Mentors: Sullivan, Runfli) (06-5904)
COMMUNITIES FOR A GREAT NORTHWEST v. U.S. DEPARTMENT OF INTERIOR
(Environmental Law, Limited and Ethical Government)
(Counsel for CGNW) (U.S. District Court, D.C., No. 06cv1842)
(Locals challenge Fish and Wildlife Service’s illegal definition of grizzly bear “population”)

On February 3, 2006, the Board of Directors approved this case in which Communities for a Great Northwest (“CGNW”) and MSLF challenge the designation of grizzly bear subpopulations for the determination of jeopardy opinions under the Endangered Species Act. Communities will assert that its members have been injured by U.S. Fish and Wildlife Service (“FWS”) issuance of a jeopardy opinion based on one of the six, non-listed subpopulations of grizzly bear.

In 1975, the FWS listed the grizzly bear as “threatened” in the conterminous 48 States, pursuant to the ESA. By a 1986 unpublished memorandum, without notice or opportunity for public comment, the FWS departed from the general rule that jeopardy opinions are to be based on the entire listed species throughout its range and, instead, determined that for nine different species jeopardy opinions should be based upon the proposed actions’ impacts to informally designated, smaller populations.

In the case of the grizzly bear, the FWS has identified six subpopulations to be used in determining jeopardy opinions. These subpopulations are found within Washington, Idaho, Montana, and Wyoming and include the Yellowstone, the Northern Continental Divide, the Cabinet-Yaak, the Selkirk, the Selway-Bitterroot, and the Northern Cascades subpopulations. The FWS cited no authority justifying its identification of these six subpopulations or its use of these populations as de facto “distinct population segments.”

Currently, the FWS issues biological opinions with jeopardy assessments for these subpopulations of grizzly bear rather than for the entire listed species. As a result, grizzly bear are overprotected because the population assessed (the de facto Distinct Population Segment (“DPS”)) consists of fewer bears, rendering the purported harm to each individual bear much more significant in relation to the smaller subpopulation.

Contrary to the actions of the FWS, the ESA requires jeopardy opinions to be based on the impacts to the entire listed species, not to merely one informal subpopulation. Moreover, a species may not be listed without a regulation promulgated in accordance with ESA requirements. If a purported subpopulation has not been formally listed as threatened or endangered, it may not be considered a separate “species” for purposes of the ESA and jeopardy opinions cannot be issued with regard to it. As a result, when rendering jeopardy opinions the FWS must examine impacts to the entire population of grizzly bear in the contiguous States.

On August 15, 2006, MSLF sent a 60-day notice of intent to sue under the ESA to Secretary of Interior Kemplhorne, U.S. Fish and Wildlife Service, and FWS officials. The 60-day period expired on October 23, 2006.

On January 2, 2007, the Court ordered the parties to confer regarding scheduling by January 17, 2007, and to file a proposed scheduling order by January 29, 2007. (Ron Opsahl) (05-5746)

**DAY v. BOND**

(Limited and Ethical Government)

*Amicus, Counsel for amici* (Tenth Circuit, Kansas, No. 05-3309)

(Students and parents fight for right to contest Kansas' illegal in-state tuition for illegal aliens)

On October 7, 2005, the Board of Directors approved the filing of an *amicus* brief on behalf of former Senator Alan K. Simpson and an unnamed U.S. Congressman, two co-sponsors of 8 U.S.C. § 1623(a), arguing that plaintiffs have standing to pursue their challenge to the granting of in-state tuition rates by the State of Kansas to undocumented aliens attending that State's public universities. In the brief, MSLF will set forth the intent of the provision's sponsors in an effort to demonstrate that the plaintiffs have standing to redress their injury.

On July 1, 2004, a Kansas statute was enacted providing that any individual (1) who attended an accredited Kansas high school for three years and (2) who either graduated or earned a Kansas general education development certificate and (3) who meets the law's other criteria is eligible to pay tuition rates equivalent to Kansas resident rates at regents' schools. Kan. Stat. Ann. § 76-731a (2004). On July 19, 2004, Ms. Day and others initiated a lawsuit in Kansas federal district court (No. 04cv4085) alleging that statute unlawfully and unfairly allows undocumented or illegal aliens to attend Kansas' universities and pay resident in-state tuition. On July 5, 2005, the suit was dismissed for lack of standing, and on August 10, 2005, the plaintiffs appealed this decision to the Tenth Circuit.

The sole issue before the Tenth Circuit is the standing of the plaintiffs to bring suit. The district court held that the plaintiffs failed to demonstrate that they have been injured because they were not subject to the provisions of § 76-731a. The court also held that the plaintiffs failed to show that a favorable decision would redress their injuries in that if the Kansas statute were held in violation of federal law plaintiffs would receive no benefit; that is, their tuition bills would not change. Plaintiffs contend that the statute operates to put nonresident U.S. citizens at a disadvantage in seeking in-state tuition and that an increase in the number of students receiving subsidized in-state tuition places upward cost pressure on the tuition rates paid by all students, including driving nonresident tuition rates higher.

The appellants' brief and appendix were filed on October 18, 2005, and Simpson and Smith's *amicus* brief in support of appellants was filed on October 27, 2005. On October 27, 2005, Washington Legal Foundation, Allied Educational Foundation, and three named individual lodged an *amicus* brief in support of appellants.

On December 5, 2005, the Kansas state defendant-appellees filed their response brief. On December 14, 2005, defendant-intervenor-appellees Kansas League of United Latin American Citizens and The Hispanic /American Leadership Organization, Kansas State Chapter, filed their response brief. On December 14, 2005, Washington Legal Foundation's *amicus* brief, was filed, and on December 21, 2005, the Kansas Association of Schools filed an *amicus* brief.

On January 17, 2006, the appellants filed their reply brief. Oral arguments were held on September 27, 2006. (Ron Opsahl) (05-5650)

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DIMITROV v. BUREAU OF LAND MANAGEMENT
(Limited and Ethical Government)
(Counsel for Dimitrovs) (U.S. District Court, Montana, No. 06cv58)
(Family of small miners fights BLM interpretation of reporting requirement that kills its claims)

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 (Case No. IBLA 2000-8). On January 14, 2005, the IBLA affirmed the ALJ’s decision.

On April 7, 2006, the Dimitrovs appealed the IBLA’s decision in Montana federal district court (No. 06cv58-BLG-RWA).

On June 12, 2006, the government filed its answer. On June 22, 2006, the government refused to consent to trial by the magistrate judge, as the Dimitrovs had requested, and, as a result, on June 26, 2006, the Court reassigned the case to Judge Cebull for hearing.

On July 10, 2006, the Court issued a scheduling order for the case. The administrative record is due on July 17, 2006. To the extent that any issues concerning the record’s scope and content are not resolved by the parties, the parties shall submit a request to the Court for additional discovery by July 24, 2006. The Dimitrovs’ motion for summary judgment, brief in support, and statement of uncontested facts are due by August 21, 2006; the government’s response and statement of genuine issues are due on October 2, 2006; and the Dimitrovs’ reply is

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due by October 23, 2006. After completion of briefing, the Court will schedule oral argument should it find that argument will aid disposition of the motion for summary judgment.

On July 17, 2006, the government filed the administrative record. On August 21, 2006, the Dimitrovs filed a motion for summary judgment.

On October 2, 2006, the federal government filed its opposition to the Dimitrovs’ motion for summary judgment and a motion for summary judgment and supporting brief. On October 16, 2006, the Dimitrovs filed their reply to the opposition and response to the motion for summary judgment.

On November 30, 2006, the magistrate judge issued his recommendations to the District Court urging that the IBLA’s decision be overturned. On December 14, 2006, the Dimitrovs filed their response to the magistrate’s findings and recommendations. On December 18, 2006, the government filed their objections to the magistrate’s findings. On January 8, 2007, the Dimitrovs filed a reply to that response. (Ron Opsahl) (97-4133)

DOE v. RUMSFELD

(Limited and ethical government) (Counsel for Plaintiffs) (D.C. District Court)
(Students sue to compel federal officials to provide military recruiters equal access to campus)

On October 6, 2006, the Board of Directors approved the filing of a suit on behalf of several students at the University of California at Santa Cruz (UCSC) to compel federal officials to provide military recruiters equal access to campus, pursuant to the Solomon Amendment. The Solomon Amendment bars federal funds from any “institution of higher education” that has “a policy or practice” that “either prohibits, or in effect prevents . . . a military department . . . from gaining entry to campuses . . . for purposes of military recruiting . . .” 10 U.S.C. § 983(b)(2003). Its constitutionality was upheld in Rumsfeld v Forum for Academic and Institutional Freedom, Inc., 547 U.S. ___ , 126 S.Ct. 1297 (2006), by a vote of 8-0. Justice Alito, who did not participate in oral arguments held December 6, 2005, did not participate in the decision; Justice O’Connor, who did participate in those arguments, was no longer on the Court.

At the April 2005 job fair on the campus of UCSC protesters forced military recruiters to flee from campus. As a result, at the April 2006 job fair, the military recruiters were placed in a facility separate from that used by other potential employers and job fair participants. Although campus security limited access to that facility, a near riot by students and professors—all of whom wore masks—made it impossible for interested students to enter the facility and within minutes the violence had escalated to such a degree that the military personnel were forced to flee. At least one automobile belonging to one of the uniformed recruiters was damaged by the rioters.

Despite media coverage Secretary Rumsfeld has not responded to a written request by MSLF that he cut funding to UCSC pursuant to the Solomon Amendment. MSLF will file suit in the federal district court for the District of Columbia on behalf of John Doe and Jane Roe, UCSC students proceeding under pseudonyms, and an unnamed Member of Congress against Secretary of Defense Rumsfeld, the Secretaries of the Navy, Army, and Air Force, and the Assistant Secretary of Defense (Force Management Policy). The primary issues in the case will be whether college students seeking to meet with military recruiters on campus have the requisite
standing to enforce the Solomon Amendment and whether they may compel federal officials to enforce the Solomon Amendment. (Liz Gallaway) (Mentor: Garcia) (06-5941)

THOMAS H. DUNBAR, TRUSTEE v. UNITED STATES
(Private Property Rights; Access to Public Lands)
(Counsel for Thomas H. Dunbar, Trustee) (U.S. District Court, Montana, No. 02cv191)
(Landowner fights for access to his dam, reservoir, and ditches, which lie on federal land)

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 Fed. R. Civ. P. 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 August 3, 2004, the Magistrate Judge stayed the case pending final action in Roth. On July 26, 2006, due to the retirement of Magistrate Judge Erickson, Judge Molloy reassigned the case to himself. (Ron Opsahl) (Mentor: Joscelyn) (01-4918)

**DYNALTANIC CORP. v. U.S. DEPARTMENT OF DEFENSE**
(Equal Protection, Limited and Ethical Government)
((Amicus) (U.S. District Court, D.C., No. 95cv2301)

(Company fights racial preferences in the awarding of U.S. Department of Defense contracts)

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 DynaLantic, 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_, 937 F.Supp. 1 (D.D.C. 1996). On appeal, the D.C. Circuit reversed, and on remand DynaLantic amended its complaint to challenge all aspects of the DOD and SBA racial preference programs. _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 _amicus_, 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 _amicus_ here have not been invited to participate in oral arguments.

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. On March 11, 2005, the parties filed responses to these _amicus_ briefs. (Scott Detamore) (04-5545)

_EEOC v. KIDMAN_

(Equal Protection, Freedom of Enterprise)

(Counsel for Richard and Shauna Kidman) (Ninth Circuit, Arizona, No. 04-17005)

(Family restaurant fights racial discrimination charge for its English language workplace rule)

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. 02cv1911-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 MSFL to become their lead counsel and return the case to federal district court.

When it took on this case MSFL 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 MSFL began representing the Kidmans. MSFL 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, MSFL 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) was due on March 18, 2005, but the EEOC was granted a two-week extension of time until April 1, 2005, in which to file its brief and it filed its brief on that date. The Kidman’s response and reply
(third cross-appeal brief) was filed on May 2, 2005; and the EEOC’s reply (fourth cross-appeal brief) was filed on May 16, 2005.

Oral arguments were held on October 16, 2006, in San Francisco and were taped by C-SPAN for later showing. (Joe Becker) (Mentor: Mead) (02-5180)

**EEOC v. SSM & RC, INC.**

(Freedom of Enterprise) (Counsel for SSM & RC, Inc., a/k/a Spring Sheet Metal and Roofing)  
(U.S. District Court, Western District, New York, No. 05cv6495)  
(Small business fights racial discrimination charge for its English language workplace rule)

On October 28, 2005, the Board of Directors approved this case. In 2000, James Erb purchased a 90-year-old, family-owned business, SSM & RC, Inc., d/b/a Spring Sheet Metal and Roofing, Inc. ("Spring Sheet Metal"). Since the roofing company began operations in 1910, approximately 40 percent of its employees have been members of a minority group. For reasons of workplace safety, Spring Sheet Metals requires a certain level of English language proficiency, as well as some willingness on the part of each employee to communicate safely in English.

After less than 60 days on the job, on December 6, 2003, Mr. Juan M. Rodriguez-Perez, an Hispanic/Cuban, was discharged by Spring Sheet Metal because of his inability, or unwillingness, to communicate in English in a dangerous third-story work setting.

Although he was hired by another firm in June 2004, about nine months later, on August 25, 2004, Mr. Rodriguez-Perez filed a complaint with the Equal Employment Opportunity Commission ("EEOC") accusing Spring Sheet Metal of national origin discrimination. On September 22, 2005, the EEOC filed suit against Spring Sheet Metal on behalf of Mr. Rodriguez-Perez alleging intentional discrimination based on Spring Sheet Metal’s safety requirement that Mr. Rodriguez-Perez speak English in Spring Sheet Metal’s workplace.

On November 1, 2005, Mr. Rodriguez-Perez filed a motion to intervene. On November 14, 2005, Spring Sheet Metal filed a motion for extension of time to respond to the EEOC’s complaint such that it could file a joint response to both the EEOC and intervenor Rodriguez-Perez should the Court grant the motion for intervention. Spring Sheet Metal waived its right to file a response to Rodriguez-Perez’ motion to intervene. On November 21, 2005, the Court granted Spring Sheet Metal’s motion, ruling that, if the motion to intervene is granted, Spring Sheet Metal’s response will be due 20 days after service of Mr. Rodriguez-Perez’ complaint, or, if the motion is not granted, Spring Sheet Metal’s response to the EEOC’s complaint is due 20 days after denial of intervention. On April 26, 2004, the Court granted Mr. Rodriguez-Perez’s motion to intervene.

On August 18, 2006, Mr. Rodriguez-Perez filed his complaint in intervention, together with a jury demand. On August 28, 2006, the Magistrate Court issued an order scheduling a rule 16 case management hearing for October 4, 2006.

On September 7, 2006, Spring Sheet Metal filed a motion to dismiss the complaints of the EEOC and Mr. Rodriguez-Perez. On September 15, 2006, the Court issued a scheduling order under which responses to the motion to dismiss are due on October 20, 2006, and oral argument on the motion to dismiss is set for November 30, 2006, before Judge Siragusa. On
September 18, 2006, the parties conferred regarding a proposed discovery plan, which must be submitted to the Court by September 28, 2006.

On September 26, 2006, the Court issued a notice of adjournment on the scheduling conference set for October 4, 2006, pending a decision on Spring Sheet Metal’s motion to dismiss.

On October 19, 2006, the EEOC and Mr. Rodriguez-Perez filed a joint opposition to Spring Sheet Metal’s motion to dismiss. Oral argument on the motion to dismiss were set for November 30, 2006, but because of medical problems of government counsel were rescheduled for February 1, 2007. (Joe Becker) (Local Counsel: Richard Bell) (05-5786)

**GONZALEZ v. YES ON PROP. 200 and RANDALL PULLEN**

(Limited and ethical government)

(Counsel for appellant-applicant intervenors Yes On Proposition 200, Randall Pullen)

(Ninth Circuit, Arizona, Nos. 06-16521, 06-16702, 06-16706)

(Proponents of Arizona law barring illegal aliens from voting fight attempts to weaken the law)

This case was approved by the Board of Directors on June 2, 2006. Arizona ballot initiative petition I-03-2004, the “Arizona Taxpayer and Citizen Protection Act” (“Proposition 200”), was passed by the voters of Arizona in November 2004 because the State was spending more than $1 billion a year to provide services and benefits for more than half a million illegal aliens. The added tax burden to each Arizona household was $700 a year.

Proposition 200 was designed to strengthen enforcement of existing laws that relate to illegal immigration by requiring that all individuals who are registering to vote or applying/voting for public benefits (including welfare, disability, retirement payments, public housing assistance, or taxpayer-subsidized postsecondary education) provide proof of U.S. citizenship. Arizona is the first State in the Nation to require both documentary proof of U.S. citizenship for first-time voter registration and presentation of a designated identity document at the polls.

The official Arizona voter registration form, promulgated by Secretary Brewer in March 2005, provides that “A complete voter registration form must also contain proof of citizenship or the form will be rejected.” The previous federal mail voter registration application prescribed by the U.S. Elections Assistance Commission (“EAC”) is no longer used in Arizona.

On March 6, 2006, the EAC wrote to Secretary Brewer that “Arizona may not refuse to register individuals to vote in a federal election for failing to provide supplemental proof of citizenship if they have properly completed and timely submitted the Federal Registration Form.” The EAC alleged that several Arizona “residents” who attempted to register to vote using the federal EAC registration application at different County Recorder’s Offices within Arizona were denied registration. It also alleged that County Recorders were not accepting the registration forms without documentary proof of citizenship because of the requirements of Proposition 200.

On May 9, 2006, several civil rights and voter adequacy groups filed suit in U.S. District Court challenging the voter registration and identification provisions of Proposition 200. *Gonzales v Arizona*, No. 06cv1268-ROS. Besides several individuals, the Southwest Voter
Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, and Arizona Hispanic community Forum are plaintiffs in this suit. A second suit, *The Inter Tribal Council of Arizona v Brewer*, No. 06cv1362-JAT, was consolidated with *Gonzalez*. Plaintiffs in the second suit include League of Women Voters of Arizona, Hopi Tribe, League of United Latin American Citizens Arizona, Arizona Advocacy Network, People For The American Way Foundation, and Representative Steve M. Gallardo, a Arizona state legislator (hereafter jointly “ITCA”). Plaintiffs in the consolidated suits have alleged numerous causes of action including violations of the U.S. Constitution (Supremacy Clause, First Amendment, Twenty-Fourth Amendment, and Equal Protection Clause of the Fourteenth Amendment), Sections 2 and 5 of the Voting Rights Act (42 U.S.C. 1973), Title VI of the Civil Rights Act, and the National Voter Registration Act of 1993, as well as violations of Arizona state law (Ariz. Rev. Stat. §§ 16-121.01, 16-151).

On June 9, 2006, a hearing was held on the application for a temporary restraining order. The judge has taken the matter under advisement.

On June 13, 2006, the County Recorders and Elections Directors filed their answer to the *Gonzalez* case only. On June 19, 2006, the Secretary of State, Jan Brewer, and the State of Arizona filed answers to both cases.

MSLF previously represented Mr. Randy Pullen, Yes On Proposition 200, and the Federation for American Immigration Reform (FAIR) as defendant-intervenors in *Friendly House v. Napolitano*, a challenge to Proposition 200. That case was dismissed by the Arizona federal district court, and on appeal the Ninth Circuit ruled the case was not ripe and ordered it dismissed. On June 20, 2006, MSLF filed a motion to intervene as defendant-intervenors in both suits on behalf of Randall Pullen and Yes On Proposition 200 (hereafter jointly “Yes On Prop. 200”), together with supporting documents. On June 23, 2006, the pro hac vice applications of MSLF’s attorneys were granted. The Court set responses to the motion to intervene due on July 28, 2006, and Yes On Prop. 200’s reply due on July 31, 2006. On July 5, 2006, Yes On Prop. 200 filed a motion for clarification of those dates in that the three-day period for preparation of the reply is over a weekend and the length of time allowed does not comport with the local rules.

A telephone status conference was held on June 28, 2006, at which discovery, briefing, and hearing schedule were discussed. MSLF participated in this conference as attorneys for the applicant intervenors.

On June 30, 2006, the Arizona Secretary of State filed a motion to consolidate the *Gonzalez* cases with a third case, *The Navajo Nation v. Brewer*, No. 06cv1575, in that its issues are essentially the same as those in *Gonzalez* cases, though somewhat narrower.

On July 5, 2006, the parties (absent applicants intervenors) filed a stipulated discovery and briefing schedule for the preliminary injunction. The cutoff for service of written discovery requests is July 17, 2006; plaintiffs are to disclose expert reports by August 1, 2006; all parties are to complete fact discovery by August 2, 2006; plaintiffs’ experts are to be deposed by August 9, 2006; defendants are to disclose expert reports by August 11, 2006; and defendants’ experts are to be deposed by August 16, 2006. Plaintiffs’ opening briefs are due by August 3, 2006; defendants’ response briefs are due by August 11, 2006; and plaintiffs’ reply briefs are due by August 18, 2006.
The plaintiffs believe that the preliminary injunction hearing should include the opportunity for testimony and evidence, including cross-examination, whereas the defendants believe that the court should determine if the matter is to be decided on the papers submitted, supplemented by oral argument. The plaintiffs requested that three days be set aside for the hearing. All of the parties agreed to a hearing the week of August 21, 2006; the Arizona Secretary of State, the primary defendant, is not available during the last week of August (the Court’s choice for the hearing) because she will be visiting all Arizona counties in preparation for the upcoming elections.

On July 5, 2006, Yes On Prop. 200 filed a motion for clarification of those dates in that the three-day period for preparation of the reply is over a weekend and the length of time allowed does not comport with the local rules. On July 6, 2006, the Court issued a clarification, setting responses to the motion to intervene due on July 12, 2006, and any reply by Yes On Prop. 200 due on July 17, 2006.

On July 11, 2006, the Court issued a schedule for preliminary injunction matters. It granted the schedule as proposed by the parties (above), however, it set the hearing on preliminary injunction matters for August 30, 2006, despite the State’s request that it be held the preceding week.

On July 12, 2006, ITCA, plaintiffs in the second case, filed a response to Yes On Prop. 200’s motion to intervene arguing, primarily, that the State adequately represents the interests of Yes On Prop. 200. The plaintiffs in the lead case did not file a response and took no position on the intervention at the time that Yes On Prop. 200 filed its motion to intervene.

On August 4, 2006, the Court denied Yes On Prop. 200’s motion to intervene, both as a matter of right and by permission. In the same order, the Court consolidated The Navajo Nation v. Brewer, No. 06cv1575, with Gonzalez. On August 11, 2006, Yes On Prop. 200 filed a notice of appeal of the decision denying intervention. On August 21, 2006, the Ninth Circuit docketed the appeal of the denial of intervention (Gonzalez v. Yes On Prop. 200, No. 06-16521).

On August 4, 2006, the Gonzalez plaintiffs and the ITCA plaintiffs filed motions for preliminary injunction and supporting documents. ITCA moved to exceed the page limits, which motion was only granted by half, and on August 9, 2006, ITCA filed an amended motion for preliminary injunction, pursuant to the Court’s order.

On August 14, 2006, Protect Arizona Now (PAN) and Washington Legal Foundation filed a motion for leave to file an amicus brief in support of Defendants. On August 16, 2006, State Defendants and County Defendants filed responses to ITCA’s motion for preliminary injunction. The State Defendants also filed a motion to exceed the page limits. A week later the parties filed replies.

On September 11, 2006, the District Court denied both motions for preliminary injunction. It ordered supplemental briefing, due September 18, 2006, by all parties as to whether the state’s identification requirements constitute a poll tax and additional briefing by the Navajo Nation on their Voting Rights Act and Civil Rights Act claims.

On September 11, 2006, the Gonzalez plaintiffs filed an appeal of the denial of their preliminary injunction (No. 16702), and on September 12, 2006, the ITCA plaintiffs filed their appeal (No. 16706). On September 27, 2006, the Ninth Circuit consolidated the appeals.
On September 29, 2006, ITCA filed an emergency motion for injunction, and on October 3, 2006, Gonzalez filed a joinder with that motion, the Coconino County appellees filed a response in support of the motion, and the State appellees filed an opposition to the motion. On October 5, 2006, the Ninth Circuit granted the motion and enjoined implementation of Proposition 200’s voting requirement in connection with the November 2006 election and its registration proof of citizenship requirements. It ordered the injunction to remain in effect pending disposition of the merits of the appeals.

On October 6, 2006, the County appellees and the State appellees filed emergency motions for reconsideration; those motions were denied on October 9, 2006.

On October 10, 2006, the Ninth Circuit granted appellants’ motion for extension of time to file its opening brief and set a new briefing schedule. The consolidated opening brief is due on November 22, 2006, the consolidated response brief is due on December 20, 2006, or 28 days after service of the opening brief, whichever is earlier, and the consolidated reply brief is due within 14 days after service of the response brief. An amicus brief by Yes On Prop. 200 would be due on December 29, 2006, or 7 days after the response brief is filed, whichever is earlier.

On October 13, 2006, the State of Arizona (06A379, 06-533) and Maricopa County (06A375, 06-532) filed applications for a stay of the Ninth Circuit’s emergency injunction with the U.S. Supreme Court (Justice Kennedy). On October 16, 2006, Gonzalez filed responses to those applications. On October 20, 2006, the Supreme Court issued a per curiam decision in which it construed the State and County applications as petitions for writ of certiorari and granted those petitions. The Court then vacated the order of the Ninth Circuit, “allow[ing] the election to proceed without an injunction suspending the voter identification rules,” and remanded the case for further proceedings.

On October 23, 2006, the District Court rescheduled its hearing on the Navajo Nation’s claims for November 2, 2006. On October 24, 2006, the State moved to vacate that hearing date, arguing that the Supreme Court’s decision should foreclose any further litigation over voter ID requirements before the general election and that holding such a hearing would only serve to further confuse the voters of Arizona.

On October 27, 2006, the Ninth Circuit, sua sponte, consolidated Yes On Prop. 200’s appeal of the District Court denial of its motion to intervene with the appeals on District Court denial of the motions for preliminary injunction. The briefing schedule for the latter will apply and opening briefs are due on November 22, 2006.

On October 31, 2006, the District Court vacated its hearing on the Navajo claims and reset that hearing to February 8, 2007, agreeing with the Supreme Court holding that, with elections only a week away, “any further court order would present a serious risk of voter confusion.”

On November 24, 2006, Yes On Prop. 200 filed its opening brief and excerpts of record and Gonzalez and ITCA filed a joint opening brief and excerpts of record.

On November 30, 2006, the Brennan Center for Justice filed a motion to file an amicus brief in the case, which motion was granted and brief filed on December 8, 2006. On December 8, 2006, the League of Women Voters of the U.S. filed a motion to file an amicus brief in the case, and that brief was filed by the Court on December 18, 2006.
On December 21, 2006, ITCA filed its answering brief in the intervention appeal and the State filed its answering brief in the merits appeals. On December 26, 2006, the State filed a brief in response to the amicus brief of the Brennan Center for Justice.

On December 29, 2006, Yes On Prop. 200 filed a motion for clarification regarding oral argument time, a motion for leave to file an amicus brief, and its amicus brief.

On January 5, 2006, Yes On Prop. 200 filed its reply brief in the intervention appeal. Oral arguments in the consolidated cases were held on January 8, 2007, in San Francisco. (Joel Spector) (Mentors: West, Garcia, Kienzle) (06-5907)

**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, No. 76HF-168)
(Owners of water rights fight attempt by Forest Service to have their rights ruled “abandoned”)

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 submitted an application to the Montana DNRC for a beneficial water use permit on the South Fork Reservoir.

On November 28, 1997, a Preliminary Decree was issued for the Westside Subbasin—Bitterroot River Basin 76H. Big Creek Lakes Reservoir Association was listed as the owner for
204 acre feet of water relating to the South Fork Dam and Reservoir. On October 5, 1998, the United States (Forest Service) filed a Notice of Objection and Request for Hearing on Claim No. 76H-W-120062-00, which was the water right owned by BCLRA (per the Preliminary Decree) for the South Fork Dam and 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. Post-hearing briefs were filed by the parties on April 13, 2005.

On July 21, 2005, the Master’s Report was issued in which the Court held that Big Creek’s claim had been abandoned through a 21-year period of non-use. Objections to the report were filed on August 5, 2005. (Ron Opsahl) (04-5533) (Mentors: Hill, Joscelyn) (Local Counsel: Joscelyn)

LARGE v. FREMONT COUNTY, WYOMING
(Equal Protection) (Counsel for Fremont County) (U.S. District Court, Wyoming, No. 05cv270J) (Some American Indian voters demand the creation of majority-minority commissioner districts)

On November 21, 2005, the Board of Directors approved this case in which MSLF will defend Fremont County, Wyoming, and its five County Commissioners and County Clerk and Recorder against a lawsuit filed by the ACLU on behalf of several American Indian voters alleging that the County’s at-large election of Commissioners violates Section 2 of the Voting rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

This case is very similar to the two Voting Rights Act (“VRA”) cases brought by the United States in which MSLF defended Blaine County, Montana, and Alamosa County, Colorado. Here, the ACLU, on behalf of several American Indian voters (James E. Large, Garry Collins, Emma Lucille McAdams, Patricia Bergie, and Pete Calhoun), the ACLU alleges that the County’s at-large system of electing Commissioners violates Section 2 of the VRA by diluting American Indian votes. Simply put, the ACLU alleges that non-Indians and Indians usually vote for different candidates and that, because there are more non-Indians than there are Indians, the Indian candidate of choice usually loses. It also alleges that the County purposely maintains at-large voting so as to discriminate against Indian voters, contrary to the Fourteenth and Fifteenth Amendments of the U.S. Constitution. The ACLU is seeking a court order requiring the establishment of single-member commissioner districts in which Indian voters constitute a majority in at least one district.

Fremont County comprises 9,266 square miles in central Wyoming’s Wind River Country. The Wind River Indian Reservation is located primarily in Fremont County and comprises 3,281 square miles. The Eastern Shoshone Tribe and the Northern Arapahoe Tribe live together on the Reservation. Though the Tribes have separate governments, they have a joint “Business Council” that coordinates activities on the Reservation. As a result of allotment under the General Allotment Act there are many non-Indian fee holders within the Reservation, although the Tribes have repurchased much of this non-Indian fee land with federal funds. Several cities and towns, including Riverton, are located within the Reservation’s boundaries.

Fremont County’s five Commissioners are elected at-large in partisan races; that is, a commissioner may reside anywhere within the County, and the entire County votes for each Commissioner. Commissioner elections coincide with national elections. The terms are for four
years and are staggered, so that the voters elect three Commissioners in one election and two in the next. Each voters has one vote for each Commissioner position and bullet voting is not allowed; that is, in an election for three commissioner positions, a voters may not cumulate his three votes and cast them for a single candidate.

According to the ACLU’s Complaint, the population of Fremont County is 35,804. Non-Hispanic whites constitute 74.6 percent of the population, and American Indians constitute 19.7 percent. The American Indians population is concentrated primarily on the Reservation. Fremont County voters have never elected an American Indian to the County Commission, though at least one American Indian is known to have run for Commissioner. Currently, all five Commissioners are Republicans. One Commissioner estimates that the Republican registration is approximately 60 percent of the registered voters are registered as Republicans, about 40 percent as Democrats. This Commissioner says that Fremont County is generally conservative, and he believes that Indian-supported candidates commonly are too liberal for the majority of voters.

In 1992, pursuant to Wyoming law, a candidate for the County Commission sponsored a petition to put an initiative on the ballot that would have replaced Fremont County’s at-large districts with single-member voting districts. The voters defeated that initiative but elected the sponsoring candidate. That election may be an important factor in this case.

On November 30, 2005, Fremont County filed its answer and a notice of intent to seek complex case certification. On January 11, 2006, at the Rule 26(f) initial pre-trial conference, Magistrate Judge Beaman granted Fremont County’s motion to declare the case a complex case. Service of written discovery was completed on March 24, 2006, and is to be finalized by April 28, 2006.

On May 3, 2006, at the second pretrial conference, a schedule for the remainder of the case was decided; that schedule was modified several times and the dates that follow are according to the most recent scheduling order. Depositions took place in August, September, and October 2006.

On November 16, 2006, Fremont County filed a motion for summary judgment arguing that Congress acted unconstitutionally in enacting the 1982 Amendments to Section 2 of the Voting Rights Act. On December 1, 2006, the plaintiffs filed their response to the motion. On December 22, 2006, the ACLU filed its first request for judicial notice in which it requested the Court to take notice of documentary evidence comprising about 125 exhibits.

LOZANO v. City of HAZLETON, PENNSYLVANIA
(Limited and Ethical Government; Constitutional Rights)
(Co-Counsel for City of Hazleton) (M.D. Penn., No. 06cv1586)
(A city defends the constitutionality of its ordinances regarding illegal immigrants)

On October 6, 2006, the Board of Directors approved representing the City of Hazleton, Pennsylvania ("the City"), in its efforts to address illegal immigration. The City, 80 miles northwest of Philadelphia near the intersection of Interstates 80 and 81, was incorporated in 1857. Its population has grown from fewer than 25,000 in the 2000 Census to more than 31,000, many of which entered the United States illegally.

Frustrated by the failure of the federal government to address the issue of illegal immigration and the problems it poses for small cash-strapped towns, on July 13, 2006, Mayor Lou Barletta and the City Council adopted legislation to deal with these problems. On August 15, 2006, liberal advocacy groups filed a lawsuit on behalf of Pedro Lozano, Humberto Hernandez, Rosa Lechuga, John Does 1-2, minor John Doe 3, Jane Does 1-3, and minor John Doe 4, Brenda Lee Miele, Casa Dominican of Hazleton, Inc., Hazleton Hispanic Business Association, and Pennsylvania Statewide Latino Coalition. Plaintiffs asserted in this lawsuit, and today, that Hazleton may take no action regarding illegal immigration because that issue is the sole responsibility of the federal government; that is, the City's actions are barred under the "Preemption Doctrine." On September 1, 2006, this suit was placed on hold after the City agreed to delay enforcement of the ordinance.

Subsequently, on September 12, 2006, the City adopted two separate ordinances, the "Illegal Immigration Relief Act" and the "Official English Ordinance," the former passing by a vote of 4-1 and the latter unanimously. The City did not set a date upon which the new ordinances would take effect in order to allow time for city officials and the public to be educated as to the new provisions of the ordinances. On September 25, 2006, the City repealed the original ordinance.

In a stipulation and order filed October 2, 2006, the City agreed to provide Plaintiffs 20 days' advance notice of its intention to enforce any provision of the new ordinances. On October 30, 2006, Plaintiffs filed an amended complaint and a motion for TRO and preliminary injunction with supporting documents. Following a conference call with the parties and the Court on October 31, 2006, and a further conference on the matter, on October 31, 2006, the Court issued a TRO prohibiting the City from implementing Illegal Immigration Relief Act Ordinance 2006-18 and Registration Ordinance 2006-13. The TRO is to remain in effect until November 14, 2006, unless extended by the Court.

On November 1, 2006, the Court set a combined hearing on the preliminary injunction and trial on the merits for November 13, 2006. On November 3, 2006, the Court issued a stipulation and order extending the October 31, 2006, restraining order for 120 days. A new scheduling order was issued setting a pretrial conference for January 12, 2007, and a combined trial and preliminary injunction hearing for January 31, 2007.

On December 4, 2006, Hazleton filed its motion to dismiss plaintiffs' first amended complaint and brief in support thereof and its brief in opposition to plaintiffs' motion for preliminary injunction and temporary restraining order. On December 13, 2006, the Hazleton City Council passed on first reading two ordinances that change some of the issues presented by
the First Amended Complaint. The parties agreed that it would be necessary to amend the pleadings to conform to the provisions of these ordinances, and on December 22, 2006, they filed a stipulation to modify the schedule such that the case would be ready for trial by August 6, 2007.

On January 5, 2007, the City filed a petition for certification of an immediate appeal of two orders, issued December 5 and 8, 2006, regarding the protection of the John and Jane Doe plaintiffs. On January 8, 2007, the Court denied that petition holding that the orders dealt with discovery disputes and thus were not eligible for immediate interlocutory appeal.


On January 12, 2007, the defendants filed their second amended complaint. (Liz Gallaway) (Mentor: Stubbs) (06-5969)

LYNX CRITICAL HABITAT U.S. FISH AND WILDLIFE SERVICE RULEMAKING
(Endangered Species Act) (Comments) (FWS rulemaking)
(MSLF comments on FWS efforts to designate critical habitat for Canada lynx)

On October 6, 2006, the Board of Directors approved the filing of comments regarding the U.S. Fish and Wildlife Service’s (FWS) attempts to designate critical habitat for the Canada lynx (*Lynx canadensis*) pursuant to the Endangered Species Act “(ESA”). 16 U.S.C. §§ 1531–1544. Designation of critical habitat has long been a tool for environmental groups to force federal protections upon public and private lands. As a result of chronic abuse, many have urged Congress to amend the ESA to remove the critical habitat provisions. These congressional efforts have not yet succeeded, however, and the abuse of critical habitat determinations continues.

After more than 10 years, and several lawsuits, on March 24, 2000, environmental groups finally succeeded in forcing FWS to list the Canada lynx as a threatened species in the contiguous United States pursuant to section 4 of the ESA, 16 U.S.C. § 1533. 65 Fed. Reg. 16,052 (Mar. 24, 2000). After the listing, environmental groups led by Defenders of Wildlife again sued the FWS alleging that the FWS violated Section 4 of the ESA by determining that “[c]ollectively, the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the range of the [listed Distinct Population Segment, i.e., lynx in the contiguous States].” *Id.* at 16,061; *Defenders of Wildlife v Norton*, No. 00-CV-2996 (D.D.C.). On December 26, 2002, the U.S. District Court for the District of Columbia set aside and remanded the FWS’s determination.

On January 15, 2004, the court, on motion by Defenders of Wildlife, issued its order requiring the FWS to designate critical habitat for the lynx by November 1, 2006. *Defenders of Wildlife v. Norton*, No. 00-CV-2996 (D.D.C.). Accordingly, on November 9, 2005, the FWS proposed designation of critical habitat of more than 18,000 square miles in the States of Idaho, Montana, Minnesota, Maine, and Washington. *70 Fed. Reg.* 68,294 (Nov. 9, 2005). The proposed critical habitat is mostly in Maine, although a vast region in northwestern Montana also is included. More than 13,000 square miles are located on private lands, again, mostly in Maine.

In August 2006, the FWS issued its Economic Analysis of Critical Habitat Designation for the Canada Lynx and then, later that month, issued its Draft Environmental Assessment: Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx. On September 11, 2006, to provide the public opportunity to review and comment on these documents, the FWS published a notice establishing a public comment period that ends on October 11, 2006. *71 Fed. Reg.* 53,355 (Sept. 11, 2006).

On October 6, 2006, MSLF, on behalf of itself and its members, submitted written comments by Federal Express to the FWS urging that economic impacts and the best available science indicate that the minimum possible area be designated as "critical habitat" for Canada lynx. MSLF also urged that any critical habitat designated be limited to only those areas that lynx currently occupy and have a high potential to persist.

On November 9, 2006, the FWS issued its final rule on lynx critical habitat (*71 Fed. Reg.* 66008, Nov. 9, 2006) The rule designates 1,841 square miles of critical habitat, in parts of Glacier, Voyageurs, and North Cascades National Parks in Montana, Minnesota, and Washington, respectively. It excludes all private lands from designation.

On November 14, 2006, the Forest Service amended its EIS for the southern Rockies Canada lynx to include the White River National Forest. The amendment modifies eight forest plans with a goal of conserving the lynx in Colorado and southern Wyoming by maintaining connected stands of dense, young trees to support snowshoe hare habitat and limit expansion of over-the-snow trails. Comments on the amendment close on February 17, 2007, and a final EIS and decision are expected in the fall of 2007. (Ron Opsahl) (06-5825)

**MANN v. UNITED STATES**

(Private Property Rights, Limited and Ethical Government)

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

(Federal lessee seeks compensation for having his valuable lease illegally cancelled)

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

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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. On April 29, 2004, the Court, on Mr. Mann’s unopposed motion for an extension of time, issued a new schedule under which discovery closes on April 1, 2005. On October 1, 2004, the Court granted the parties’ September 29, 2004, joint motion for extension of time until May 6, 2005, to complete fact discovery.

On January 24, 2005, a new attorney entered an appearance for the United States. On March 2, 2005, that attorney, citing “excusable neglect” (using the electronic docket entry instead of the Court’s order to ascertain discovery deadlines) and the press of other business, filed a motion for extension of the discovery deadlines. On March 18, 2005, MSLF filed a response to the motion. Not surprisingly, the Court did not accept the government’s excuses and, on March 24, 2005, issued an order granting the United States only a limited extension in which to serve its expert disclosures. It did so only because it “would be helpful to the Court, and to the parties to the extent they have an interest in settling this case, were expert opinion to be provided on both sides.” The May 6, 2005, discovery deadline was not extended and the United States was not permitted any discovery concerning Mr. Mann’s rebuttal experts.

In early May depositions were taken on the expert witnesses in the case and Mr. Mann. On May 20, 2005, the parties’ joint status report, including a proposed schedule for further proceedings, was filed. On June 2, 2005, the Court issued an scheduling order under which the government’s motion for summary judgment on damages is due on July 8, 2005. A hearing on the motion for summary judgment is set for September 1, 2005, in Washington, D.C., and a trial is set for November 28, 2005, through December 2, 2005, in Las Cruces, New Mexico.

On July 8, 2005, the United States filed a motion for partial summary judgment and proposed findings of uncontroverted fact. On August 8, 2005, Mann filed his brief in opposition to the United States’ motion for partial summary judgment, his response to the United States’ proposed findings of uncontroverted fact, and an appendix to his brief in opposition. The United States filed its reply on August 22, 2005. Oral arguments on the motion for partial summary judgment were in held in Washington, D.C., on September 1, 2005.

On October 18, 2005, Mann filed his memorandum of fact and contentions of law, exhibit list, and witness list. On October 31, 2005, the United States filed similar documents. The final pretrial conference was held on November 16, 2005.

On November 28, 2005, the Court denied the United States’ motion for partial summary judgment, and trial was held on the matter of damages November 28-30, 2005. Post-hearing briefs were filed on February 2, 2006. The United States and Mann filed post-trial response briefs on March 3, 2006. On March 8, 2006, the United States filed a post-trial reply brief.

(Steve Lechner) (96-3743)
McFARLAND v. UNITED STATES
(Access to Federal Lands)
(Counsel for John McFarland) (Ninth Circuit, Montana, No. 06-36106)
(Landowner seeks access to his private property across federal lands)

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 (No. 00cv20) 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. Stipulated facts were filed on November 22, 2000. 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.

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 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 (No. 03-35831). At a 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, and 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, 2004, 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 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 filed McFarland’s brief in the event that he wished to submit a brief replying also to the NPCA’s brief. MSLF informed the Court that the brief as submitted should be filed and on April 15, 2004, the brief was filed.

Oral arguments were held on February 10, 2005. On October 11, 2005, the Ninth Circuit reversed the District Court’s decision on both the quiet title and APA issues and remanded the case to the District Court for consideration of the merits of those issues. The United States did not file any petitions for rehearing and the time to file a petition for writ of certiorari to the Supreme Court expired on about January 11, 2006.

On January 4, 2006, the district court ordered the parties to confer on Rule 26 matters on or before February 10, 2006, and to file a written status report and joint management plan to govern all further matters in the case by February 24, 2006, which it did.


On October 2, 2006, defendant-intervenor National Parks Conservation Association filed a motion to reschedule oral arguments; that same date, McFarland filed his opposition to that motion. On October 5, 2006, the court denied the motion.

Oral arguments were held on November 16, 2006, and one day later, on November 17, 2006, the court ruled against McFarland on all issues. A notice of appeal would be due on January 17, 2007.

On November 22, 2006, the federal government and the conservation intervenors filed a notice with the court requesting publication of the decision.

MEDICINE BOW NATIONAL FOREST LOCAL GOVERNMENT COALITION v. U.S. FOREST SERVICE

(Environmental Law, Access to Federal Lands)
(Counsel for Medicine Bow Coalition) (U.S. District Court, Wyoming)
(Locals fight refusal of Forest Service to harvest more timber and thus release more water)

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 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 the Medicine Bow National Forest Local Government Coalition ("Medicine Bow Coalition") in a challenge to 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.

A meeting with Forest Service officials was held on August 23, 2006, in Laramie, and another meeting is scheduled for October 11, 2006. (Josh McMahon) (Mentors: Hill, Mead) (03-5358)

MONTANA WILDERNESS ASS’N v. FRY, BLM, AND MACUM ENERGY, INC.
(Access To Federal Lands and Resources)
(Counsel for Macum Energy) (District Court, Montana, No. 00cv039)
(Oil and gas lessee defends the legality of his leases and his gas pipeline)

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
On January 14, 2005, the hearing was concluded. On February 18, 2005, MSLF filed comments with the BLM regarding Environmental Assessment MT-064-04-016 (Macum Energy, Inc., Natural Gas Pipeline ROW Grant Amendment and Road ROW Grant).

On August 26, 2005, Macum filed a notice with the Court informing the Court that on June 8, 2005, the BLM issued a Final EA, a FONSI, and a Decision Record for Macum’s pipeline. The Decision Record allowed continued use of the pipeline and also provided that an appeal had to be filed with the IBLA within 30 days. No appeal was filed.

With permission of the Court, on September 23, 2005, plaintiff Curley Youpee filed a response to Macum’s notice, and on October 25, 2005, Macum filed a reply to that response.

On January 12, 2006, the Court issued an order that Macum’s use of the leases and pipeline is stayed pending completion of new environmental documents by the BLM, even though the BLM issued a Final EA, FONSI, and Decision Record in June 2005 and in August 2005 Macum filed a notice informing the Court of that fact. The Court also ordered Macum’s bond amount quadrupled.

On January 26, 2006, Macum filed an unopposed motion to lift the injunction on its pipeline, arguing that Macum’s pipeline has remained open with this Court’s permission since April 2004. Plaintiffs did not ask that the pipeline be shut down while the wells were productive, and the Court may have been under the mistaken impression that the pipeline was shut down. On February 3, 2006, the Court granted Macum’s unopposed motion to lift the injunction on the pipeline.

On March 13, 2006, the BLM filed a notice of appeal (No. 06-35221, docketed March 17, 2006), and on March 21, 2006, Macum filed a notice of appeal (No. 06-35249, docketed March 27, 2006).

On April 26, 2006, Macum filed comments on the BLM’s Draft EIS for the Missouri Breaks National Monument.

On May 15, 2006, the Court consolidated the BLM and Macum appeals. Opening briefs are due on June 29, 2006, response briefs are due on July 31, 2006, and reply briefs are due on August 14, 2006. On May 19, 2006, the BLM filed an unopposed motion for voluntary dismissal of its appeal, which, on May 24, 2006, was granted by the Court. On June 15, 2006, Macum Energy filed an unopposed motion for voluntary dismissal of its appeal, which was granted on June 21, 2006.

On September 19, 2006, the BLM filed an unopposed motion for dismissal of the injunction imposed by the Court’s order of March 31, 2004, as to Macum’s natural gas pipeline. On September 20, 2006, the Court signed on order based upon the parties’ stipulation for compromise settlement, approving the payment of $71,989.17 ($61,155.42 pursuant to ESA and NHPA and $10,833.75 pursuant to EAJA). On September 22, 2006, the Court granted that motion and directed the Clerk to close the case. (Steve Lechner) (00-4650)
MOODY v. THE GREAT WESTERN RAILWAY
(Private Property Rights, Limited and Ethical Government)
(Counsel for Rodney Nelson) (District Court, Weld County, Colorado, No. 03CV779)
(Landowner asserts that railroad easement reverted to him and may not be used as a trail)

This case was approved by the Board of Directors on March 10, 2006. Rodney Nelson owns farmland in Weld County near Eaton, Colorado. The farmland is traversed by a 100-foot-wide railway easement formerly occupied by the Great Western Railroad dating from 1905. The instrument evidencing the easement declares that it was conveyed “for a right of way for the construction and operation over, through, across and upon the same by the [railroad] . . . of a line of railroad and in [the] event the [railroad] . . . shall cease or fail to maintain and operate a railroad to be therein constructed for a continuous period of 2 years, then . . . said premises . . . shall revert to [property owners] . . .”

On October 21, 2003, the Great Western Railway Company filed an application with the Surface Transportation Board (STB) seeking permission to abandon an 11.7-mile stretch of track near the cities of Severance, Windsor, and Eaton, Colorado, on which, it admitted, for “more than ten years, rail service has not operated thereon.” On November 25, 2003, Severance, Windsor, and Eaton filed a request, under 49 C.F.R. § 1152.29(a)(3), to “rail bank” the right-of-way for use as recreational trail. This provision, 16 U.S.C. § 1247(d), allows State and local governments, as well as private organizations, to convert rail corridors proposed for abandonment to recreational trails. Whenever such an entity is prepared to assume full responsibility for managing such a trail, the STB must grant the entity’s application and deny the proposal for “abandonment.”

Under Colorado law, the Great Western Railway has a duty to report any abandonment of rail lines to the Colorado Transportation Legislation Review Committee for possible acquisition by the State of Colorado, should such acquisition serve any number of legislatively defined “public purposes.” Colo. Rev. Stat. § 43-1-1303. Both federal and state law arguably result in a taking of Nelson’s reversionary interests made clear by the language of the original conveyance.

This issue of reversionary interests and railway abandonment is of considerable interest to the Colorado Farm Bureau, the Weld County Farm Bureau, and a newly formed organization of property owners, the Reversionary Property Owners (“RPO”), all of which are possible amicus.

In July 2006, it was determined that Mr. Nelson’s predecessor-in-interest, J. Gale Moody, had filed a quiet title action against the Great Western Railway and the Western Construction Company before he sold part of the property that is the subject of that suit to Mr. Nelson. The suit is stayed pending the STB’s decision on the application of Severance, Windsor, and Eaton to rail bank the railroad right-of-way for use as a recreational trail.

On August 3, 2006, MSLF filed Mr. Nelson’s unopposed motion to intervene and complaint and cross-claim. On August 7, 2006, the Court granted Mr. Nelson’s motion to intervene. The case continues to be stayed pending STB action on Great Western Railway’s proposal for abandonment and the application of Windsor, Eaton, and Severance for rail banking for recreational purposes. (Joe Becker) (06-5852)
MOUNT ROYAL JOINT VENTURE v. NORTON
(Limited and Ethical Government, Access To Federal Lands and Resources)
(Counsel for Mount Royal Joint Venture) (D.C. Circuit, No. 05-5379)
(Miners contest illegal closure of federal land to mining)

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 (Civil Action No. 1:99cv02728). On March 13, 2001, after a detailed analysis of the administrative record, MRJV filed a motion for summary judgment. On May 9, 2001, the federal government filed a cross motion for summary judgment and its opposition to MRJV's motion for summary judgment. On June 6, 2001, MRJV filed its response to the government's cross motion and its reply in support of its own motion. The government filed its reply on July 5, 2001.

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.

On February 24, 2005, Chief Justice Rehnquist reassigned a number of cases in the D.C. District Court, including MRJV, to Judge William H. Stafford, Jr., Senior Judge, Northern District of Florida. On March 31, 2005, Judge Stafford issued a notice to the parties that the cross-motions for summary judgment would be taken under advisement on April 22, 2005. On April 6, 2005, MRJV filed a second motion for oral argument.

On August 26, 2005, the Court denied MRJV's motion for summary judgment and granted the government's motion. On September 14, 2005, the government filed a bill of costs against MRJV in the amount of $8,681.25. On September 26, 2005, the parties filed a joint stipulation in which MRJV agreed to pay the United States $300.00 in costs, but that such agreement would not preclude MRJV from filing an appeal. The Court approved that stipulation on September 29, 2005.
MRJV filed its notice of appeal on October 3, 2005, and the case was docked by the D.C. Circuit on October 19, 2005. The docketing statement, statement of issues, and other procedural pleadings were filed on November 18, 2005. That same date the United States filed a motion requesting the Court establish a briefing schedule of no sooner than February 20, 2006, for the filing of its brief.

On January 4, 2006, the Court issued a briefing schedule. MRJV’s opening brief and appendix are due on February 13, 2006; the government’s response brief is due on March 15, 2006; and MRJV’s reply brief is due on March 29, 2006. On February 2, 2006, MRJV filed a motion for extension of time to file its brief until February 21, 2006.

MRJV filed its opening brief and appendix on February 22, 2006. The government’s response brief was due on March 23, 2006; however, its motion for extension of time to April 6, 2006, and its request for an additional day (also for MRJV) both were granted, and on April 7, 2006, the government filed its response brief. On April 21, 2006, MRJV filed its reply brief.

Oral arguments were held on September 19, 2006, before Circuit Judges Henderson, Rogers, and Griffith. (Steve Lechner) (93-3413)

**MOUNTAIN STATES LEGAL FOUNDATION v. NORTON**
(Endangered Species Act)
(Plaintiff) (U.S. District Court, Wyoming, No. 03cv250)
(MSLF challenges the listing of and habitat for the Preble’s Meadow Jumping Mouse)

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 prebleti*, 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 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, but 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, and on September 26, 2003, MSLF filed a second 60-day letter of intent to sue on behalf of the Wheatland Irrigation District and itself.

On December 9, 2003, MSLF 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 Preble’s jumping mouse listing and subsequent designation of critical habitat. 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 FWS’ decision on petitions, filed on December 17, 2003, by the State of Wyoming and by Coloradoans for Water Conservation and Development, to remove the mouse from the threatened species list based on a genetic and morphological study of the mouse by the Denver Museum of Nature and Science. The motion proposed a schedule under which FWS would issue an initial 90-day finding by March 22, 2004. If FWS determined that the petitioned action may be warranted, FWS would begin review of the mouse’s status and would issue its findings within 12 months. On March 23, 2004, the Biodiversity Conservation Alliance opposed the joint motion. On April 8, 2004, at a telephone hearing, Judge Johnson granted the motion to stay.

On February 4, 2005, the government notified the Court that on February 2, 2005, the FWS’s 12-month finding on petitions to de-list the Preble’s meadow jumping mouse (Chris Massey) and subsequent proposed rule were published in the Federal Register. The government, with agreement of MSLF, requested that the Court maintain the stay in the case until the FWS publishes its final rule. On February 16, 2005, MSLF filed comments on the proposed rule.

On March 1, 2006, the government notified the Court that on February 17, 2006, in light of additional and recently disclosed scientific information, it extended and reopened the comment period for a period of six months, and the government requested, together with MSLF, that the current stay in the case be maintained until the final rule is published.

In October 2006, the government notified the Court that the FWS intends to issue its final rule regarding delisting on December 22, 2006, in the Federal Register. If no rule is published, MSLF is responsible for filing a motion to lift the stay pending issuance of a final rule; 30 days after the motion to lift the stay is filed, the government’s motion to consolidate the cases is due; 30 days after the motion to consolidate is filed, MSLF’s response to that motion is due; and 10 days after the Court issues an order lifting the stay, the government and MSLF oppositions to intervention by the Biodiversity Conservation Alliance are due.

On December 22, 2006, the government filed its second status report in which it informed the court that, because of new scientific data and the need to incorporate those data, FWS will not be able to issue its final rule regarding delisting until June 29, 2007. (Ron Opsahl) (Mentor: Smith) (03-5380)

**State of NEW MEXICO ex rel. GOVERNOR BILL RICHARDSON v. BLM/NEW MEXICO WILDERNESS ALLIANCE v. LINDA RUNDELL**

(Environmental Laws; Access to Public Lands and Resources)
(Counsel for Defendant-Intervenor IPANM)
(Tenth Circuit, N. Mex., Nos. 06-2351, 06-2352, 06-2353, 06-5354)
(Oil and gas association joins in defending legality of BLM leasing decision)

This case was approved by the Board of Directors on June 3, 2005. On January 24, 2005, the Bureau of Land Management ("BLM") issued a Record of Decision ("ROD") approving its Resource Management Plan Amendment for Oil and Gas Leasing and Development in Otero and Sierra Counties ("RMPA") in the State of New Mexico. The RMPA provides for leasing of federal minerals on more than 1.9 million acres of public lands, 40,500 acres of which will be available with a stipulation of No Surface Occupancy, 484,100 acres with a stipulation of Controlled Surface Use, and 1,406,600 acres with standard lease terms and conditions. The
RMPA will allow strictly regulated and carefully monitored activity and result in a maximum surface disturbance of only 1,589 acres in Otero and Sierra Counties from well pads, roads, and pipelines—less than one-tenth of one per cent of the total surface area. At most, 141 exploratory wells could be drilled, resulting in no more than 84 producing wells. According to the New Mexico State BLM Director, the RMPA is the most restrictive oil and gas leasing plan that the BLM has ever issued.

Prior to the BLM issuing the ROD, however, on March 5, 2004, New Mexico Governor Bill Richardson submitted a Consistency Review and Recommended Changes to the RMPA. Governor Richardson proposed an alternative similar to one of the alternatives in the draft RMPA. His alternative would have placed more than 1.5 million acres off-limits to drilling or under stipulations that would have placed significant barriers to effective exploration and development. The BLM determined that the alternative proposed by Governor Richardson did not provide a reasonable balance of State and federal interests and did not reasonably consider the federal and State interests in domestic energy production in Otero and Sierra Counties. For these reasons, the BLM rejected Governor Richardson’s proposed alternative.

Governor Richardson stated publicly that he would do everything in his power to prevent oil and gas drilling at Otero Mesa, and, as a result of the BLM rejecting Governor Richardson’s proposal, on April 22, 2005, the State of New Mexico filed a lawsuit in U.S. District Court for the District of New Mexico challenging the RMPA. In its complaint, the State alleges violations of various federal statutes, including the Federal Land Policy and Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA"). The State alleged a violation of FLPMA because the BLM "refus[ed] to accept Governor Bill Richardson’s recommendations with respect to the Otero Mesa RMPA, even through the Governor’s recommendations provided for a reasonable balance between the [N]ational interest and the State of New Mexico’s interest.” Contrary to the State’s claim, the BLM is not required to accept a Governor’s recommendations with respect to a land-use plan. If the BLM Director determines that the Governor’s recommendations do not provide for a reasonable balance between the national interest and the State’s interest, the Director must publish in the Federal Register the reasons for the decision to reject the recommendations. On January 24, 2005, BLM Director Kathleen Clarke issued that response. See Federal Register, January 25, 2005. The State also alleged the BLM violated FLPMA because it failed to provide the Governor’s recommendations to the public for review and comment. However, only if the Governor had recommended changes not raised during the public participation process was the State Director required to provide the public with an opportunity to comment on the Governor’s recommendations.

The State claimed that the BLM violated NEPA because it failed to prepare a supplemental draft Environmental Impact Statement ("EIS") fully addressing the environmental impacts of the RMPA. If a court is asked to review an agency’s decision not to prepare a supplemental EIS, the decision not to supplement will be set aside only if it is arbitrary and capricious. In addition, an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. An agency must file a supplemental impact statement only if its previous filings have been undermined by significant new information. The State further claimed that the BLM violated NEPA because it failed to analyze a reasonable range of alternatives. Using a “rule of reason,” courts have required that agencies discuss all reasonable alternatives within the federal government’s jurisdiction, as well as the environmental effects of all reasonable alternatives. Court have also stated, however, that a detailed statement of
alternatives cannot be found wanting simply because the agency failed to include every conceivable alternative.

On June 28, 2005, on behalf of the Independent Petroleum Association of New Mexico ("IPANM"), MSLF filed a motion to intervene as a defendant in the State’s case. On July 1, 2005, the BLM filed its answer. On July 15, 2005, the State filed its response to the IPANM’s motion to intervene, agreeing that the IPANM had standing to intervene, and on July 22, 2005, the IPANM replied to the response.

Meanwhile, on July 7, 2005, the parties in the two cases filed a joint motion to consolidate the State’s case (05cv460) and New Mexico Wilderness Alliance, et al. v. Linda Rundell, et al [federal defendants] (05cv588). MSLF, as attorney for the IPANM, was consulted regarding the motion and indicated that IPANM did not oppose consolidation. On July 14, 2005, the Court issued an order of consolidation.

On July 19, 2005, the parties filed a stipulation and joint motion, which was granted on August 4, 2005, for expedited briefing such that the merits of plaintiffs’ claims and the federal defendants’ defenses would be presented to the Court for resolution prior to the time that Plaintiffs “would be inclined to file a motion for preliminary injunctive relief” as a result of the July 20, 2005, competitive lease sale for a 1,600-acre parcel on Otero Mesa. Potentials bidders would be informed that the State and “Conservation” (plaintiffs from second, consolidated case) plaintiffs have filed protests with the BLM regarding this sale and that the lease would not be executed by the BLM until this lawsuit has been resolved or on February 15, 2006, whichever is earlier.

On July 20, 2005, the Conservation plaintiffs filed a first amended complaint, and on July 29, 2005, the State filed an amended complaint.

On August 4, 2005, the IPANM filed a motion to intervene in the Conservation case. On August 8, 2005, the Court granted the IPANM’s motion to intervene in the State case, and on August 15, 2005, the IPANM filed an amended answer. Also on August 15, 2005, the New Mexico Commissioner of Public Lands filed a motion to intervene as defendant in both cases. On August 24, 2005, the federal defendants filed an answer in the Conservation case.

On August 26, 2005, the Court denied the IPANM’s motion to intervene in the Conservation case as moot in that the IPANM already was an intervenor in the State case and that case had been consolidated with the Conservation case. On August 31, 2005, the federal government lodged the administrative record (7 CD-ROMs).

On September 1, 2005, the Conservation plaintiffs and the State of New Mexico filed responses to the Public Lands Commission’s motion to intervene in both cases. On September 19, 2005, the Public Lands Commission filed its reply. On September 23, 2005, at a hearing on the Commission’s motion to intervene, the motion was denied.

On October 11, 2005, the court issued a modified briefing schedule. Also, on October 11, 2005, the State filed an amended first complaint, which the IPANM had already answered on August 15, 2005, shortly after the first amended complaint was lodged. On October 17, 2005, the State filed its opening brief.

On October 19, 2005, the Court issued a written order and findings of fact and conclusions of law regarding its denial of the Public Lands Commissioner’s motion to intervene. It held that the commissioner’s interests were adequately represented by the BLM and the...
IPANM and that the Commissioner, under New Mexico’s Constitution and statutes, could not take action contrary to the Governor of New Mexico. It ordered that the Commissioner could file an *amicus* brief on the issues.

On October 21, 2005, the Conservation plaintiffs filed their opening brief. On October 25, 2005, the Court granted the National Trust for Historic Preservation in the United States, Ysleta del Sur Pueblo, and the Association on American Indian Affairs permission to file an *amicus curiae* brief in support of the State of New Mexico and the brief was filed.

On November 9, 2005, the BLM filed its answer to the first amended complaint. On December 1, 2005, the New Mexico State Land Office filed an *amicus* brief in support of the BLM. The federal defendants filed their response to the State’s opening brief on December 11, 2005, and to the Conservation plaintiffs’ opening brief on December 14, 2005. On December 13, 2005, the IPANM filed its response to both opening briefs. On January 10, 2006, the State and the Conservation plaintiffs filed reply briefs. Oral arguments were held on January 24, 2006. On May 17, 2006, an evidentiary hearing on the aplomado falcon was held.

On August 14, 2006, the IPANM filed supplementary authority, *Northern Alaska Envtl. Center v Kempthorne*, ___ F.3d ___, 2006 WL 2061246 (9th Cir. 2006), a recent Ninth Circuit decision that provides further support for Defendant-Intervenor’s argument that the BLM need not conduct site-specific analyses for particular locations where drilling might occur during its environmental analysis within a large planning area, such as Otero Mesa.

On September 27, 2006, the Court issued a memorandum opinion and final order affirming the BLM’s actions challenged by Plaintiffs pursuant to the Administrative Procedure Act and other federal statutes but requiring the BLM to perform a site-specific analysis of the environmental effects of the issuance of the Bennett Ranch Unit lease before such lease may be issued.

On October 12, 2006, both groups of plaintiffs filed rule 59 motions to amend/clarify the judgment regarding the preparation of full NEPA compliance for the leases prior to issuance thereof. On October 26, 2006, the IPANM filed its opposition to the motions, and on October 30, 2006, the federal government filed separate oppositions to the motions. On November 16, 2006, the State of New Mexico filed its reply, and the Conservation plaintiffs filed an unopposed motion for extension of time until November 21, 2006, to file its reply.

On November 22, 2006, the federal government filed its notice of appeal of the Court’s order of September 27, 2006 (10th Cir. 06-2351). On November 27, 2006, the IPANM (10th Cir. 06-2352) and the Conservation plaintiffs (10th Cir. 06-2353) filed notices of appeal. The IPANM is appealing both the Court’s final order and its denial of the IPANM’s motion to intervene in the Conservation case.

On December 7, 2006, the State of New Mexico filed a notice of appeal (06-5354). On December 12, 2006, the Tenth Circuit consolidated the four cases and ordered that by December 27, 2006, the parties in the four cases file memoranda regarding the jurisdictional issues, addressing any and all appellate jurisdictional issues and in particular, the implications of the pending motions in the district court on the Tenth Circuit’s jurisdiction and procedure. The Tenth Circuit’s order consolidates, in cross-appeals, the merits of the case and keeps separate the IPANM’s appeal of the denial of its motion for intervention in the Conservation plaintiffs’ district court case.
On December 18, 2006, the IPANM filed its memorandum concerning jurisdictional issues. On December 22, 2006, jurisdictional memoranda were filed by the State of New Mexico, the Conservation plaintiffs, and the BLM.

On December 28, 2006, the District Court certified to the Tenth Circuit that the record in the intervention appeal was complete. Therefore, the IPANM’s opening brief and appendix would be due on February 6, 2006; the environmental groups’ response brief on March 8, 2006, and the IPANM’s reply brief 14 days after service of the response brief. On January 5, 2007, the Tenth Circuit issued an order in response to the parties’ jurisdictional memoranda. The Court held that the notices of appeal that were filed are ineffective to appeal the district court’s final memorandum opinion and final order of September 27, 2006, until the date of entry of an order disposing of the various motions for reconsideration. The Court abated proceedings in the appeals pending notification that the district court has disposed of those motions. The Tenth Circuit ordered the parties to notify the Court within 10 days of the entry of the district court’s order. If, by January 26, 2007, the district court has not ruled on the motions, the parties are to file a status report with the Tenth Circuit. (Ron Opsahl) (Mentor: Haas) (Local Counsel: Jason Bowles) (04-5420)

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

(Limited and Ethical Government, Equal Protection)

(Counsel for PPROA) (Oklahoma Supreme Court, Case No. 104,002)

(Association challenges tax withholding law that treats residents differently)

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 (No. 04cv1128-C). 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.
On April 29, 2005, the District Court granted the OTC’s motion to dismiss, holding that “for the Court to declare Oklahoma’s royalty withholding statutes unconstitutional and enjoin their enforcement would be an impermissible federal interference with Oklahoma’s tax collection efforts.” The Court said that “Oklahoma provides an adequate remedy in its state courts to challenge its state tax programs and raise all federal constitutional concerns.”

On November 21, 2005, MSLF filed a petition in Oklahoma County District Court (No. CJ-2005-9120). The State filed a motion to dismiss on December 13, 2005. On December 22, 2005, PPROA filed its response to that motion, and a hearing on the motion was held on January 13, 2006, at which the Court granted PPROA’s motion to file an amended complaint. On February 2, 2006, the OTC filed its answer to the PPROA’s amended complaint.

On April 7, 2006, a scheduling conference was held. Motions to join parties and amend pleadings are due on May 15, 2006; plaintiffs’ final witness list and summary of testimony of undeposed witnesses and plaintiffs’ final exhibit list are due on October 1, 2006, defendants’ final witness list and defendants’ final exhibit lists are due on October 15, 2006, and objections to exhibits or witnesses are due 5 days after the lists are filed. Discovery is to be completed by October 31, 2006. Final pretrial setting is November 15, 2006; exhibits are to be exchanged at least 10 days before trial; and trial is set for the December trial docket.

On July 7, 2006, the OTC filed a motion to dismiss certain of PPROA’s claims in its second amended petition. On July 25, 2006, PPROA filed its response to the OTC’s motion. On August 11, 2006, a hearing on the motion was held at which no arguments were heard and the court granted the motion. On August 22, 2006, the Court issued a written order granting the motion to dismiss PPROA’s section 193 and section 226 claims; that order was filed by the Clerk on August 23, 2006.

On August 31, 2006, the OTC filed a motion for summary judgment. On September 18, 2006, PPROA filed its motion for summary judgment and its response to the OTC’s motion. PPROA argued that the loss of non-residents’ use of the money withheld constitutes a burden violative of PPROA members’ constitutional rights to equal protection and privileges and immunities and its rights under the Commerce Clause.

On September 28, 2006, PPROA filed an unopposed motion to correct its brief in support of its motion for summary judgment so as to correct the citations errors in its rational-basis equal protection argument.

On October 6, 2006, a hearing on the motions for summary judgment was held, but no arguments were heard. The court granted the OTC’s motion for summary judgment and denied that of PPROA.

A notice of appeal was filed on November 17, 2006, and on December 7, 2006, the OTC entered an appearance and filed its statement of the case. The Oklahoma Supreme Court is referred the case to the Court of Civil Appeals for determination and that Court has, unusually, scheduled oral argument, to be held March 1, 2007. (Joe Becker) (Mentor: Haas) (03-5342)
On July 14, 2006, the Board of Directors approved the filing of an amicus brief on the merits in one or both cases on affirmative action in public schooling that will be heard together by the U.S. Supreme Court. The first case, Parents Involved in Community Schools v. Seattle School District No. 1 (No. 05-908), involves the public high schools of Seattle, Washington, which are not racially segregated but may vary widely in quality and popularity. Seattle’s “open choice” assignment plan allows students to select any of the district’s ten high schools and, because families can vote with their feet, five are oversubscribed, i.e., they have more applicants than openings.

When a school is oversubscribed, the district first admits siblings of enrolled students. Then, in an effort to achieve a predetermined racial balance in each school (40 percent white to 60 percent nonwhite, the ratio among all students in the district), the district next looks at a school’s racial composition and uses race to determine who will be admitted. A student is deemed to be of the race specified in her registration materials (and if a parent declines to identify a child’s race, the District assigns a race to the child based on a visual inspection of the student or parent). If the ratio of white to nonwhite pupils in an oversubscribed school deviates by more than a set number of percentage points from the desired balance, then a student whose race will move the school closer to the desired racial balance will be admitted and a student whose race will move the school away from the desired balance will be denied admission. There is no individual consideration of applicants; whenever race is considered, it is the sole deciding factor. The Superintendent of Schools and others testified that there had been no study of race-neutral assignment plans when the plan was adopted.

The district offers several justifications for this method including the educational benefits argued to flow from racial diversity, increased racial and cultural understanding, and the desire to avoid racially isolated schools.

Petitioner filed suit in federal district court asserting claims under the Washington Civil Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the federal Civil Rights Act of 1964. Both the district court and the Ninth Circuit sided with the school district.

In the second case, Meredith, Crystal D. v. Jefferson County Board of Education (Ky. No. 05-915), Plaintiff Crystal Meredith’s son, Joshua McDonald, was unable to be enrolled in his original school of choice, Breckinridge-Franklin Elementary School, because it was filled to capacity. He was then assigned to Young Elementary School for kindergarten in 2002-2003. He applied for a transfer to Bloom Elementary School, which was not in his assigned cluster of schools, and was denied admittance because his transfer to Bloom would have had an adverse effect on Young Elementary’s racial composition in violation of the racial guidelines under the student assignment plan.

Jefferson County Public Schools is the Nation’s 28th largest public school system. Its district boundaries mirror those of the new Metropolitan Louisville, now the Nation’s 16th largest city. The racial profile of students subject to the 2001 Plan is about 34 percent black and
66 percent white. The JCPS student assignment plan records the race of each student as black or African-American and white.

The Kentucky Education Reform Act of 1990 sets out many requirements for curriculum development, educational goals and assessment requirements for all Kentucky schools. It requires each school to form a School-Based Decision Making Council composed of parents, teachers and the school’s principal or administrator. Each council determines which textbooks, instructional materials and student support services will be used at its school and adopts policies for various aspects of school life. The Act requires a statewide assessment program known as the Commonwealth Accountability Testing System that measures core academic content, basic skills, and higher-order thinking skills and their application. The Act requires that the school districts and councils identify achievement gaps between various groups of students, including between black and white students and between free and reduced lunch students and non-free and reduced lunch students. The Jefferson County Public School System sets biennial targets for eliminating those achievement gaps.

The plaintiffs in this lawsuit alleged that the school system’s use of race in school admissions violates the Equal Protection Clause of the Fourteenth Amendment. The district court held that, for the most part, the school district’s consideration of race was constitutional, and the Sixth Circuit affirmed this decision.

In 2003, the Supreme Court issued two decisions, Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003), analyzing the use of race in higher education. In Grutter, the Court held that the University of Michigan law school’s individualistic consideration of race did not violate the Equal Protection Clause because ideological diversity was a compelling government interest and the admissions process was narrowly tailored to further that compelling interest. This analysis is known as the “strict scrutiny test.” In Gratz, however, the Court held that the University of Michigan undergraduate admissions program, which granted minority students a certain number of admissions “points” solely on the basis of their minority status, did not satisfy the strict scrutiny test.

Because of these seemingly contradictory holdings, there is considerable disagreement among the lower courts about whether schools may engage in racial balancing for the sake of racial diversity. These two new cases provide an excellent vehicle for the Court to clarify the application of Grutter and Gratz to secondary schools. First, there are no impediments to analyzing the Equal Protection issue at hand. None of the many opinions below found any procedural barrier and each squarely addressed the issue directly. Second, there are no factual disputes to prevent the Court from reaching the important legal questions. The parties below agreed there were no material facts in dispute and that the question for the courts is the application of the Equal Protection Clause to those undisputed facts. Third, these cases squarely present the question of the applicability of the Supreme Court’s Equal Protection jurisprudence in a factual scenario likely to recur frequently. Without clear guidance from the Court, uncertainty will remain and the substantial volume of lengthy and costly litigation will continue.

On August 1, 2006, the Court granted the motion of the petitioner in the Kentucky case to proceed in forma pauperis. An amicus brief in the Kentucky case was filed on August 10, 2006, by Pacific Legal Foundation. On August 17, 2006, petitioner Crystal Meredith filed her brief.

Amicus briefs in the Seattle case were filed on August 18, 2006, by Pacific Legal Foundation, and on August 21, 2006, by MSLF, the Competitive Enterprise Institute, the Center

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for Individual Rights, and Drs. Murphy, Rossell, and Walberg. Also, on August 21, petitioner Parents Involved in Community Schools filed its brief on the merits and the joint appendix.

Joint amicus briefs in both cases were filed on August 17, 2006, by the Project on Fair Representation, et al., and on August 21, 2006, by the United States; Asian American Legal Foundation; Various School Children from Lynn Massachusetts Who are Parties in Comfort v. Lynn School Committee; David J. Armor; and Florida Governor John Ellis “Jeb” Bush and State Board of Education.

Amicus briefs were filed in both cases in support of respondents on October 6, 2006, by the Anti-Defamation League and on October 9, 2006, by the American Civil Liberties Union, et al.


On October 10, 2006, in the Seattle case only, amicus briefs were filed by Alliance for Education, et al.; Los Angeles Unified School District; National Lawyers Guild; and Walt Sherlin. In the Kentucky case only, amicus briefs were filed by the Human Rights Advocacy Groups and International Law Professors and the Pritchard Committee for Academic Excellence.

On November 6, 2006, the motion of the NAACP Legal Defense and Educational Fund to participate in oral argument as amicus was denied, and a similar motion by the Solicitor General of the United States was granted. On November 13, 2006, the petitioners in the Kentucky case filed their reply brief. On November 14, 2006, Parents Involved in Community Schools filed its reply brief in the Seattle case.

Oral arguments were held on December 4, 2006. (Joel Spector) (06-5954)
PENNACO ENERGY CO. v. MONTANA BOARD OF ENVIRONMENTAL REVIEW
(Private Property Rights; Limited and Ethical Government)

(Amicus) (Mont. 22d J.D., No. DV 06-68)
(The State of Montana acted illegally when it amended its water quality standards)

On October 6, 2006, the Board of Directors approved the filing of an amicus brief in Montana State court on behalf of Mountain States Legal Foundation and an unidentified Montana landowners’ association in support of the plaintiffs Pennaco Energy Inc., Marathon Oil Co., Nance Petroleum Corp., and Yates Petroleum Corp.

On March 28, 2003, in response to the petition by several environmental groups, the Montana Board of Environmental Review adopted new rules that included restrictive water quality standards for electrical conductivity and sodium adsorption ratio for the Powder, Little Powder, and Tongue Rivers, and Rosebud Creek and for all tributaries “and other surface waters” located within the watershed for each of these waterways. Under section 313 of the Clean Water Act, the Environmental Protection Agency (“EPA”) is required to approve state water quality standards that meet federal guidelines, and on August 28, 2003, the EPA Regional Administrator approved the new standards.

In May 2005, several environmental groups again petitioned for more restrictive water quality standards in produced water. Although the Board rejected most of the petitioners’ proposal, on March 23, 2006, it adopted a new rule that designates electrical conductivity and sodium adsorption ratio as “harmful parameters” for the purpose of non-degradation review. The 2006 amended water quality standards also provide that a proposed discharger of produced water must receive authorization if the receiving waters have electrical conductivity or sodium adsorption ratio levels at or exceeding as little as 40 percent of the criteria adopted in 2003. On June 5, 2006, the 2006 amendment was submitted to the EPA for approval; however, the EPA has yet to either approve or disapprove the amendment.

On July 21, 2006, Pennaco Energy Co. and other natural gas producers filed suit in Montana State court against the Montana Board of Environmental Review alleging the 2003 and 2006 water quality standard amendments are arbitrary and capricious, are not supported by scientific evidence, have singled out one industry in one area of the State, and are unduly burdensome.

After a briefing schedule is issued, MSLF will file an amicus curiae brief on behalf of itself and its members and an unidentified Montana landowners’ association arguing that the State exceeded statutory guidelines in amending Montana’s water quality standards in 2003 and 2006 relating to produced water from coaled methane operations because the new standards are not supported by credible scientific and technical evidence and are not necessary to protect beneficial uses of water. Amici would further argue that EPA acted arbitrarily and capriciously when it adopted Montana’s unlawfully amended water quality standards. (Ron Opsahl) (Mentor: Joscelyn) (05-5743)
On October 6, 2006, the Board of Directors approved the filing of an amicus brief in Wyoming federal district court on behalf of Mountain States Legal Foundation and an unidentified Montana landowners’ association in support of the plaintiffs in the set of consolidated cases involving new rules for water quality in the Powder River Basin promulgated by the Montana Board of Environmental Review.

On March 28, 2003, in response to the petition by several environmental groups, the Montana Board of Environmental Review adopted new rules that included restrictive water quality standards for electrical conductivity and sodium adsorption ratio for the Powder, Little Powder, and Tongue Rivers, and Rosebud Creek and for all tributaries “and other surface waters” located within the watershed for each of these waterways. Under section 313 of the Clean Water Act, the Environmental Protection Agency (“EPA”) is required to approve state water quality standards that meet federal guidelines, and on August 28, 2003, the EPA Regional Administrator approved the new standards.

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On April 25, 2006, Pennaco Energy Company, Marathon Oil Company, and Devon Energy Corporation filed suit in Wyoming federal district court against the Montana Board of Environmental Review alleging the 2003 and 2006 water quality standard amendments are arbitrary and capricious, are not supported by scientific evidence, have singled out one industry in one area of the State, and are unduly burdensome and that the EPA acted arbitrarily and capriciously when it adopted Montana’s unlawfully amended water quality standards. Intervenor-plaintiffs in the lawsuit are the State of Wyoming, Williams Production RMT Co., Yates Petroleum Corporation, Anadarko Petroleum Corporation, Carlton Dewey, Mike Coulter, Jess Anderson, Joann Tweedy, and Charles Tweedy. Intervenor-Defendants are the State of Montana, Tongue River Water Users’ Association, and Powder River Basin Resource Council.

On September 11, 2006, the State of Wyoming filed a petition for review of the standards against the EPA (06cv228). Intervenor-Defendant in that suit is the State of Montana. On the same date, Pennaco Energy Company, Marathon Oil Company, Devon Energy Corporation, Nance Petroleum Corporation, and Yates Petroleum Corporation filed a similar suit against the EPA, with the State of Montana as Intervenor-Defendant (06cv229). On September 19, 2006, Anadarko Petroleum Corporation filed a similar suit against the EPA (06cv235).
On October 5, 2006, the Court issued an order to consolidate the four cases. On October 16, 2006, the Court scheduled a hearing for January 8, 2007, to consider a variety of motions and orders including the order for consolidation.

On October 11, 2006, the States of Wyoming and Montana and the EPA filed a joint/unopposed motion to a stay the consolidated cases until February 15, 2007, to allow officials “at the highest levels” of these entities to discuss differences over water-quality standards in the Montana-Wyoming region. At the end of the stay period the parties involved would submit a status report and/or appropriate motions to govern further proceedings.

After a briefing schedule is issued, MSLF will file an *amicus curiae* brief on behalf of itself and its members and an unidentified Montana landowners’ association arguing that the State exceeded statutory guidelines in amending Montana’s water quality standards in 2003 and 2006 relating to produced water from coalbed methane operations because the new standards are not supported by credible scientific and technical evidence and are not necessary to protect beneficial uses of water. *Amici* would further argue that EPA acted arbitrarily and capriciously when it adopted Montana’s water quality standards.

At a hearing held on January 8, 2007, the Court granted the joint/unopposed motion to stay litigation pending discussions between officials of Montana, Wyoming, and the EPA regarding water-quality standards in the region. It stayed the case until August 1, 2007, and ordered the parties to keep the Court informed regarding the discussions. In addition, it took a number of motions regarding consolidation of the various cases under advisement. (Ron Opsahl) (Mentor: Joselyn) (05-5743)

**REYNOLDS v. VALLEY PARK, MISSOURI**

(Limited and Ethical Government; Constitutional Rights)

(Co-Counsel for City of Valley Park) (Circuit Court, County of St. Louis, No. 06cv1487-ERW)

(A city defends the constitutionality of its ordinances regarding illegal immigrants)

On October 6, 2006, the Board of Directors approved representation of Valley Park, Missouri, in defense of the constitutionality of ordinances controlling illegal immigration similar to those passed by Hazleton, Pennsylvania. Valley Park, Missouri, is a small community in St. Louis County, just southwest of the City of St. Louis and along the Meramec River, a flood-prone tributary of the Mississippi River. Its population according to the 2000 Census was 6,518, but the current population is thought to be 8,000. Its annual general revenue budget is only $2 million; however, recently, the City, at a cost of $12.5 million, joined in a $49.5-million dollar project with the U.S. Army Corps of Engineers to rebuild a levee to protect the local floodplain.

Valley Park was incorporated in 1917 as a company town for a large plate glass works factory. That corporation failed, and the factory flooded and then burned in the early 1920s. Much of the housing in the area is old and, because the area has been flooded many times, Federal Emergency Management Agency (FEMA) rules have limited improvements to the housing stock. Prices in the area therefore are lower than in the surrounding St. Louis Metropolitan Area, a factor that has resulted in absentee owners and below market rental rates.

Landscaping companies, some of which are the largest in the St. Louis area, have located recently in Valley Park and are able to purchase properties to warehouse their employees, many of whom are reputed to be "guest workers" on government programs from Mexico. Police,
during major and minor traffic stops, have noted an increase in the numbers of unlicensed, uninsured drivers with Mexican licenses and Valley Park addresses. Although federal immigration officials have been contacted when obviously illegal residents come into contact with the police, those officials have failed to take custody of the individuals.

Valley Park Mayor Jeffery Whiteaker concluded that enactment of an ordinance to reduce the burdens of illegal immigration was the appropriate action for the city to take to aid in the enforcement of the laws of the United States related to immigration. On July 17, 2006, the ordinance was passed unanimously by the Board of Aldermen. After passage of the ordinance, 20 families were moved with the assistance of the Archdiocese of St. Louis.

On September 25, 2006, Stephanie Reynolds, Florence Streeter, Jaqueline Gray and The Metropolitan St. Louis Equal Housing Opportunity Council, Inc. (hereafter “Reynolds”), filed for a temporary restraining order against the ordinance (Circuit Court, County of St. Louis, No. 406-CC-3802). James Zhang, a large city landlord, moved to intervene as a Plaintiff. Valley Park immediately adopted the same ordinance, with minor modifications, as adopted by Hazleton, Pennsylvania; however, on September 27, 2006, the Circuit Court entered a TRO against the revised ordinance. That same date, Reynolds filed an amended petition for injunctive and declaratory relief.

On October 10, 2006, Valley Park filed a notice of removal to U.S. District Court for the Eastern District of Missouri. On October 12, 2006, Reynolds filed an emergency motion to compel the taking of depositions previously agreed to by the parties as part of the state court case. On October 13, 2006, a hearing on that motion was held, and on October 16, 2006, the motion was denied. On October 16, 2006, Reynolds filed an emergency motion for remand, on which the Court did not act immediately, and a motion to expedite briefing on the motion to remand, which the Court granted that same date.

On October 25, 2006, Valley Park filed a motion to dismiss as parties the Aldermen of Valley Park, in that they are not responsible for enforcing the ordinance. That duty is assigned to Jeffrey Whitaker, the Mayor, who was also named as a defendant. On October 27, 2006, Valley Park filed its answer to the first amended petition.

On November 3, 2006, the Court held a hearing on the motion to remand to state court and took the matter under advisement. On November 6, 2006, Reynolds filed a response to Valley Park’s motion to dismiss the aldermen as parties in the suit. On November 15, 2006, the district court remanded the case to state court and denied the aldermen’s motion to dismiss as moot. (Liz Gallaway) (Mentor: Stubbs) (06-6003)

**ROBERTS v. HAGENER**

(Private Property Rights, Equal Protection)

(Counsel for Randy Roberts) (U.S. District Court, Montana, No. 05cv153)

(Property owner within reservation boundary seeks right to hunt on his fee lands)

This case initially was approved by the Board of Directors on February 6, 2004, but no client was identified. On June 3, 2005, the Board approved representing Mr. Randy Roberts.

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

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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 denies 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. 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. 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 violate equal protection because Indians represent a political classification, not a racial classification. The State will rely on Morton v. Mancari, 417 U.S. 535 (1974), which explicitly considers whether a law that distinguishes based on tribal membership violates equal protection. It will argue that its regulation, which distinguishes on the basis of tribal membership, is constitutional under equal protection because tribal membership is not a racial distinction. Using this rationale courts previously have decided that they need only address whether the regulation that prohibits non-tribal members from hunting 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 the regulation does not violate equal protection. Morton v Mancari is misguided, however, and in direct conflict with Adarand v. Peña, which held that all racial classifications, including those associated with Native Americans, are subject to strict scrutiny.

On November 30, 2005, MSLF filed a complaint in federal court on behalf of Mr. Randy Roberts of Billings, Montana. Defendants waived service and on February 10, 2006, filed a motion to dismiss as to all claims for failure to state a claim under which relief can be granted and a memorandum in support. The State asserted that the classification of individuals on the basis of enrollment in a federally recognized tribe is a political, not a racial, classification, subject only to rational basis review, and that the State may make such a classification to accommodate federal preemption of state regulatory authority over tribal members hunting on their reservations. It argued that such regulation is a valid exercise of the State's police power and rationally related to legitimate state purposes.

On March 6, 2006, Roberts filed a response to the State's motion to dismiss, and on March 24, 2006, the State filed its reply.

On August 4, 2006, the Court issued an order stating that it intends to convert the State's motion to dismiss into a motion for summary judgment in order to allow Roberts to attempt to demonstrate fully the lack of rational basis for the hunting regulation at issue. In its order, the Court stated that, although Roberts equal protection argument has real force, the weight of established law requires the Court to review the regulation for a rational basis. The Court ordered that by September 5, 2006, Roberts show how the regulation is not rationally related to a legitimate governmental interest and why his claim should not be dismissed as a matter of law.

On August 22, 2006, Roberts filed a motion for extension of time until September 26, 2006, to file his motion for summary judgment, which motion was granted on August 23, 2006.

On September 26, 2006, Roberts filed a motion for summary judgment in response to the Court's order of August 4, 2006, together with a statement of undisputed facts and memorandum.
in support of the motion for summary judgment. On October 20, 2006, the State filed its response, and on November 3, 2006, Roberts filed his reply. (Joe Becker) (Local counsel: Ronald E. Youde, Crowley Haughey, Billings) (05-5687)

**ROTH v. UNITED STATES**
(Private Property Rights, Access to Federal Lands)
(Counsel for Roth) (Ninth Circuit, Montana, No. 04-35296)
(Family fights for access to its dam, reservoir, and ditches, which lie on federal land)

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 (No. 02cv44). On March 12, 2002, the Court issued a scheduling order for preliminary matters.

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. On November 26, 2002, Chief Judge Molloy reassigned the case, for litigation of all proceedings, to Magistrate Judge Leif B. Erickson.


On December 12, 2003, Magistrate Judge Erickson granted the Roths’ motion for partial summary judgment and denied the United States’ cross-motion. 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. 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 was held on June 1, 2004. On June 3, 2004, a second assessment conference (telephone) was set for July 7, 2004, then rescheduled for July 20, 2004. At that conference, the U.S. Attorney indicated that further consultation with the Department of Justice was required.

On August 13, 2004, a settlement conference in Missoula was attended by Mr. Roth, Ms. Koehler, and the government attorneys. 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 October 20, 2004, a settlement conference was scheduled for December 8, 2004, then rescheduled and held on November 22, 2004. At that conference, another conference was scheduled for January 7, 2005. At the conference of January 7, 2005, the Court reset the briefing schedule.

At a pre-briefing conference on February 17, 2005, the Court set a further status conference for April 21, 2005, and again reset the briefing schedule. Subsequently, briefing was stayed for settlement discussions, which continue. (Steve Lechner) (Local Counsel: Ward Shanahan) (01-4845)

SAN JUAN COUNTY, UTAH v. UNITED STATES
(Private Property Rights) (Amicus)(Tenth Circuit, Utah, No. 04-4260)
(County fights right of environmental groups to intervene in lawsuit over County’s right to road)

On October 7, 2005, the Board of Directors approved the filing of an amicus brief on behalf of the Foundation in support of San Juan County, Utah’s, petition for rehearing and for rehearing en banc of the Tenth Circuit’s decision to allow environmental groups to intervene in a quiet title action to Salt Creek Road, in Canyonlands National Park, which leads to Angel Arch.

After years of litigation regarding closure of the road, from 1995 to 2005, the NPS road closure was upheld. The County filed a quiet title action in U.S. District Court for the District of Utah claiming a right-of-way under Section 8 of the Mining Act of 1866, later codified as Revised Statute 2477 (“R.S. 2477”). The Southern Utah Wilderness Alliance and other environmental groups (“SUWA”) sought to intervene on behalf of the United States and other federal defendants. The District Court denied SUWA’s motion to intervene and SUWA appealed that decision to the Tenth Circuit.

In its appeal SUWA maintained that its standing to intervene is based on the “years” it has spent “in a successful effort to protect Salt Creek Canyon … from damages due to motorized vehicles.” It suggested that the right-of-way San Juan County is trying to perfect will make the County immune from the NPS’s efforts to protect Salt Creek Canyon from motor vehicle damage. SUWA stated that its purpose in intervening is “to oppose the recognition of a right-of-way in Salt Creek Canyon.” It claimed no title to the land, nor did it seek to have title quieted to it. It merely contended that the County’s claim to an R.S. 2477 right-of-way should not be recognized because of what SUWA perceives as adverse environmental impacts.

On August 31, 2005, the Tenth Circuit found that SUWA had a sufficient interest in the land in question and reversed the district court’s denial of SUWA’s motion to intervene. Petitions for rehearing and for rehearing en banc were filed by San Juan County on October 13,
2005, and by the United States on November 4, 2005. MSLF's amicus brief in support of the petitions was filed on November 30, 2005. SUWA filed its response in opposition to the petition on December 16, 2005.

On February 24, 2006, the Tenth Circuit granted the petitions for rehearing en banc, set a briefing schedule, and announced the case would be argued during the September Session, September 25-29, 2006.

On May 1, 2006, appellant SUWA and appellee San Juan County filed supplemental briefs. Amicus curiae briefs in support of SUWA were filed by Alaska Wilderness, et al.; Civil Procedure and Public Lands Law Professors; Environmental Organizations; and Property Owners for Sensible Roads Policy. Briefs in support of San Juan County were filed by MSLF and by Utah and Wyoming. New Mexico, Oklahoma, and California filed an amicus brief in support of neither party and supporting neither affirmance nor reversal; they asked the Court to reach its decision in a way that does not require a prospective intervenor to demonstrate Article III standing and does not preclude a State from protecting its sovereign interests as an intervenor in quiet title disputes.

On June 2, 2006, supplemental reply briefs were file by appellants SUWA and by appellee San Juan County and appellee United States. Supplemental amicus reply briefs in support of appellants were filed by Civil Procedure and Public Lands Law Professors; Property Owners for Sensible Roads Policy; Environmental Organizations; and Alaska Wilderness, et al. An amicus brief in support of appellees was file by Utah and Wyoming.

Oral arguments were held on September 26, 2006. (Ron Opsahl) (Mentor: Pos) (05-5755)

**SILVER CREEK TIMBER CO. v. State of CALIFORNIA  
State of WYOMING v. USDA**  
(Limited and Ethical Government; Access To Federal Lands and Resources)  
(Amicus) (Ninth Circuit, N.D. Calif., No. 06-16810; District of Wyoming, No. 01cv86)  
(A timber company and a State challenge reinstatement of the Clinton Roadless Rule)

On October 6, 2006, the Board of Directors approved the filing of an amicus curiae brief in support of the appeal of a district court ruling reinstating the Clinton Roadless Rule. In 2001, the U.S. Forest Service enacted the Roadless Rule, which essentially prohibited road construction and reconstruction and timber harvesting, subject to certain limited exceptions, in inventoried roadless areas on a uniform nationwide basis. The Roadless Rule was the culmination of a lengthy process regarding the impact of road construction and reconstruction in roadless areas starting in early 1999 with the Interim Roads Rule (64 Fed. Reg. 7,290 (Feb. 12, 1999) (to be codified at 36 C.F.R. pt. 212)), and followed by over a year of rulemaking in response to President Clinton's order to the Forest Service. In adopting the Roadless Rule, the Forest Service conducted an environmental analysis under NEPA and prepared a biological evaluation under the Endangered Species Act, resulting in a Final Environmental Impact Statement that included letters of concurrence from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service stating that the rule would not likely adversely affect threatened or endangered species. Prior to the Roadless Rule, individual forest plans had governed the use of roadless areas and permitted road construction in 34.3 million acres of the...
nation's 58.5 million acres of roadless areas. The Roadless Rule and the interim protections leading up to it replaced forest-by-forest decision making with uniform national protections that the agency determined were necessary purportedly to protect areas of national forest from further fragmentation by local decisions allowing encroachment.

The Roadless Rule was scheduled to take effect on March 13, 2001; however, incoming President Bush issued a moratorium on all regulations from the prior administration that had not yet been implemented. As the moratorium was to expire, the Idaho federal district court preliminarily enjoined implementation of the Roadless Rule in May 2001. The Forest Service exercised its discretion not to appeal the injunction, informing the district court that it planned to "initiate an additional public process that [would] . . . examine possible modifications to the Rule."

Environmental groups that had intervened at the district court appealed the Idaho injunction. In December 2002, the Ninth Circuit reversed the injunction. Although the Ninth Circuit reviewed the validity of the Roadless Rule in the context of a preliminary injunction, it explained in great detail its conclusion on that record that the Forest Service had provided adequate notice and opportunity to comment and properly considered a reasonable range of alternatives under NEPA. When the Court's mandate issued in April 2003, the Roadless Rule went into effect.

In July 2003, the Wyoming federal district court issued a nationwide permanent injunction against the Roadless Rule. Again, the Forest Service declined to appeal the ruling and, again, environmental groups appealed. On May 5, 2005, one day after the Tenth Circuit heard oral argument on the appeal, the Forest Service adopted the State Petitions Rule.

The State Petitions Rule reverted to the prior regime of forest-by-forest plans, but added an optional State-by-State petitioning process to alter the level of protection of roadless areas within individual State borders from that afforded by the forest plans. If a State's petition were accepted, rulemaking on management of roadless areas within that State would begin, although individual forest plans would guide forest management starting immediately upon the rule's promulgation until changed in a State by rulemaking. For those States that did not petition, forest plans would continue to govern roadless areas. For States that did choose to petition, petitions were not due until November 2006.

Based on the State Petitions Rule, the Forest Service asked the Tenth Circuit to dismiss the appeal in Wyoming as moot. In July 2005, the Tenth Circuit agreed that adoption of the State Petitions Rule had mooted the appeal. It vacated the district court decision, finding no reason to depart from the general practice of vacatur of the judgment below when a case becomes moot pending appeal through circumstances beyond the control of the party seeking vacatur.

The State of California and environmental groups then filed suit against the U.S. Forest Service and the State Petition Rules and the cases were consolidated. California v. U.S. Department of Agriculture, No. 05cv3508, 05cv4038 (N.D. Calif.). On September 20, 2006, the district court ruled against the Forest Service, and on September 21, 2006, Defendant-Intervenor Silver Creek Timber Co. appealed the decision to the Ninth Circuit.

On October 31, 2006, Silver Creek filed a motion for voluntary dismissal of its appeal pursuant to Rule 42(b). Because the environmental groups have dropped their opposition to the
timber sales, choosing to focus instead on fighting oil and gas leasing, Silver Creek no longer has any interests at stake.

On November 7, 2006, the court denied without prejudice Silver Creek’s motion because Silver Creek’s motion to dismiss without prejudice did not state the conditions under which reinstatement would occur. Pending submittal of either a renewed motion that omits the words “without prejudice” or a motion that proposes the conditions under which reinstatement would occur, the current briefing schedule continues to govern the appeal. On November 30, 2006, Silver Creek refiled its motion to dismiss. On December 6, 2006, the Ninth Circuit granted Silver Creek’s motion to dismiss without prejudice.

In a related case, State of Wyoming v. USDA (No. 01cv86), on September 22, 2006, the State filed a motion pursuant to rule 60(b) for relief from its order of January 3, 2006, dismissing the case without prejudice. It requested that Judge Brimmer reinstate his original order in the case in which he held that the Clinton Roadless Rule was promulgated in violation of NEPA and the Wilderness Act and permanently enjoined enforcement of the rule. The State also requested the Court to set an immediate hearing on the matter. On September 29, 2006, the environmental group intervenor-defendants filed a brief in opposition to the order, and on October 13, 2006, the federal defendants filed a response opposing the motion, stating that the State should simply file a new complaint or request relief from the Tenth Circuit.

In Wyoming v. USDA, on December 5, 2006, the State of Wyoming filed a “notice” informing the Court of the California district court’s most recent decision of November 29, 2006, in which the Magistrate Judge set aside the State Petitions Rule and reinstated the 2001 Roadless Rule. The State of Wyoming again asserted that it is being materially injured by the California court’s order and requested the Court to reopen the matter and reinstate its order enjoining enforcement of the 2001 Roadless Rule.

On January 9, 2007, the Court set a hearing in Wyoming v. USDA for February 26, 2007, to consider the State’s motion to reopen the case and for the Court’s reinstate its injunction. Josh McMahon (06-6014)

SOUTHEAST ALASKA CONSERVATION COUNCIL v. ARMY CORPS OF ENGINEERS
(Environmental law) (Amicus) (Ninth Circuit, Alaska, No. 06-35679)
(Mining company defends right to discharge slurry under Clean Water Act)

On October 6, 2006, the Board of Directors approved the filing of an amicus curiae brief in support of Coeur Alaska, Inc.’s proposed underground gold mine located approximately 45 miles north of Juneau, Alaska. The Kensington Project mill and some other facilities are located on privately owned land that was patented under the Mining Law. Other components of the project—including Lower Slate Lake—are on a section of the Tongass National Forest that the U.S. Forest Service has specifically designated for mining. On June 17, 2005, the U.S. Army Corps of Engineers (“Corps”) issued a permit, under Section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344, that allows Coeur Alaska to discharge 210,000 gallons per day of slurry containing mine tailings into Lower Slate Lake. On September 15, 2005, the Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (hereinafter “SEACC”) filed a lawsuit in the U.S. District Court for the District of Alaska seeking to set aside the permits. SEACC claimed that the permitting process should have been conducted under the

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more stringent requirements of Section 402 of the CWA, 33 U.S.C. § 1342. In short, SEACC asserted that the Corps' definition of "fill material" violates the CWA.

Shortly after this suit was filed, the Corps moved for a voluntary remand because it had decided to suspend the permits and reconsider its decision. On November 14, 2005, the District Court granted the Corps' motion. On March 29, 2006, the Corps issued a revised Record of Decision explaining its rationale for issuing the permits and reinstated the permits.

On April 4, 2006, SEACC moved to reopen the case and filed an amended complaint in light of the Corps' revised Record of Decision. On August 4, 2006, after an expedited briefing schedule on cross-motions for summary judgment, the District Court denied SEACC's motion and granted judgment in favor of the Corps. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, No. 05-cv-12 (D. Alaska Aug. 4, 2006). In essence, the District Court held that it had to defer to the Corps' definition of "fill material" under *Chevron*. Subsequently, SEACC moved the Ninth Circuit for an injunction pending appeal, which, astonishingly, was granted on August 24, 2006.


On October 4, 2006, the Corps filed its response brief and intervenor-defendant-appellee Coeur Alaska filed a response brief; and on October 6, 2006, Goldbelt, and the State of Alaska filed response briefs. On October 10, 2006, the City and Borough of Juneau filed an *amicus* brief in support of defendants; on October 11, 2006, MSLF filed an *amicus* brief; and on October 12, 2006, Bemers Bay Consortium filed an *amicus* brief. On October 16, 2006, SEACC filed its reply brief.

On November 7, 2006, Coeur Alaska filed an urgent motion to vacate the injunction granted by the Ninth Circuit pending appeal on or before December 8, 2006. On November 14, 2006, the court issued an order stating that it would consider the motion to vacate at the hearing set for December 4, 2006. On November 22, 2006, Southeast Alaska Coalition filed its response to Coeur Alaska's motion, and on November 30, 2006, Coeur Alaska filed its reply.

Oral arguments were held on December 4, 2006. On December 8, 2006, the Court denied Coeur Alaska's motion to vacate the injunction that had been granted by the Ninth Circuit pending its decision on the merits. (Steve Lechner) (06-6013)

**UNITED STATES v. ENO**

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

*(Counsel for Eno) (Interior Board of Land Appeals, No. 2004-92)*

*(Miner fights attempt by federal officials to close down his valuable mine)*

This case was approved by the Board of Directors on June 8, 2001, with the caveat that MSLF not represent Mr. Donald Eno in any claims contest. Board approval was granted: (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.

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 order issued.

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

In 1996 Mr. Eno located the "Hound Dog" placer mining claim in the Plumas National Forest. He properly filed a copy of the location notice; gold and travertine were sought as locatable minerals on the claim. The claim was filed pursuant to the Mining Claims Rights Restoration Act of 1955 because of the 1927 power site withdrawal.

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 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 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 also 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.

Before MSLF took on this case, no P.L. 359 hearing had been set, although since Mr.
Eno located his claim he has done all necessary annual assessments and paid all required fees.

On July 19, 2001, the 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, 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 scheduling report.

Subsequently, the ALJ issued a schedule under which discovery would be completed by

On April 1-3, 2002, Mr. Lechner visited the Hound Dog site with Mr. Eno and did
research in the Sacramento area. On April 3, 2002, Mr. Eno began reviewing and copying
materials at the Mt. Hough District Ranger’s Office.

On June 3-7, 2002, a hearing was held before the ALJ in Sacramento. The government
filed its post-hearing opening brief on August 27, 2002, and Eno filed his post-hearing opening
brief on November 26, 2002. The government filed its reply brief on January 13, 2003, and Eno
filed his reply brief on February 18, 2003.

On December 4, 2003, the ALJ rejected 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.

On January 12, 2004, Mr. Eno filed his opposition to the petition for stay. On January
23, 2004, government filed its reply and on January 27, 2004, Mr. Eno filed a motion to strike
the assignments of error made in that 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 his response. A decision is pending. (Steve Lechner) (Mentor: Ruffatto) (01-4807)
UNITED STATES v. WYOMING AND COLORADO RAILROAD COMPANY
(Private Property Rights, Limited and Ethical Government)
(Counsel for Marvin Brandt) (U.S. District Court, Wyoming, No. 06cv184)
(United States files to quiet title to man's property rights)

On June 2, 2006, the Board of Directors approved the filing of a takings action against the United States challenging the federal rails-to-trails program. The General Railroad Right-of-Way Act was enacted on March 3, 1875, and provided for a right-of-way for railroad purposes through the public lands of the United States. The 1875 Act provided for a 200-foot-wide right-of-way pursuant to requirements for filing plats with the Secretary of the Interior. The Laramie, Hahns Peak and Pacific Railway Company filed its profile plats with the Department of Interior Land Office in Cheyenne, Wyoming, in 1904 and in 1908 acquired a 200-foot-wide by 66-mile-long railroad from Laramie, Wyoming, to the Colorado State line. In November 1987, WYCO became the most recent successor to Laramie-Hahns Peak railroad, and until about September 1995 it operated a rail line used primarily to transport carbon dioxide, wood products, and coal. Most of that shipping ceased in 1992, and on May 15, 1996, WYCO filed with the Surface Transportation Board a Notice of Intent to Abandon Rail Service along 66 miles of its Coalmont Branch in Albany County, Wyoming. It removed the track and ties in 1999 and 2000, and the termination of service was effective at the end of 2003.

Prior to 1902, all the land on the right-of-way within the National Forest was public domain land administered by the DOI, except for a school trust section tract owned by the State of Wyoming. On May 22, 1902, the Medicine Bow Forest Reserve was reserved from the public domain, and on March 2, 1907, an additional 200,000 acres was added to the reserve. Except for the state trust section, these two forest reservations preceded all other private land patents and acquisitions along the railroad right-of-way within the Medicine Bow National Forest.

The private land areas of Albany, Fox Park, and Mountain Home along the right-of-way were acquired after establishment of the railroad right-of-way and are therefore subject to it. At Albany, private lots were platted over the right-of-way and the land conveyed subject to the railroad. Therefore, the abandonment of the railroad right-of-way creates a title conflict between these ownerships and the effects of the 1988 Rails-to-Trails Act.

Fox Park consists of 83 acres of private land that was patented to Mr. Marvin Brandt on February 18, 1976, as part of a land exchange with the U.S. Forest Service. That patent was issued subject to the railroad right-of-way and to the reservation of a public road right-of-way through the middle of the tract. This tract has also been subdivided and includes summer and year-round residences, but none of the subdivided lots are located within the 200-foot railroad right-of-way. At Fox Park, there are land title issues with only Mr. Brandt who was the original patentee from the 1976 land exchange. The railroad easement to which Mr. Brandt's property was subject has a reversionary clause.

The Forest Service has been working with a number of partners, including Albany County, Wyoming Department of Transportation, City of Cheyenne Board of Public Utilities, Wyoming Institute for Disabilities, Laramie Bicycling Club, and others to convert the rail bed into a 26-mile-long recreation trail in the Medicine Bow National Forest.

In April 2005, the Forest Service issued an environmental assessment and decision notice for the trail segment from the Colorado State line to the Dry Park road. Specific trail
development plans include grading, shaping, and surfacing the rail bed with crushed and compacted gravel and building six trailheads with parking areas, information kiosks, shelters, benches, picnic tables, a hand-pump water well, a handicapped-accessible fishing pier and trail around Lake Owen, and an underpass below State Highway 230. MSLF intended to file suit in the U.S. District Court for the District of Wyoming and/or U.S. Court of Federal Claims asserting that the federal rails-to-trails program violates the Takings Clause of the Fifth Amendment when reversionary property interests held by property owners are uncompensated.

On July 14, 2006, the United States filed a complaint for declaratory judgment of abandonment and to quiet title to the Wyoming and Colorado Railroad Company, Inc., right-of-way lying within the Medicine Bow National Forest asserting that the right-of-way has been abandoned and that all rights to it are vested in the United States. About 637 acres are involved, of which, according to the complaint, Mr. Brandt may claim an interest in 10.04 acres. The suit is against the Railroad, Albany County, and 22 individuals, groups of individuals, or trusts and one limited liability corporation. Mr. Brandt was served with the complaint on July 19, 2006, and his answer is due on August 8, 2006.

On August 3, 2006, MSLF filed its appearance in the case as counsel for Mr. Brandt. On August 2, 2006, counsel for defendants June and Gary Williams filed a motion for extension of time of 15 days to file an answer.

On August 4, 2006, Defendants Lawrence and Ginny Otterstein filed an answer and counterclaim to quiet title. On August 7, 2006, Defendant Breazeale Trust filed an answer and counterclaim, Defendants David and Marilyn Yeutter filed an answer and counterclaim, and Defendants Elizabeth Keeney, DuWayne Keeney, Patrick Rinker, Patricia Rinker, Kenneth Lankford II, and Kenneth Lankford, Sr., filed an answer, and Defendant Roger L. Morgan filed a motion to dismiss him as a party in this lawsuit in that Morgan had filed a quiet title action to the same property on July 3, 2006, previous to the government’s action. Morgan argued that he should be allowed to pursue his suit separately or, in the alternative, the government’s suit should be consolidated with Morgan’s with Morgan as lead plaintiff.

On August 8, 2006, MSLF filed an answer and counterclaims on behalf of Marvin Brandt. On August 9, 2006, Defendants Donald Graff and Wanda Graff filed an answer and counterclaim and Defendant Albany County Board of County Commissioners filed an answer.

On August 15, 2006, the Wyoming and Colorado Railroad Company was finally served with a summons and complaint. The Railroad’s answer is due by September 5, 2006.


On August 31, 2006, Defendant Roger Morgan filed his reply to the government’s response to the motion to dismiss Roger Morgan as a party in this case. On September 5, 2006, the Court denied Morgan’s motion to dismiss him as a party, or in the alternative, to consolidate the government’s suit with his suit. The Court held that “the view promoted by Mr. Morgan would create a situation where the opportunity of numerous other parties would take a back seat to his litigation effort and any eventual decision in his action might well differ from the result
The Court ordered the cases consolidated, with the government’s case, 06cv184, as lead and with all future pleadings filed only in 06cv184.

On September 13, 2006, Rondal Wayne and Glenna Marrs filed an answer. On September 9, 2006, Roger Morgan filed an answer with affirmative defenses and counterclaims.

The United States filed replies to the counterclaims of the Otterstein defendants on October 3, 2006; David and Marilyn Yeutter on October 6, 2006; Breazeale Revocable Trust on October 10, 2006; Marvin Brandt on October 10, 2006; Donald and Wanda Graff on October 10, 2006; and Daniel K. and Susan McNierney on October 27, 2006.

On November 20, 2006, the United States filed its reply to the counterclaim of Roger Morgan. On November 28, 2006, the United States and WYCO filed a stipulation that WYCO has terminated all railroad activities and abandons all rights, title, and interests that it may have in the right-of-way, agrees to a judicial decree of abandonment of the right-of-way, takes no position on quiet title claims raised by the United States or the other Defendants, and does not need to be involved in further proceedings. (Joe Becker) (Mentor: Hill) (06-5858)

**UNNAMED PLAINTIFFS v. ARIZONA DEPT’ OF ECONOMIC SECURITY**

(Limited and Ethical Government, Right to Own and Use Property)

(Counsel for yet unnamed plaintiffs) (Arizona State Court)

(Proposition 200 proponents challenge failure of state agencies to withhold “benefits”)

This case was approved by the Board of Directors on June 3, 2005. Arizona ballot initiative petition I-03-2004 was filed with the Arizona Secretary of State on July 7, 2003, and certified to appear on the November 2, 2004, general election ballot as Proposition 200, the “Arizona Taxpayer and Citizen Protection Act.” Prior to the November 2004 election, Arizona Governor Janet Napolitano and Attorney General Terry Goddard publicly stated their political, legal, and personal opposition to Proposition 200 and urged the citizens of Arizona to defeat the measure at the polls; however, the voters approved Proposition 200 by a margin of 56 percent in favor to 44 percent opposed.

Sections 3, 4, and 5 of Proposition 200 deal with voting requirements and Section 6 deals with the identification required to receive state and local public benefits not mandated by federal law, including welfare, disability, retirement payments, public housing assistance, and taxpayer-subsidized postsecondary education. The State of Arizona currently spends more than $1 billion a year to provide services and benefits for more than half a million illegal aliens. The added tax burden to each Arizona household is $700 a year. Section 6 creates a verification process to enforce current laws prohibiting state and local governments from providing non-essential public benefits to illegal aliens. This verification process has been used since 1996 to check eligibility for federal benefits.

On November 12, 2004, the Arizona Attorney General issued an Opinion that Proposition 200 should be interpreted narrowly and only applied to those State and local benefits subject to the federal eligibility restrictions in 8 U.S.C. § 1621. Att’y Gen. Op. No. 104-010. In reliance of this opinion many State agencies are ignoring the requirements of Proposition 200. Proponents of Proposition 200 are arguing for a broader interpretation than that of the Opinion and believe that the correct scope of Proposition 200 is determined by the federal Welfare Reform Act of 1996, 8 U.S.C. §§ 1601-1646. In a State court challenge to the Opinion by the Federation for
American Immigration Reform ("FAIR"), the trial court held that such advisory opinions could not be challenged. FAIR has appealed that decision.

MSLF will file suit in State court on behalf of as yet unnamed plaintiffs against one or more State agencies for their failure to implement Proposition 200. (Liz Gallaway) (Mentors: West, Garcia) (05-5692)

**WALKER v. UNITED STATES**

*(Access to Federal Lands, Private Property Rights) (Amicus)*

(Federal Claims, No. 04-155L, certified question to N. Mex. Supreme Court, No. 29,544)

(MLSF files friend of the court brief in support of family’s state water and grazing rights)

This case was approved by the Board of Directors on February 3, 2006. Roy and Shellie Walker own and raise cattle on the Walker Ranch in Grant County, New Mexico. The Walker Ranch consists of 40 acres of fee land that is the base property for two grazing allotments in the Gila National Forest administered by the United States Forest Service. After a number of exchanges between the Forest Service and the Walkers regarding conditions on the allotments and whether the Walkers were required to comply with orders issued by the Forest Service, the Forest Service partially cancelled the Walkers’ grazing permit on October 4, 1996. The Walkers responded, asserting that they owned all surface rights on the allotments and were not required to have a grazing permit.

On November 8, 1996, the grazing permit was cancelled in its entirety and the Walkers were directed to remove all remaining livestock. They did not appeal but continued to graze cattle on the allotments until June 30, 1998.

On May 7, 1997, the United States filed suit in New Mexico federal district court alleging trespass and seeking damages, unpaid grazing fees, and an order enjoining the Walkers from continuing to graze livestock on the allotments. On June 9, 1997, the Walkers answered, asserting ownership of all surface rights on the allotments and filing a counterclaim for just compensation. On August 26, 1997, the United States filed a motion to dismiss the counterclaim. On October 7, 1997, the Walkers filed a motion to dismiss. On October 8, 1997, the United States filed a motion for summary judgment.

On January 7, 1998, the district court denied the Walkers’ motion to dismiss, dismissed the Walkers’ counterclaim without prejudice, and granted the United States’ motion for summary judgment. It held that the Walkers did not hold title to the surface of the allotments or to the allotments and that their continued use of the allotments without a permit constituted trespass. It also held that because the Walkers sought damages in excess of $670,500.00 and injunctive relief against the government it did not have jurisdiction. The Walkers were ordered to remove all livestock from the allotments and assessed a $13,411.84 fine for unlawful grazing.

On February 5, 2004, the Walkers filed suit in the Court of Federal Claims asserting violations of the Just Compensation Clause of the Fifth Amendment to the United States Constitution and a claim for compensation pursuant to 43 U.S.C. § 1752(g). The Just Compensation claim alleged a taking of water, access, and rights on the allotments through physical appropriation of the water and a denial of all economic uses of water, including deprivation of all reasonable investment-backed expectations in that the water, forage, and grazing rights are essential to ranch operations.
On May 4, 2004, the United States filed a motion to dismiss arguing that the Walkers’ claims were barred by the six-year statute of limitations because the claims accrued when their grazing permit was cancelled by the Forest Service in November 1996. On August 16, 2004, the Walkers filed an opposition to the motion arguing that their Just Compensation claims did not accrue until June 30, 1998, the effective date of the district court’s injunction.

On May 31, 2005, the Court of Federal Claims granted the United States’ motion to dismiss regarding compensation for the alleged takings of the Walkers’ property interests in the allotments and the Walkers’ grazing permit. It held, however, that the second cause of action, the alleged taking of the Walker Ranch, survived the motion to dismiss in that water, forage, and grazing rights are essential to ranch operations.

On June 17, 2005, the Walkers filed for reconsideration, which, on October 31, 2005, was granted. The Court certified questions of law to the New Mexico Supreme Court and denied the motion to dismiss. It determined that it had erred in holding that the Walkers were collaterally estopped from asserting their Just Compensation claims. The error arose because the Court believed that to bring a claim based on the taking of the surface rights on the allotments the Walkers had to establish ownership of a property interest in the surface estate of the allotments at the time of the alleged taking. The Court held that the water, access, and forage rights the Walkers claimed to possess, to the extent recognized by New Mexico law, were legally distinct from the surface estate rights addressed by the district court’s decision. Thus, the Walkers were not collaterally estopped from alleging compensable water, access, and forage rights.

The Court also held that, as a matter of federal law, the laws of the Territory of New Mexico and the State of New Mexico, local customs, and decisions of courts govern the determination, validity, scope, and nature of the Walkers’ alleged rights in the allotments. It also held that under New Mexico law the water rights alleged in the complaint were separate and independent property interests, the ownership of which was not dependent on possessing an interest in the associated surface estate.

The Court also held that New Mexico law recognizes a “right of way and other instrumentalities for the maintenance and enjoyment” of water rights protected under the Mining Act of 1866, that ownership of the underlying surface estate was not necessary, and that New Mexico law was silent on the scope of rights-of-way for the enjoyment of water rights protected under the Mining Act of 1866. It held that New Mexico law also was silent on whether forage rights were included in a vested water right or ditch right-of-way, but that the Court of Federal Claims has held that the Mining Act of 1866 protects a narrower forage right recognized as an aspect of a water right under Nevada law. *Hage v. United States*, 42 Fed. Cl. 249 (1998). It then Court certified two questions to the New Mexico Supreme Court, asking if New Mexico law recognizes a limited forage right implicit in a vested water right and if New Mexico law recognizes a limited forage right implicit in a right-of-way for the maintenance and enjoyment of a vested water right.

On March 10, 2006, MSLF filed an *amicus* brief with the New Mexico Supreme Court (No. 29,544) addressing these two questions.

On July 5, 2006, the United States filed a motion for summary judgment in the Claims Court asserting that a recent Federal Circuit decision should apply to the Walkers’ case and thus the Court should reconsider the accrual date of the Walkers’ takings claims and dismiss those
claims for lack of jurisdiction. It also suggested that the Court withdraw its certification to the New Mexico Supreme Court pending resolution of the motion for summary judgment.

On July 10, 2006, the United States filed for a motion stay of certification proceedings with the New Mexico Supreme Court pending Claims Court action on the motion for summary judgment. That same date, the New Mexico State Supreme Court granted the motion to stay. On July 11, 2006, the Claims Court informed the parties that it did not intend to act on the motion for summary judgment until certification proceedings were complete, and on July 13, 2006, the New Mexico Supreme Court, learning of the Claims Court action, lifted its stay. On July 17, 2006, the government filed a renewed motion for stay, and on July 18, 2006, the Walkers informed the Claims Court of that renewed motion.

On July 21, 2006, the Claims Court issued a published memorandum opinion and order in which it: (1) reiterated that it would take no further action until the New Mexico Supreme Court answered the certified questions; (2) stated that the recent Federal Circuit decision did not apply to the Walkers’ case and thus denied the government’s motion to reconsider the accrual date of the Walkers’ takings claims and dismiss those claims for lack of jurisdiction; (3) denied the government’s request that the Court withdraw the certification to the New Mexico Supreme Court pending resolution of the motion for summary judgment; (4) denied the motion for summary judgment as untimely; and (5) ordered both sides to provide it with timely notice of all future filings in the New Mexico Supreme Court related to the case.

On September 12, 2006, oral arguments were held before the New Mexico Supreme Court. (Josh McMahon) (06-5824) (Mentor: Kienzle)

**State of WASHINGTON v. WASHINGTON EDUCATION ASSOCIATION**

(Constitutional Rights) (Amicus) (Supreme Court, Washington, No. 05-1657)

(State law requires union to obtain nonmember consent to use fees for political purposes)

On October 6, 2006, the Board of Directors approved the filing of an *amicus* brief in support of a State of Washington statute that requires a union to obtain an individual’s consent prior to using their fees for political purposes. Pursuant to this statute, educators who choose not to belong to the Washington Education Association ("WEA") are only required to pay "agency shop fees" in exchange for collective bargaining services provided by the WEA. Revised Code of Washington ("RCW") §§ 41.59.100, 41.56.122. Non-members may not be required to support the political activities of the WEA.

The State has also enacted a statute which provides that "A labor organization may not use agency shop fees paid by an individual who is *not a member* of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless *affirmatively authorized* by the individual." RCW § 42.17.760 (emphasis added). Thus, it is not the individual’s responsibility to opt out of the union’s political activities, it is the union’s responsibility to acquire affirmative authorization from the nonmember in order to use the nonmember’s fees for political purposes.

The WEA has not been acquiring the affirmative authorization of nonmembers before those nonmembers’ fees are used for political purposes. Instead, it assumes that nonmembers consent to the WEA using their fees for political purposes unless they opt out.
The Attorney General filed suit against the WEA in superior court for violating RCW § 42.17.760, seeking civil penalties, treble damages if the violations were held to be intentional, and costs and attorneys’ fees. The trial court ruled in favor of the State, holding that the statute was constitutional, that it required affirmative authorization from nonmembers, and that the WEA’s procedures did not satisfy the requirements of the statute. The trial court entered a total monetary judgment against the WEA of $590,375 and a permanent injunction setting out the manner in which the WEA was to comply with RCW § 42.17.760 in the future.

The WEA appealed to the Washington Court of Appeals and a divided three-judge panel reversed the trial court. The Supreme Court of Washington granted the State’s petition for review and affirmed the appeals court decision by a vote of six to three. On June 14, 2006, the State petitioned the U.S. Supreme Court for certiorari. Certiorari was granted on September 26, 2006, and the case was consolidated with Gary Davenport, et al v. WEA (No. 05-1589).

Amicus briefs in support of the State were filed in both cases on November 7, 2006, by the Campaign Legal Center and Pacific Legal Foundation, and on November 8, 2006, by the Institute for Justice, Evergreen Freedom Foundation, and the National Federation of Independent Business Legal Foundation. An amicus brief in support of the State was filed in State of Washington by Mountain States Legal Foundation.

On November 8, 2006, the State of Washington filed its brief on the merits, and on November 13, 2006, a joint appendix was filed in that case. On November 8, 2006, a joint appendix was filed in Davenport, and on November 9, 2006, Davenport, et al, filed their brief on the merits.

On November 10, 2006, the Religious Objector Members of the Northwest Professional Educators filed an amicus brief in support of the State in Washington.

Amicus briefs were filed in both cases on November 13, 2006, by the American Educators, American Legislative Exchange Council, Cato Institute, et al., Mackinac Center for Public Policy, and the United States. That same date the State of Colorado, et al, filed an amicus brief in support of the State in Washington.

On December 15, 2006, the WEA filed response briefs in both cases. The American Federation of Labor and Congress of Industrial Organizations, et al., filed an amicus brief in support of the WEA in both cases.

On January 3, 2007, Davenport, et al., filed their reply brief. On January 10, 2007, oral arguments were held. The Solicitor General argued as amicus curiae. (Joel Spector) (06-6008)