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 2008 calendar year, or tax year beginning and ending

B Check if applicable

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

C Name of organization

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

D Employer identification number

84-0736725

E Telephone number

303-292-2021

G Gross receipts $

2,460,206.

H(a) Is this a group return

Yes

H(b) Are all affiliates included?

Yes

If "No," attach a list (see instructions)

J Website:

WWW.MOUNTAINSTATESLEGAL.ORG

K Type of organization

□ Corporation

□ Trust

□ Association

□ Other □

L Year of formation

1977

M State of legal domicile

CO

Part I Summary

1 Briefly describe the organization’s mission or most significant activities

PUBLIC INTEREST LAW FIRM

2 Check this box □ if the organization discontinued its operations or disposed of more than 25% of its assets

3 Number of voting members of the governing body (Part VI, line 1a)

3

67

4 Number of independent voting members of the governing body (Part VI, line 1b)

4

67

5 Total number of employees (Part V, line 2a)

5

16

6 Total number of volunteers (estimate if necessary)

6

0

7a Total gross unrelated business revenue from Part VIII, line 12, column (C)

7a

0

7b Net unrelated business taxable income from Form 990-T, line 34

7b

0

Revenues:

8 Contributions and grants (Part VIII, line 1h)

Prior Year

Current Year

2,826,558

2,335,756

51,576

57,988

36,460

53,967

48,411

2,987,987

2,420,627

10 Investment income (Part VIII, column (A), lines 3, 4, and 7d)

10

11 Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)

11

12 Total revenue - add lines 8 through 11 (must equal Part VIII, column (A), line 12)

12

Expenditures:

13 Grants and similar amounts paid (Part IX, column (A), lines 1-3)

13

14 Benefits paid to or for members (Part IX, column (A), line 4)

14

15 Salaries, other compensation, employee benefits (Part IX, column (A), lines 5-10)

15

16 Professional and related services (Part IX, column (A), line 11e)

16

17 Total fundraising expenses (Part IX, column (D), line 25) □ 921,037.

17

18 Other expenses (Part IX, column (A), lines 11a-11d, 11f-24)

18

19 Total expenses (add lines 17a-17I, must equal Part IX, column (A), line 25)

19

20 Revenue less expenses. Subtract line 18 from line 12

20

21 Total assets (Part X, line 26)

21

22 Net assets or fund balances. Subtract line 21 from line 20

22

Part II Signature Block

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.

Sign Here

Signature of officer

President and Chief Operating Officer

Type or print name and title

Preparer's signature

Preparer's identifying number (see instructions)

Preparer's name (or years of self-employed)

Phone number □ 303-794-5661

Paid Preparer's Use Only

Date

Check if self-employed □

EIN □

Firm's name (or years of self-employed), address, and ZIP + 4

BROCK AND COMPANY, CPAS, P.C.

26 WEST DRY CREEK CIRCLE, SUITE 710

LITTLETON, CO 80120

May the IRS discuss this return with the preparer shown above? (see instructions)

□ Yes □ No

Date

832001 12-18-08 LHA For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.
1 Briefly describe the organization's mission:

NON PROFIT PUBLIC INTEREST LAW FIRM, REPRESENTING THE GENERAL PUBLIC ON ISSUES OF BROAD PUBLIC INTEREST.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ?
   Yes [x] No

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services?
   Yes [x] No

4 Describe the exempt purpose achievements for each of the organization's three largest program services by expenses
   Section 501(c)(3) and 501(c)(4) organizations and section 4947(a)(1) trusts are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code ) (Expenses $ 1,300,897., including grants of $ ) (Revenue $ 2,335,756.)

LEGAL ACTIVITIES—PUBLIC INTEREST LAW FIRM. SEE ATTACHED SCHEDULE.

4b (Code ) (Expenses $ ) including grants of $ ) (Revenue $ )

4c (Code ) (Expenses $ ) including grants of $ ) (Revenue $ )

4d Other program services (Describe in Schedule O )
   (Expenses $ including grants of $ ) (Revenue $ )

4e Total program service expenses $ 1,300,897. (Must equal Part IX, Line 25, column (B))
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? If &quot;Yes,&quot; complete Schedule A</td>
<td>1</td>
<td>X</td>
</tr>
<tr>
<td>2. Is the organization required to complete Schedule B, Schedule of Contributors?</td>
<td>2</td>
<td>X</td>
</tr>
<tr>
<td>3. Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If &quot;Yes,&quot; complete Schedule C, Part I</td>
<td>3</td>
<td>X</td>
</tr>
<tr>
<td>4. Section 501(c)(3) organizations. Did the organization engage in lobbying activities? If &quot;Yes,&quot; complete Schedule C, Part II</td>
<td>4</td>
<td>X</td>
</tr>
<tr>
<td>5. Section 501(c)(4), 501(c)(5), and 501(c)(6) organizations. Is the organization subject to the section 6033(e) notice and reporting requirement and proxy tax? If &quot;Yes,&quot; complete Schedule C, Part III</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>6. Did the organization maintain any donor advised funds or any accounts where donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? If &quot;Yes,&quot; complete Schedule D, Part I</td>
<td>6</td>
<td>X</td>
</tr>
<tr>
<td>7. Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? If &quot;Yes,&quot; complete Schedule D, Part II</td>
<td>7</td>
<td>X</td>
</tr>
<tr>
<td>8. Did the organization maintain collections of works of art, historical treasures, or other similar assets? If &quot;Yes,&quot; complete Schedule D, Part III</td>
<td>8</td>
<td>X</td>
</tr>
<tr>
<td>9. Did the organization report an amount in Part X, line 21, serve as a custodian for amounts not listed in Part X, or provide credit counseling, debt management, credit repair, or debt negotiation services? If &quot;Yes,&quot; complete Schedule D, Part IV</td>
<td>9</td>
<td>X</td>
</tr>
<tr>
<td>10. Did the organization hold assets in term, permanent, or quasi-endowments? If &quot;Yes,&quot; complete Schedule D, Part V</td>
<td>10</td>
<td>X</td>
</tr>
<tr>
<td>11. Did the organization report an amount in Part X, lines 10, 12, 13, 15, or 25? If &quot;Yes,&quot; complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>12. Did the organization receive an audited financial statement for the year for which it is completing this return that was prepared in accordance with GAAP? If &quot;Yes,&quot; complete Schedule D, Parts XI, XII, and XIII</td>
<td>12</td>
<td>X</td>
</tr>
<tr>
<td>13. Is the organization a school as described in section 170(b)(1)(A)(ii)? If &quot;Yes,&quot; complete Schedule E</td>
<td>13</td>
<td>X</td>
</tr>
<tr>
<td>14a. Did the organization maintain an office, employees, or agents outside of the U.S.?</td>
<td>14a</td>
<td>X</td>
</tr>
<tr>
<td>b. Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, and program service activities outside the U.S.? If &quot;Yes,&quot; complete Schedule F, Part I</td>
<td>14b</td>
<td>X</td>
</tr>
<tr>
<td>15. Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or assistance to any organization or entity located outside the United States? If &quot;Yes,&quot; complete Schedule F, Part II</td>
<td>15</td>
<td>X</td>
</tr>
<tr>
<td>16. Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or assistance to individuals located outside the United States? If &quot;Yes,&quot; complete Schedule F, Part III</td>
<td>16</td>
<td>X</td>
</tr>
<tr>
<td>17. Did the organization report more than $15,000 on Part IX, column (A), line 11e? If &quot;Yes,&quot; complete Schedule G, Part I</td>
<td>17</td>
<td>X</td>
</tr>
<tr>
<td>18. Did the organization report more than $15,000 total on Part VIII, lines 1c and 8a? If &quot;Yes,&quot; complete Schedule G, Part II</td>
<td>18</td>
<td>X</td>
</tr>
<tr>
<td>19. Did the organization report more than $15,000 on Part VIII, line 9a? If &quot;Yes,&quot; complete Schedule G, Part III</td>
<td>19</td>
<td>X</td>
</tr>
<tr>
<td>20. Did the organization operate one or more hospitals? If &quot;Yes,&quot; complete Schedule H</td>
<td>20</td>
<td>X</td>
</tr>
<tr>
<td>21. Did the organization report more than $5,000 on Part IX, column (A), line 1? If &quot;Yes,&quot; complete Schedule I, Parts I and II</td>
<td>21</td>
<td>X</td>
</tr>
<tr>
<td>22. Did the organization report more than $5,000 on Part IX, column (A), line 2? If &quot;Yes,&quot; complete Schedule I, Parts I and III</td>
<td>22</td>
<td>X</td>
</tr>
<tr>
<td>23. Did the organization answer &quot;Yes&quot; to Part VII, Section A, questions 3, 4, or 5? If &quot;Yes,&quot; complete Schedule J</td>
<td>23</td>
<td>X</td>
</tr>
<tr>
<td>24a. Did the organization have a tax-exempt issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? If &quot;Yes,&quot; answer questions 24b-24d and complete Schedule K</td>
<td>24a</td>
<td>X</td>
</tr>
<tr>
<td>b. Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?</td>
<td>24b</td>
<td></td>
</tr>
<tr>
<td>c. Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?</td>
<td>24c</td>
<td></td>
</tr>
<tr>
<td>d. Did the organization act as an &quot;on behalf of&quot; issuer for bonds outstanding at any time during the year?</td>
<td>24d</td>
<td></td>
</tr>
<tr>
<td>25a. Section 501(c)(3) and 501(c)(4) organizations. Did the organization engage in an excess benefit transaction with a disqualified person during the year? If &quot;Yes,&quot; complete Schedule L, Part I</td>
<td>25a</td>
<td>X</td>
</tr>
<tr>
<td>b. Did the organization become aware that it had engaged in an excess benefit transaction with a disqualified person from a prior year? If &quot;Yes,&quot; complete Schedule L, Part II</td>
<td>25b</td>
<td>X</td>
</tr>
<tr>
<td>26. Was a loan to or by a current or former officer, director, trustee, key employee, highly compensated employee, or disqualified person outstanding as of the end of the organization's tax year? If &quot;Yes,&quot; complete Schedule L, Part II</td>
<td>26</td>
<td>X</td>
</tr>
<tr>
<td>27. Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, or substantial contributor, or to a person related to such an individual? If &quot;Yes,&quot; complete Schedule L, Part III</td>
<td>27</td>
<td>X</td>
</tr>
</tbody>
</table>
28 During the tax year, did any person who is a current or former officer, director, trustee, or key employee
a Have a direct business relationship with the organization (other than as an officer, director, trustee, or employee), or an
indirect business relationship through ownership of more than 35% in another entity (individually or collectively with other
person(s) listed in Part VII, Section A)? If "Yes," complete Schedule L, Part IV
28a X
b Have a family member who had a direct or indirect business relationship with the organization?
28b X
c Serve as an officer, director, trustee, key employee, partner, or member of an entity (or a shareholder of a professional
corporation) doing business with the organization? If "Yes," complete Schedule L, Part IV
28c X
29 Did the organization receive more than $25,000 in non-cash contributions? If "Yes," complete Schedule M
29 X
30 Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation
contributions? If "Yes," complete Schedule M
30 X
31 Did the organization liquidate, terminate, or dissolve and cease operations?
31 X
32 Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? If "Yes," complete
Schedule N, Part I
32 X
33 Did the organization own 100% of an entity disregarded as separate from the organization under Regulations
sections 301 7701-2 and 301 7701-3? If "Yes," complete Schedule R, Part I
33 X
34 Was the organization related to any tax-exempt or taxable entity?
34 X
35 Is any related organization a controlled entity within the meaning of section 512(b)(13)?
35 X
36 Section 501(c)(3) organizations. Did the organization make any transfers to an exempt non-charitable related organization?
36 X
37 Did the organization conduct more than 5% of its activities through an entity that is not a related organization
and that is treated as a partnership for federal income tax purposes? If "Yes," complete Schedule R, Part VI
37 X
### Part V | Statements Regarding Other IRS Filings and Tax Compliance

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a Enter the number reported in Box 3 of Form 1096, Annual Summary and Transmittal of U.S. Information Returns. Enter -0- if not applicable</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>1b Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable</td>
<td>1b</td>
<td>0</td>
</tr>
<tr>
<td>1c Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?</td>
<td>1c</td>
<td>X</td>
</tr>
<tr>
<td>2a Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return</td>
<td>2a</td>
<td>16</td>
</tr>
<tr>
<td>2b If at least one is reported on line 2a, did the organization file all required federal employment tax returns?</td>
<td>2b</td>
<td>X</td>
</tr>
<tr>
<td><strong>Note:</strong> If the sum of lines 1a and 2a is greater than 250, you may be required to e-file this return (see instructions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3a Did the organization have unrelated business gross income of $1,000 or more during the year covered by this return?</td>
<td>3a</td>
<td>X</td>
</tr>
<tr>
<td>3b If &quot;Yes,&quot; has it filed a Form 990-T for this year? If &quot;No,&quot; provide an explanation in Schedule O</td>
<td>3b</td>
<td></td>
</tr>
<tr>
<td>4a 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)?</td>
<td>4a</td>
<td>X</td>
</tr>
<tr>
<td><strong>Note:</strong> See the instructions for exceptions and filing requirements for Form TD F 90-22 1, Report of Foreign Bank and Financial Accounts.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5a Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?</td>
<td>5a</td>
<td>X</td>
</tr>
<tr>
<td>5b Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?</td>
<td>5b</td>
<td>X</td>
</tr>
<tr>
<td>5c If &quot;Yes,&quot; to question 5a or 5b, did the organization file Form 8886-T, Disclosure by Tax-Exempt Entity Regarding Prohibited Tax Shelter Transaction?</td>
<td>5c</td>
<td></td>
</tr>
<tr>
<td>6a Did the organization solicit any contributions that were not tax deductible?</td>
<td>6a</td>
<td>X</td>
</tr>
<tr>
<td>6b If &quot;Yes,&quot; did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?</td>
<td>6b</td>
<td></td>
</tr>
<tr>
<td>7 Organizations that may receive deductible contributions under section 170(c).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a Did the organization provide goods or services in exchange for any quid pro quo contribution of more than $75?</td>
<td>7a</td>
<td>X</td>
</tr>
<tr>
<td>b If &quot;Yes,&quot; did the organization notify the donor of the value of the goods or services provided?</td>
<td>7b</td>
<td></td>
</tr>
<tr>
<td>c Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?</td>
<td>7c</td>
<td>X</td>
</tr>
<tr>
<td>d If &quot;Yes,&quot; indicate the number of Forms 8282 filed during the year</td>
<td>7d</td>
<td></td>
</tr>
<tr>
<td>e Did the organization, during the year, receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?</td>
<td>7e</td>
<td>X</td>
</tr>
<tr>
<td>f Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?</td>
<td>7f</td>
<td>X</td>
</tr>
<tr>
<td>g For all contributions of qualified intellectual property, did the organization file Form 8899 as required?</td>
<td>7g</td>
<td>X</td>
</tr>
<tr>
<td>h For contributions of cars, boats, airplanes, and other vehicles, did the organization file a Form 1098-C as required?</td>
<td>7h</td>
<td>X</td>
</tr>
<tr>
<td>8 Section 501(c)(3) and other sponsoring organizations maintaining donor advised funds and section 509(a)(3) supporting organizations. Did the supporting organization, or a fund maintained by a sponsoring organization, have excess business holdings at any time during the year?</td>
<td>8</td>
<td>X</td>
</tr>
<tr>
<td>9 Section 501(c)(3) and other sponsoring organizations maintaining donor advised funds.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a Did the organization make any taxable distributions under section 4966?</td>
<td>9a</td>
<td></td>
</tr>
<tr>
<td>b Did the organization make a distribution to a donor, donor advisor, or related person?</td>
<td>9b</td>
<td></td>
</tr>
<tr>
<td>10 Section 501(c)(7) organizations. Enter N/A</td>
<td>10a</td>
<td></td>
</tr>
<tr>
<td>a Initiation fees and capital contributions included on Part VIII, line 12</td>
<td>10b</td>
<td></td>
</tr>
<tr>
<td>b Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities</td>
<td>10c</td>
<td></td>
</tr>
<tr>
<td>11 Section 501(c)(12) organizations. Enter N/A</td>
<td>11a</td>
<td></td>
</tr>
<tr>
<td>a Gross income from members or shareholders</td>
<td>11b</td>
<td></td>
</tr>
<tr>
<td>b Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them)</td>
<td>11c</td>
<td></td>
</tr>
<tr>
<td>12a Section 4947(a)(1) non-exempt charitable trusts. Is the organization filing Form 990 in lieu of Form 1041?</td>
<td>12a</td>
<td></td>
</tr>
<tr>
<td>b If &quot;Yes,&quot; enter the amount of tax-exempt interest received or accrued during the year</td>
<td>12b</td>
<td></td>
</tr>
</tbody>
</table>
Section A. Governing Body and Management

For each "Yes" response to lines 2-7b below, and for a "No" response to lines 8 or 9b below, describe the circumstances, processes, or changes in Schedule O. See instructions.

1a Enter the number of voting members of the governing body 67

1b Enter the number of voting members that are independent 67

2 Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee? X

3 Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person? X

4 Did the organization make any significant changes to its organizational documents since the prior Form 990 was filed? X

5 Did the organization become aware during the year of a material diversion of the organization's assets? X

6 Does the organization have members or stockholders? X

7a Does the organization have members, stockholders, or other persons who may elect one or more members of the governing body? X

7b Are any decisions of the governing body subject to approval by members, stockholders, or other persons? X

8 Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following?
   a The governing body? X
   b Each committee with authority to act on behalf of the governing body? X

8a Each committee with authority to act on behalf of the governing body? X

8b Each committee with authority to act on behalf of the governing body? X

9a Does the organization have local chapters, branches, or affiliates? X

9b If "Yes," does the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with those of the organization? X

10 Was a copy of the Form 990 provided to the organization's governing body before it was filed? All organizations must describe in Schedule O the process, if any, the organization uses to review the Form 990 X

11 Is there any officer, director or trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? If "Yes," provide the names and addresses in Schedule O X

Section B. Policies

12a Does the organization have a written conflict of interest policy? If "No," go to line 13 X

12b Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts? X

12c Does the organization regularly and consistently monitor and enforce compliance with the policy? If "Yes," describe in Schedule O how this is done X

13 Does the organization have a written whistleblower policy? X

14 Does the organization have a written document retention and destruction policy? X

15 Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?
   a The organization's CEO, Executive Director, or top management official? X
   b Other officers or key employees of the organization? Describe the process in Schedule O (see instructions) X

16a Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year? X

16b If "Yes," has the organization adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and taken steps to safeguard the organization's exempt status with respect to such arrangements? X

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed AR, ME, MI, MN, MS, NM, NY, NC, OK, OR, PA, SC

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (501(c)(3) is only) available for public inspection. Indicate how you make these available. Check all that apply.
   □ Own website □ Another's website □ Upon request

19 Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy, and financial statements available to the public

20 State the name, physical address, and telephone number of the person who possesses the books and records of the organization

JANICE ALVARADO, V.P. OF ADMINISTRATION - 303-292-2021
2596 SOUTH LEWIS WAY LAKewood CO 80227

SEE SCHEDULE O FOR FULL LIST OF STATES
### Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed Use Schedule J-2 if additional space is needed

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation, and current key employees. Enter ‘0’ in columns (D), (E), and (F) if no compensation was paid.
- List the organization's five current highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations.
- List all of the organization's former officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's former directors or trustees that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations.

List persons in the following order: individual trustees or directors, institutional trustees, officers, key employees, highest compensated employees, and former such persons.

- Check this box if the organization did not compensate any officer, director, trustee, or key employee.

<table>
<thead>
<tr>
<th>(A) Name and Title</th>
<th>(B) Average hours per week</th>
<th>(C) Position (check all that apply)</th>
<th>(D) Reportable compensation from the organization (W-2/1099-MISC)</th>
<th>(E) Reportable compensation from related organizations (W-2/1099-MISC)</th>
<th>(F) Estimated amount of other compensation from the organization and related organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td>KAREN KENNEDY CHAIRMAN</td>
<td>10.00 X</td>
<td></td>
<td>0.</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>WILLIAM PERRY PENDLEY PRESIDENT</td>
<td>40.00 X</td>
<td></td>
<td>250,237.</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>PETER K. ELLISON TREASURER</td>
<td>5.00 X</td>
<td></td>
<td>0.</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>JAMES TARANIK SECRETARY</td>
<td>5.00 X</td>
<td></td>
<td>0.</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>STEPHEN M. BROPHY VICE CHAIRMAN</td>
<td>5.00 X</td>
<td></td>
<td>0.</td>
<td>0.</td>
<td>0.</td>
</tr>
<tr>
<td>STEVEN J. LECHNER MANAGING ATTORNEY</td>
<td>40.00 X</td>
<td></td>
<td>126,894.</td>
<td>0.</td>
<td>0.</td>
</tr>
</tbody>
</table>

**SEE ATTACHED SCHEDULE**
### Part VII | Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees (continued)

<table>
<thead>
<tr>
<th>(A) Name and title</th>
<th>(B) Average hours per week</th>
<th>(C) Position (check all that apply)</th>
<th>(D) Reportable compensation from the organization (W-2/1099-MISC)</th>
<th>(E) Reportable compensation from related organizations (W-2/1099-MISC)</th>
<th>(F) Estimated amount of other compensation from the organization and related organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Mid-level officer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mid-level employee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Key employee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Highest compensated</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Employee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1b Total: 377,131.  0.  0.

2 Total number of individuals (including those in 1a) who received more than $100,000 in reportable compensation from the organization: 2.

3 Did the organization list any former officer, director or trustee, key employee, or highest compensated employee on line 1a? If "Yes," complete Schedule J for such individual: 3 X.

4 For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? If "Yes," complete Schedule J for such individual: 4 X.

5 Did any person listed on line 1a receive or accrue compensation from any unrelated organization for services rendered to the organization? If "Yes," complete Schedule J for such person: 5 X.

### Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization:

<table>
<thead>
<tr>
<th>(A) Name and business address</th>
<th>(B) Description of services</th>
<th>(C) Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2 Total number of independent contractors (including those in 1) who received more than $100,000 in compensation from the organization: 0.
### Part VIII | Statement of Revenue

<table>
<thead>
<tr>
<th>Contributions, gifts, grants and other similar amounts</th>
<th>(A) Total revenue</th>
<th>(B) Related or exempt function revenue</th>
<th>(C) Unrelated business revenue</th>
<th>(D) Revenue excluded from tax under sections 512, 513, or 514</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 a Federated campaigns</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 b Membership dues</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 c Fundraising events</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 d Related organizations</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 e Government grants (contribution)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 f All other contributions, gifts, grants, and similar amounts not included above</td>
<td></td>
<td></td>
<td></td>
<td>2,335,756.</td>
</tr>
<tr>
<td>1 g Noncash contributions included in lines 1a-1f $</td>
<td>52,743.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 h Total. Add lines 1a-1f</td>
<td>2335756.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 a Business Code</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 b</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 c</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 d</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 e</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 f All other program service revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 g Total. Add lines 2a-2f</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Investment income (including dividends, interest, and other similar amounts)</td>
<td></td>
<td></td>
<td></td>
<td>39,518.</td>
</tr>
<tr>
<td>4 Income from investment of tax-exempt bond proceeds</td>
<td></td>
<td></td>
<td></td>
<td>39,518.</td>
</tr>
<tr>
<td>5 Royalties</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 a Gross Rents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 b Less rental expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 c Rental income or (loss)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 d Net rental income or (loss)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 a Gross amount from sales of assets other than inventory</td>
<td>36,521.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 b Less cost or other basis and sales expenses</td>
<td>37,445.</td>
<td></td>
<td>2,134.</td>
<td></td>
</tr>
<tr>
<td>7 c Gain or (loss)</td>
<td>-924.</td>
<td></td>
<td>-2,134.</td>
<td></td>
</tr>
<tr>
<td>7 d Net gain or (loss)</td>
<td></td>
<td></td>
<td></td>
<td>-3,058.</td>
</tr>
<tr>
<td>8 a Gross income from fundraising events (not including $ of contributions reported on line 1c) See Part IV, line 18</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 b Less direct expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 c Net income or (loss) from fundraising events</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 a Gross income from gaming activities See Part IV, line 19</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 b Less direct expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9 c Net income or (loss) from gaming activities</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 a Gross sales of inventory, less returns and allowances</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 b Less cost of goods sold</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 c Net income or (loss) from sales of inventory</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Miscellaneous Revenue

<table>
<thead>
<tr>
<th>Miscellaneous Revenue</th>
<th>Business Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>11 a Mailing List Rental</td>
<td>48,411.</td>
</tr>
<tr>
<td>12 Total Revenue</td>
<td>2420627.</td>
</tr>
</tbody>
</table>

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02-02-09
### Part IX | Statement of Functional Expenses

<table>
<thead>
<tr>
<th>Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.</th>
<th>(A) Total expenses</th>
<th>(B) Program service expenses</th>
<th>(C) Management and general expenses</th>
<th>(D) Fundraising expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Grants and other assistance to governments and organizations in the U.S. See Part IV, line 21</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Grants and other assistance to individuals in the U.S. See Part IV, line 22</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Grants and other assistance to governments, organizations, and individuals outside the U.S. See Part IV, lines 15 and 16</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Benefits paid to or for members</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Compensation of current officers, directors, trustees, and key employees</td>
<td>250,000</td>
<td>212,500</td>
<td>12,500</td>
<td>25,000</td>
</tr>
<tr>
<td>6 Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)</td>
<td>688,492</td>
<td>518,555</td>
<td>55,624</td>
<td>114,313</td>
</tr>
<tr>
<td>7 Other salaries and wages</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 Pension plan contributions (include section 401(k) and section 403(b) employer contributions)</td>
<td>60,981</td>
<td>46,446</td>
<td>4,754</td>
<td>9,781</td>
</tr>
<tr>
<td>9 Other employee benefits</td>
<td>138,356</td>
<td>97,280</td>
<td>18,858</td>
<td>22,218</td>
</tr>
<tr>
<td>10 Payroll taxes</td>
<td>65,101</td>
<td>49,548</td>
<td>5,079</td>
<td>10,474</td>
</tr>
<tr>
<td>11 Fees for services (non-employees)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a Management</td>
<td>37,617</td>
<td>28,213</td>
<td>9,404</td>
<td></td>
</tr>
<tr>
<td>b Legal</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c Accounting</td>
<td>71,506</td>
<td>50,628</td>
<td>16,876</td>
<td>4,002</td>
</tr>
<tr>
<td>d Lobbying</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e Professional fundraising services. See Part IV, line 17</td>
<td>479,019</td>
<td>479,019</td>
<td></td>
<td></td>
</tr>
<tr>
<td>f Investment management fees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>g Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12 Advertising and promotion</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13 Office expenses</td>
<td>57,840</td>
<td>39,385</td>
<td>9,811</td>
<td>8,644</td>
</tr>
<tr>
<td>14 Information technology</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15 Royalties</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16 Occupancy</td>
<td>52,527</td>
<td>42,022</td>
<td>10,505</td>
<td></td>
</tr>
<tr>
<td>17 Travel</td>
<td>20,662</td>
<td>17,977</td>
<td>1,060</td>
<td>1,625</td>
</tr>
<tr>
<td>18 Payments of travel or entertainment expenses for any federal, state, or local public officials</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>19 Conferences, conventions, and meetings</td>
<td>36,381</td>
<td>29,105</td>
<td>7,276</td>
<td></td>
</tr>
<tr>
<td>20 Interest</td>
<td>1,013</td>
<td>841</td>
<td>172</td>
<td></td>
</tr>
<tr>
<td>21 Payments to affiliates</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 Depreciation, depletion, and amortization</td>
<td>56,228</td>
<td>42,529</td>
<td>8,710</td>
<td>4,989</td>
</tr>
<tr>
<td>23 Insurance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24 Other expenses. Itemize expenses not covered above. (Expenses grouped together and labeled miscellaneous may not exceed 5% of total expenses shown on line 25 below.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a FUNDRAISING EXPENSE</td>
<td>208,051</td>
<td>29,906</td>
<td>0</td>
<td>178,145</td>
</tr>
<tr>
<td>b PROFESSIONAL SERVICE</td>
<td>57,304</td>
<td></td>
<td></td>
<td>57,304</td>
</tr>
<tr>
<td>c EQUIPMENT RENTAL AND MAINTENANCE</td>
<td>47,892</td>
<td>41,329</td>
<td>1,901</td>
<td>4,662</td>
</tr>
<tr>
<td>d INSURANCE</td>
<td>36,539</td>
<td>33,760</td>
<td>2,018</td>
<td>761</td>
</tr>
<tr>
<td>e MEMBERSHIP / EDUCATION</td>
<td>9,662</td>
<td>9,562</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>f All other expenses</td>
<td>11,601</td>
<td>11,311</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>25 Total functional expenses</td>
<td>2,386,772</td>
<td>1,300,897</td>
<td>164,838</td>
<td>921,037</td>
</tr>
</tbody>
</table>

| 26 Joint Costs | Check here □ | [ ] | if following SAP 98-2. Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation |

Form 990 (2008)
<table>
<thead>
<tr>
<th>Assets</th>
<th>(A) Beginning of year</th>
<th>(B) End of year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Savings and temporary cash investments</td>
<td>1,241,564.</td>
</tr>
<tr>
<td>3</td>
<td>Pledges and grants receivable, net</td>
<td>330,501.</td>
</tr>
<tr>
<td>4</td>
<td>Accounts receivable, net</td>
<td>4</td>
</tr>
<tr>
<td>5</td>
<td>Receivables from current and former officers, directors, trustees, key employees, or other related parties Complete Part II of Schedule L</td>
<td>5</td>
</tr>
<tr>
<td>6</td>
<td>Receivables from other disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B) Complete Part II of Schedule L</td>
<td>6</td>
</tr>
<tr>
<td>7</td>
<td>Notes and loans receivable, net</td>
<td>7</td>
</tr>
<tr>
<td>8</td>
<td>Inventories for sale or use</td>
<td>8</td>
</tr>
<tr>
<td>9</td>
<td>Prepaid expenses and deferred charges</td>
<td>30,982.</td>
</tr>
<tr>
<td>10a</td>
<td>Land, buildings, and equipment cost basis</td>
<td>1,886,591.</td>
</tr>
<tr>
<td>b</td>
<td>Less accumulated depreciation Complete Part VI of Schedule D</td>
<td>453,701.</td>
</tr>
<tr>
<td>11</td>
<td>Investments - publicly traded securities</td>
<td>38,032.</td>
</tr>
<tr>
<td>12</td>
<td>Investments - other securities See Part IV, line 11</td>
<td>12</td>
</tr>
<tr>
<td>13</td>
<td>Investments - program-related See Part IV, line 11</td>
<td>13</td>
</tr>
<tr>
<td>14</td>
<td>Intangible assets</td>
<td>14</td>
</tr>
<tr>
<td>15</td>
<td>Other assets. See Part IV, line 11</td>
<td>1,327,702.</td>
</tr>
<tr>
<td>16</td>
<td>Total assets. Add lines 1 through 15 (must equal line 34)</td>
<td>4,538,693.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities</th>
<th>(A) Beginning of year</th>
<th>(B) End of year</th>
</tr>
</thead>
<tbody>
<tr>
<td>17</td>
<td>Accounts payable and accrued expenses</td>
<td>163,491.</td>
</tr>
<tr>
<td>18</td>
<td>Grants payable</td>
<td>18</td>
</tr>
<tr>
<td>19</td>
<td>Deferred revenue</td>
<td>19</td>
</tr>
<tr>
<td>20</td>
<td>Tax exempt bond liabilities</td>
<td>20</td>
</tr>
<tr>
<td>21</td>
<td>Escrow account liability Complete Part IV of Schedule D</td>
<td>21</td>
</tr>
<tr>
<td>22</td>
<td>Payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons Complete Part II of Schedule L</td>
<td>22</td>
</tr>
<tr>
<td>23</td>
<td>Secured mortgages and notes payable to unrelated third parties</td>
<td>23</td>
</tr>
<tr>
<td>24</td>
<td>Unsecured notes and loans payable</td>
<td>24</td>
</tr>
<tr>
<td>25</td>
<td>Other liabilities Complete Part X of Schedule D</td>
<td>103,260.</td>
</tr>
<tr>
<td>26</td>
<td>Total liabilities. Add lines 17 through 25</td>
<td>266,751.</td>
</tr>
</tbody>
</table>

Organizations that follow SFAS 117, check here ▶ [X] and complete lines 27 through 29, and lines 33 and 34.

<table>
<thead>
<tr>
<th>(A) Beginning of year</th>
<th>(B) End of year</th>
</tr>
</thead>
<tbody>
<tr>
<td>27 Unrestricted net assets</td>
<td>3,584,410.</td>
</tr>
<tr>
<td>28 Temporarily restricted net assets</td>
<td>687,532.</td>
</tr>
<tr>
<td>29 Permanently restricted net assets</td>
<td>29</td>
</tr>
</tbody>
</table>

Organizations that do not follow SFAS 117, check here ▶ [ ] and complete lines 30 through 34.

<table>
<thead>
<tr>
<th>(A) Beginning of year</th>
<th>(B) End of year</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 Capital stock or trust principal, or current funds</td>
<td>30</td>
</tr>
<tr>
<td>31 Paid-in or capital surplus, or land, building, or equipment fund</td>
<td>31</td>
</tr>
<tr>
<td>32 Retained earnings, endowment, accumulated income, or other funds</td>
<td>32</td>
</tr>
<tr>
<td>33 Total net assets or fund balances</td>
<td>33</td>
</tr>
<tr>
<td>34 Total liabilities and net assets/fund balances</td>
<td>4,538,693.</td>
</tr>
</tbody>
</table>

Part XI Financial Statements and Reporting

1 Accounting method used to prepare the Form 990 [ ] Cash [X] Accrual [ ] Other

2a Were the organization's financial statements compiled or reviewed by an independent accountant? [ ] Yes [X] No

2b Were the organization's financial statements audited by an independent accountant? [ ] Yes [X] No

2c If "Yes" to lines 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant? [ ] Yes [X] No

3a As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133? [ ] Yes [X] No

3b If "Yes," did the organization undergo the required audit or audits? [ ] Yes [X] No

Form 990 (2008)

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SCHEDULE A
(From 990 or 990-EZ)

Public Charity Status and Public Support

To be completed by all section 501(c)(3) organizations and section 4947(a)(1)
nonexempt charitable trusts.

Attach to Form 990 or Form 990-EZ. See separate instructions.

Name of the organization

Employer identification number

<table>
<thead>
<tr>
<th>Part I</th>
<th>Reason for Public Charity Status (All organizations must complete this part) (see instructions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>☐ A church, convention of churches, or association of churches described in section 170(b)(1)(A)(i).</td>
</tr>
<tr>
<td>2</td>
<td>☐ A school described in section 170(b)(1)(A)(ii). (Attach Schedule E)</td>
</tr>
<tr>
<td>3</td>
<td>☐ A hospital or a cooperative hospital service organization described in section 170(b)(1)(A)(iii). (Attach Schedule H)</td>
</tr>
<tr>
<td>4</td>
<td>☐ A medical research organization operated in conjunction with a hospital described in section 170(b)(1)(A)(vi). Enter the hospital's name, city, and state</td>
</tr>
<tr>
<td>5</td>
<td>☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in section 170(b)(1)(A)(v). (Complete Part II)</td>
</tr>
<tr>
<td>6</td>
<td>☐ A federal, state, or local government or governmental unit described in section 170(b)(1)(A)(v).</td>
</tr>
<tr>
<td>7</td>
<td>☑ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in section 170(b)(1)(A)(vi). (Complete Part II)</td>
</tr>
<tr>
<td>8</td>
<td>☐ A community trust described in section 170(b)(1)(A)(vi). (Complete Part II)</td>
</tr>
<tr>
<td>9</td>
<td>☐ An organization that normally receives (1) more than 33 1/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions - subject to certain exceptions, and (2) no more than 33 1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975 See section 509(a)(2). (Complete the Part III)</td>
</tr>
<tr>
<td>10</td>
<td>☐ An organization organized and operated exclusively to test for public safety See section 509(a)(4). (see instructions)</td>
</tr>
<tr>
<td>11</td>
<td>☑ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2) See section 509(a)(3). Check the box that describes the type of supporting organization and complete lines 11e through 11h</td>
</tr>
<tr>
<td>a</td>
<td>☐ Type I</td>
</tr>
<tr>
<td>b</td>
<td>☥ Type II</td>
</tr>
<tr>
<td>c</td>
<td>☐ Type III - Functionally integrated</td>
</tr>
<tr>
<td>d</td>
<td>☐ Type III - Other</td>
</tr>
<tr>
<td>e</td>
<td>☑ By checking this box, I certify that the organization is not controlled directly or indirectly by one or more disqualified persons other than foundation managers and other than one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2) supporting organization, check this box</td>
</tr>
<tr>
<td>f</td>
<td>☧ If the organization received a written determination from the IRS that it is a Type I, Type II, or Type III supporting organization, check this box</td>
</tr>
<tr>
<td>g</td>
<td>☧ Since August 17, 2006, has the organization accepted any gift or contribution from any of the following persons?</td>
</tr>
<tr>
<td>(i)</td>
<td>☧ A person who directly or indirectly controls, either alone or together with persons described in (ii) and (iii) below, the governing body of the supported organization?</td>
</tr>
<tr>
<td>(ii)</td>
<td>☧ A family member of a person described in (i) above?</td>
</tr>
<tr>
<td>(iii)</td>
<td>☧ A 35% controlled entity of a person described in (i) or (ii) above?</td>
</tr>
</tbody>
</table>

h   Provide the following information about the organizations the organization supports

(i) Name of supported organization

(ii) EIN

(iii) Type of organization (described on lines 1-9 above or IRC section (see instructions))

(iv) Is the organization in col. (i) listed in your governing document?

(v) Did you notify the organization in col. (i) of your support?

(vi) Is the organization in col. (i) organized in the U.S.?

(vii) Amount of support

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Yes</th>
<th>No</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>11g(i)</td>
<td>☧</td>
<td>☐</td>
<td>☧</td>
<td>☐</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11g(ii)</td>
<td>☧</td>
<td>☐</td>
<td>☧</td>
<td>☐</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11g(iii)</td>
<td>☧</td>
<td>☐</td>
<td>☧</td>
<td>☐</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total

LHA For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 990.

Schedule A (Form 990 or 990-EZ) 2008

832021 12-17-08
### Section A. Public Support

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2004</th>
<th>(b) 2005</th>
<th>(c) 2006</th>
<th>(d) 2007</th>
<th>(e) 2008</th>
<th>(f) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Gifts, grants, contributions, and membership fees received</td>
<td>1,937,330.00</td>
<td>3,165,291.00</td>
<td>2,436,842.00</td>
<td>2,826,558.00</td>
<td>2,335,756.00</td>
<td>12,701,777.00</td>
</tr>
<tr>
<td>2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 The value of services or facilities furnished by a governmental unit to the organization without charge</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Total. Add lines 1 - 3</td>
<td>1,937,330.00</td>
<td>3,165,291.00</td>
<td>2,436,842.00</td>
<td>2,826,558.00</td>
<td>2,335,756.00</td>
<td>12,701,777.00</td>
</tr>
<tr>
<td>5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>402,047.00</td>
</tr>
<tr>
<td>6 Public Support. Subtract line 5 from line 4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>12,299,730.00</td>
</tr>
</tbody>
</table>

### Section B. Total Support

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2004</th>
<th>(b) 2005</th>
<th>(c) 2006</th>
<th>(d) 2007</th>
<th>(e) 2008</th>
<th>(f) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 Amounts from line 4</td>
<td>1,937,330.00</td>
<td>3,165,291.00</td>
<td>2,436,842.00</td>
<td>2,826,558.00</td>
<td>2,335,756.00</td>
<td>12,701,777.00</td>
</tr>
<tr>
<td>8 Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources</td>
<td>12,165.00</td>
<td>28,952.00</td>
<td>44,501.00</td>
<td>57,988.00</td>
<td>39,518.00</td>
<td>183,124.00</td>
</tr>
<tr>
<td>9 Net income from unrelated business activities, whether or not the business is regularly carried on</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part IV)</td>
<td>93.00</td>
<td>70.00</td>
<td>8.00</td>
<td></td>
<td></td>
<td>171.00</td>
</tr>
<tr>
<td>11 Total support. Add lines 7 through 10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>12,885,072.00</td>
</tr>
<tr>
<td>12 Gross receipts from related activities, etc. (see instructions)</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>65,636.00</td>
</tr>
<tr>
<td>13 First five years. If the Form 990 is for the organization’s first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and stop here</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Section C. Computation of Public Support Percentage

| 14 Public support percentage for 2008 (line 6, column (f) divided by line 11, column (f)) | 14 | 95.46 % |
| 15 Public support percentage from 2007 Schedule A, Part IV-A, line 26 | 15 | 91.33 % |

16a **33 1/3% support test - 2008.** If the organization did not check the box on line 13, and line 14 is 33 1/3% or more, check this box and stop here. The organization qualifies as a publicly supported organization

16b **33 1/3% support test - 2007.** If the organization did not check a box on line 13 or 16a, and line 15 is 33 1/3% or more, check this box and stop here. The organization qualifies as a publicly supported organization

17a **10% -facts-and-circumstances test - 2008.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and stop here. Explain in Part IV how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization

17b **10% -facts-and-circumstances test - 2007.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and stop here. Explain in Part IV how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions
### Section A. Public Support

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2004</th>
<th>(b) 2005</th>
<th>(c) 2006</th>
<th>(d) 2007</th>
<th>(e) 2008</th>
<th>(f) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Gifts, grants, contributions, and membership fees received. (Do not include any &quot;unusual grants&quot;)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Gross receipts from activities that are not an unrelated trade or business under section 513</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 The value of services or facilities furnished by a governmental unit to the organization without charge</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Total. Add lines 1 - 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7a Amounts included on lines 1, 2, and 3 received from disqualified persons</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7b Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of 1% of the total of lines 9, 10c, 11, and 12 for the year or $5,000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7c Add lines 7a and 7b</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 Public support (Subtract line 7c from line 6)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Section B. Total Support

<table>
<thead>
<tr>
<th>Calendar year (or fiscal year beginning in)</th>
<th>(a) 2004</th>
<th>(b) 2005</th>
<th>(c) 2006</th>
<th>(d) 2007</th>
<th>(e) 2008</th>
<th>(f) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>9 Amounts from line 6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10a Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10b Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10c Add lines 10a and 10b</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11 Net income from unrelated business activities not included in line 10b, whether or not the business is regularly carried on</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part IV)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13 Total support (Add lines 9, 10c, 11, and 12)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14 First five years. If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and stop here</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Supplemental Financial Statements

Part I | Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts. Complete if the organization answered "Yes" to Form 990, Part IV, line 6

<table>
<thead>
<tr>
<th></th>
<th>(a) Donor advised funds</th>
<th>(b) Funds and other accounts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Total number at end of year</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Aggregate contributions to (during year)</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Aggregate grants from (during year)</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Aggregate value at end of year</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? [ ] Yes [ ] No</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Did the organization inform all grantees, donors, and donor advisors in writing that grant funds may be used only for charitable purposes and not for the benefit of the donor or donor advisor or other impermissible private benefit? [ ] Yes [ ] No</td>
<td></td>
</tr>
</tbody>
</table>

Part II | Conservation Easements. Complete if the organization answered "Yes" to Form 990, Part IV, line 7

1. | Purpose(s) of conservation easements held by the organization (check all that apply) |
   | Preservation of land for public use (e.g., recreation or pleasure) |
   | Preservation of an historically important land area |
   | Protection of natural habitat |
   | Preservation of certified historic structure |
   | Preservation of open space |

2. | Complete lines 2a-2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year |
   | Held at the End of the Year |
   | 2a |
   | 2b |

3. | Number of conservation easements |
   | Number of conservation easements on a certified historic structure included in (a) |
   | Number of conservation easements included in (c) acquired after 6/17/06 |

4. | Number of states where property subject to conservation easement is located |

5. | Does the organization have a written policy regarding the periodic monitoring, inspection, violations, and enforcement of the conservation easements it holds? [ ] Yes [ ] No |

6. | Staff or volunteer hours devoted to monitoring, inspecting, and enforcing easements during the year |

7. | Amount of expenses incurred in monitoring, inspecting, and enforcing easements during the year $ |

8. | Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? [ ] Yes [ ] No |

9. | In Part XIV, describe how the organization reports conservation easements in its revenue and expense statement, and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements |

Part III | Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets. Complete if the organization answered "Yes" to Form 990, Part IV, line 8

1a. | If the organization elected, as permitted under SFAS 116, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide, in Part XIV, the text of the footnote to its financial statements that describes these items |

1b. | If the organization elected, as permitted under SFAS 116, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items |
   | Revenues included in Form 990, Part VIII, line 1 $ |
   | Assets included in Form 990, Part X $ |

2. | If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under SFAS 116 relating to these items |
   | Revenues included in Form 990, Part VIII, line 1 $ |
   | Assets included in Form 990, Part X $ |

LHA | For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 990.
Part III | Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets (continued)

3 Using the organization's accession and other records, check any of the following that are a significant use of its collection items (check all that apply)
   a [ ] Public exhibition
   b [ ] Scholarly research
   c [ ] Preservation for future generations
   d [ ] Loan or exchange programs
   e [ ] Other 

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIV

5 During the year, did the organization solicit or receive donations of art, historical treasures, or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection?
   a [ ] Yes
   b [ ] No

Part IV | Trust, Escrow and Custodial Arrangements. Complete if organization answered "Yes" to Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X?
   a [ ] Yes
   b [ ] No

   b If "Yes," explain the arrangement in Part XIV and complete the following table

<table>
<thead>
<tr>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1c</td>
</tr>
<tr>
<td>1d</td>
</tr>
<tr>
<td>1e</td>
</tr>
<tr>
<td>1f</td>
</tr>
</tbody>
</table>

2a Did the organization include an amount on Form 990, Part X, line 21?
   a [ ] Yes
   b [ ] No

   b If "Yes," explain the arrangement in Part XIV

Part V | Endowment Funds. Complete if organization answered "Yes" to Form 990, Part IV, line 10

1a Beginning of year balance
   132,691.00

   b Contributions
   145,600.00

   c Investment earnings or losses
   -315,572.00

   d Grants or scholarships
   

   e Other expenditures for facilities and programs
   

   f Administrative expenses
   -12,620.00

   g End of year balance
   114,435.90

2 Provide the estimated percentage of the year end balance held as
   a Board designated or quasi-endowment ▶ 27.20 %
   b Permanent endowment ▶ 72.80 %
   c Term endowment ▶ %

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by
   a (i) unrelated organizations
   a (ii) related organizations
   [ ] Yes
   [ ] No

   b If "Yes" to 3a(i), are the related organizations listed as required on Schedule R?
   [ ] Yes
   [ ] No

Part VI | Investments - Land, Buildings, and Equipment. See Form 990, Part X, line 10

<table>
<thead>
<tr>
<th>Description of investment</th>
<th>(a) Cost or other basis (investment)</th>
<th>(b) Cost or other basis (other)</th>
<th>(c) Depreciation</th>
<th>(d) Book value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a Land</td>
<td>154,705.</td>
<td></td>
<td>154,705.</td>
<td></td>
</tr>
<tr>
<td>b Buildings</td>
<td>1,431,590.</td>
<td>254,828.</td>
<td>1,176,762.</td>
<td></td>
</tr>
<tr>
<td>c Leasehold improvements</td>
<td>145,599.</td>
<td>95,936.</td>
<td>49,663.</td>
<td></td>
</tr>
<tr>
<td>d Equipment</td>
<td>154,697.</td>
<td>102,937.</td>
<td>51,760.</td>
<td></td>
</tr>
</tbody>
</table>

Total, Add lines 1a-1e. (Column (d) should equal Form 990, Part X, column (b), line 10(c)) ▶ 1,432,890.00

Schedule D (Form 990) 2008
### Part VII | Investments - Other Securities

<table>
<thead>
<tr>
<th>(a) Description of security or category (including name of security)</th>
<th>(b) Book value</th>
<th>(c) Method of valuation Cost or end-of-year market value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial derivatives and other financial products</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Closely-held equity interests</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total (Col (b) should equal Form 990, Part X, col (B) line 12)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Part VIII | Investments - Program Related

<table>
<thead>
<tr>
<th>(a) Description of investment type</th>
<th>(b) Book value</th>
<th>(c) Method of valuation Cost or end-of-year market value</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total (Col (b) should equal Form 990, Part X, col (B) line 13)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Part IX | Other Assets

<table>
<thead>
<tr>
<th>(a) Description</th>
<th>(b) Book value</th>
</tr>
</thead>
<tbody>
<tr>
<td>ENDOWMENT FUND</td>
<td>1,144,359</td>
</tr>
<tr>
<td>Total (Column (b) should equal Form 990, Part X, col (B) line 15)</td>
<td>1,144,359</td>
</tr>
</tbody>
</table>

### Part X | Other Liabilities

<table>
<thead>
<tr>
<th>(a) Description of liability</th>
<th>(b) Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal income taxes</td>
<td></td>
</tr>
<tr>
<td>ENDOWMENT FUND PAYABLE</td>
<td>31,465</td>
</tr>
<tr>
<td>PENSION FUND PAYABLE</td>
<td>59,911</td>
</tr>
<tr>
<td>CAPITAL LEASE OBLIGATION</td>
<td>6,185</td>
</tr>
<tr>
<td>Total (Column (b) should equal Form 990, Part X, col (B) line 25)</td>
<td>97,561</td>
</tr>
</tbody>
</table>

In Part XIV, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FIN 48.
## Part XI | Reconciliation of Change in Net Assets from Form 990 to Financial Statements

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Total revenue (Form 990, Part VIII, column (A), line 12)</td>
<td>2,420,627.</td>
</tr>
<tr>
<td>2</td>
<td>Total expenses (Form 990, Part IX, column (A), line 25)</td>
<td>2,386,772.</td>
</tr>
<tr>
<td>3</td>
<td>Excess or (deficit) for the year Subtract line 2 from line 1</td>
<td>33,855.</td>
</tr>
<tr>
<td>4</td>
<td>Net unrealized gains (losses) on investments</td>
<td>-327,123.</td>
</tr>
<tr>
<td>5</td>
<td>Donated services and use of facilities</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Investment expenses</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Prior period adjustments</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Other (Describe in Part XIV)</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Total adjustments (net) Add lines 4-8</td>
<td>-327,123.</td>
</tr>
<tr>
<td>10</td>
<td>Excess or (deficit) for the year per financial statements Combine lines 3 and 9</td>
<td>-293,268.</td>
</tr>
</tbody>
</table>

## Part XII | Reconciliation of Revenue per Audited Financial Statements With Revenue per Return

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Total revenue, gains, and other support per audited financial statements</td>
<td>2,093,504.</td>
</tr>
<tr>
<td>2</td>
<td>Amounts included on line 1 but not on Form 990, Part VIII, line 12</td>
<td></td>
</tr>
<tr>
<td>a</td>
<td>Net unrealized gains on investments</td>
<td>-327,123.</td>
</tr>
<tr>
<td>b</td>
<td>Donated services and use of facilities</td>
<td></td>
</tr>
<tr>
<td>c</td>
<td>Recoveries of prior year grants</td>
<td></td>
</tr>
<tr>
<td>d</td>
<td>Other (Describe in Part XIV)</td>
<td></td>
</tr>
<tr>
<td>e</td>
<td>Add lines 2a through 2d</td>
<td>-327,123.</td>
</tr>
<tr>
<td>3</td>
<td>Subtract line 2e from line 1</td>
<td>2,420,627.</td>
</tr>
<tr>
<td>4</td>
<td>Amounts included on Form 990, Part VIII, line 12, but not on line 1</td>
<td></td>
</tr>
<tr>
<td>a</td>
<td>Investment expenses not included on Form 990, Part VIII, line 7b</td>
<td></td>
</tr>
<tr>
<td>b</td>
<td>Other (Describe in Part XIV)</td>
<td></td>
</tr>
<tr>
<td>c</td>
<td>Add lines 4a and 4b</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Total revenue Add lines 3 and 4c (This should equal Form 990, Part I, line 12)</td>
<td>2,420,627.</td>
</tr>
</tbody>
</table>

## Part XIII | Reconciliation of Expenses per Audited Financial Statements With Expenses per Return

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Total expenses and losses per audited financial statements</td>
<td>2,386,771.</td>
</tr>
<tr>
<td>2</td>
<td>Amounts included on line 1 but not on Form 990, Part IX, line 25</td>
<td></td>
</tr>
<tr>
<td>a</td>
<td>Donated services and use of facilities</td>
<td></td>
</tr>
<tr>
<td>b</td>
<td>Prior year adjustments</td>
<td>2a</td>
</tr>
<tr>
<td>c</td>
<td>Losses reported on Form 990, Part IX, line 25</td>
<td>2b</td>
</tr>
<tr>
<td>d</td>
<td>Other (Describe in Part XIV)</td>
<td>2d</td>
</tr>
<tr>
<td>e</td>
<td>Add lines 2a through 2d</td>
<td>0.</td>
</tr>
<tr>
<td>3</td>
<td>Subtract line 2e from line 1</td>
<td>2,386,771.</td>
</tr>
<tr>
<td>4</td>
<td>Amounts included on Form 990, Part IX, line 25, but not on line 1</td>
<td></td>
</tr>
<tr>
<td>a</td>
<td>Investment expenses not included on Form 990, Part VIII, line 7b</td>
<td></td>
</tr>
<tr>
<td>b</td>
<td>Other (Describe in Part XIV)</td>
<td>4b</td>
</tr>
<tr>
<td>c</td>
<td>Add lines 4a and 4b</td>
<td>0.</td>
</tr>
<tr>
<td>5</td>
<td>Total expenses Add lines 3 and 4c (This should equal Form 990, Part I, line 18)</td>
<td>2,386,771.</td>
</tr>
</tbody>
</table>

## Part XIV | Supplemental Information

Complete this part to provide the descriptions required for Part II, lines 3, 5, and 9, Part III, lines 1a and 4, Part IV, lines 1b and 2b, Part V, line 4, Part X, Part XI, line 8, Part XII, lines 2d and 4b, and Part XIII, lines 2d and 4b

**PART V, LINE 4: MOUNTAIN STATES LEGAL FOUNDATION (MSLF) ENDOWMENT**

**SEEKS TO ENSURE THAT MSLF WILL CONTINUE TO HAVE THE RESOURCES TO LITIGATE ON BEHALF OF ITS CURRENT CONSTITUENCY AS WELL AS FUTURE GENERATIONS.**

---

832054
12-23-08
**Superimposed Information Regarding Fundraising or Gaming Activities**

**Part I** Fundraising Activities. Complete if the organization answered "Yes" to Form 990, Part IV, line 17.

1. Indicate whether the organization raised funds through any of the following activities. Check all that apply:
   - [X] Mail solicitations
   - [X] Solicitation of non-government grants
   - [ ] Email solicitations
   - [ ] Solicitation of government grants
   - [ ] Phone solicitations
   - [ ] Special fundraising events
   - [ ] In-person solicitations

2. Did the organization have a written or oral agreement with any individual (including officers, directors, trustees or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services?
   - [X] Yes
   - [ ] No

   a. If "Yes," list the ten highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least $5,000 by the organization. Form 990-EZ filers are not required to complete this table.

<table>
<thead>
<tr>
<th>(i) Name of individual or entity (fundraiser)</th>
<th>(ii) Activity</th>
<th>(iii) Did fundraiser have custody or control of contributions?</th>
<th>(iv) Gross receipts from activity</th>
<th>(v) Amount paid to (or retained by) fundraiser listed in col (i)</th>
<th>(vi) Amount paid to (or retained by) organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>EBERLE AND ASSOCIATES</td>
<td>FUNDRAISING</td>
<td>X</td>
<td>845,766</td>
<td>479,019</td>
<td>366,747</td>
</tr>
</tbody>
</table>

   Total: 845,766 | 479,019 | 366,747 |

3. List all states in which the organization is registered or licensed to solicit funds or has been notified it is exempt from registration or licensing:

   AR, CO, FL, IL, KS, KY, ME, MI, MN, MS, MO, NM, NJ, NY, NC, OK, OR, PA, SC, TN, UT, VA, WA

*For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 990.*
**Part II** Fundraising Events. Complete if the organization answered “Yes” to Form 990, Part IV, line 18, or reported more than $15,000 on Form 990-EZ, line 6a. List events with gross receipts greater than $5,000.

<table>
<thead>
<tr>
<th>Revenue</th>
<th>(a) Event #1</th>
<th>(b) Event #2</th>
<th>(c) Other Events</th>
<th>(d) Total Events (Add col (a) through col (c))</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Gross receipts</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Less Charitable contributions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Gross revenue (line 1 minus line 2)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Cash prizes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Non-cash prizes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Rent/facility costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 Other direct expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Direct Expenses**

<table>
<thead>
<tr>
<th></th>
<th>(a) Bingo</th>
<th>(b) Pull tabs/Instant bingo/progressive bingo</th>
<th>(c) Other gaming</th>
<th>(d) Total gaming (Add col (a) through col (c))</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Gross revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Cash prizes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Non-cash prizes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Rent/facility costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Other direct expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Part III** Gaming. Complete if the organization answered “Yes” to Form 990, Part IV, line 19, or reported more than $15,000 on Form 990-EZ, line 6a.

<table>
<thead>
<tr>
<th>Revenue</th>
<th>(a) Bingo</th>
<th>(b) Pull tabs/Instant bingo/progressive bingo</th>
<th>(c) Other gaming</th>
<th>(d) Total gaming (Add col (a) through col (c))</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Gross revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Cash prizes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Non-cash prizes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Rent/facility costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Other direct expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Volunteer labor**

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

| 6 Volunteer labor   | Yes | No |                  |

| 7 Direct expense summary | Add lines 2 through 5 in column (d) | (                      ) |

| 8 Net gaming income summary | Combine lines 1 and 7 in column (d) | (                      ) |

**Part IV**

<table>
<thead>
<tr>
<th>9 Enter the state(s) in which the organization operates gaming activities</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a Is the organization licensed to operate gaming activities in each of these states?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b If “No,” Explain</td>
<td>9a</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10a Were any of the organization’s gaming licenses revoked, suspended or terminated during the tax year?</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>b If “Yes,” Explain</td>
<td>10a</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>11 Does the organization operate gaming activities with nonmembers?</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

| 12 Is the organization a grantor, beneficiary or trustee of a trust or a member of a partnership or other entity formed to administer charitable gaming? | Yes | No |

82062 03-18-09
13 Indicate the percentage of gaming activity operated in
   a The organization's facility
   b An outside facility

14 Provide the name and address of the person who prepares the organization's gaming/special events books and records
   Name ▶ 
   Address ▶ 

15a Does the organization have a contract with a third party from whom the organization receives gaming revenue?
   b If "Yes," enter the amount of gaming revenue received by the organization ▶ $ and the amount of gaming revenue retained by the third party ▶ $ 
   c If "Yes," enter name and address
      Name ▶ 
      Address ▶ 

16 Gaming manager information
   Name ▶ 
   Gaming manager compensation ▶ $ 
   Description of services provided ▶ 
   □ Director/officer □ Employee □ Independent contractor

17 Mandatory distributions
   a Is the organization required under state law to make charitable distributions from the gaming proceeds to retain the state gaming license?
   b Enter the amount of distributions required under state law distributed to other exempt organizations or spent in the organization's own exempt activities during the tax year ▶ $
<table>
<thead>
<tr>
<th>Part I</th>
<th>Questions Regarding Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Check the appropriate box(es) if the organization provided any of the following to or for a person listed in Form 990.</td>
</tr>
<tr>
<td></td>
<td>Complete Part III to provide any relevant information regarding these items</td>
</tr>
<tr>
<td></td>
<td>☐ First-class or charter travel</td>
</tr>
<tr>
<td></td>
<td>☐ Housing allowance or residence for personal use</td>
</tr>
<tr>
<td></td>
<td>☐ Travel for companions</td>
</tr>
<tr>
<td></td>
<td>☐ Payments for business use of personal residence</td>
</tr>
<tr>
<td></td>
<td>☐ Tax indemnification and gross-up payments</td>
</tr>
<tr>
<td></td>
<td>☐ Health or social club dues or initiation fees</td>
</tr>
<tr>
<td></td>
<td>☐ Discretionary spending account</td>
</tr>
<tr>
<td></td>
<td>☐ Personal services (e.g., maid, chauffeur, chef)</td>
</tr>
<tr>
<td>b</td>
<td>If line 1a is checked, did the organization follow a written policy regarding payment or reimbursement or provision of all of the expenses described above? If &quot;No,&quot; complete Part III to explain</td>
</tr>
<tr>
<td>1b</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Did the organization require substantiation prior to reimbursing or allowing expenses incurred by all officers, directors, trustees, and the CEO/Executive Director, regarding the items checked in line 1a?</td>
</tr>
<tr>
<td>2</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Indicate which, if any, of the following the organization uses to establish the compensation of the organization's CEO/Executive Director. Check all that apply</td>
</tr>
<tr>
<td></td>
<td>☐ Compensation committee</td>
</tr>
<tr>
<td></td>
<td>☐ Independent compensation consultant</td>
</tr>
<tr>
<td></td>
<td>☐ Written employment contract</td>
</tr>
<tr>
<td></td>
<td>☐ Compensation survey or study</td>
</tr>
<tr>
<td></td>
<td>☑ Approval by the board or compensation committee</td>
</tr>
<tr>
<td>4</td>
<td>During the year, did any person listed in Form 990, Part VII, Section A, line 1a</td>
</tr>
<tr>
<td>4a</td>
<td>☑ Receive a severance payment or change of control payment?</td>
</tr>
<tr>
<td>4b</td>
<td>☑ Participate in, or receive payment from, a supplemental nonqualified retirement plan?</td>
</tr>
<tr>
<td>4c</td>
<td>☑ Participate in, or receive payment from, an equity-based compensation arrangement?</td>
</tr>
<tr>
<td></td>
<td>If &quot;Yes&quot; to any of lines 4a-c, list the persons and provide the applicable amounts for each item in Part III</td>
</tr>
<tr>
<td>Only 501(c)(3) and 501(c)(4) organizations must complete lines 5-8.</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>For persons listed in Form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the revenues of</td>
</tr>
<tr>
<td>5a</td>
<td>☑ The organization?</td>
</tr>
<tr>
<td>5b</td>
<td>☑ Any related organization?</td>
</tr>
<tr>
<td></td>
<td>If &quot;Yes,&quot; to line 5a or 5b, describe in Part III</td>
</tr>
<tr>
<td>6</td>
<td>For persons listed in Form 990, Part VII, Section A, line 1a, did the organization pay or accrue any compensation contingent on the net earnings of</td>
</tr>
<tr>
<td>6a</td>
<td>☑ The organization?</td>
</tr>
<tr>
<td>6b</td>
<td>☑ Any related organization?</td>
</tr>
<tr>
<td></td>
<td>If &quot;Yes&quot; to line 6a or 6b, describe in Part III</td>
</tr>
<tr>
<td>7</td>
<td>For persons listed in Form 990, Part VII, Section A, line 1a, did the organization provide any non-fixed payments not described in lines 5 and 6? If &quot;Yes,&quot; describe in Part III</td>
</tr>
<tr>
<td>7</td>
<td>☑</td>
</tr>
<tr>
<td>8</td>
<td>Were any amounts reported in Form 990, Part VII, paid or accrued pursuant to a contract that was subject to the initial contract exception described in Regs. section 53.4958-4(a)(3)? If &quot;Yes,&quot; describe in Part III</td>
</tr>
<tr>
<td>8</td>
<td>☑</td>
</tr>
</tbody>
</table>
For each individual whose compensation must be reported in Schedule J, report compensation from the organization on row (i) and from related organizations, described in the instructions, on row (ii). Do not list any individuals that are not listed on Form 990, Part VII.

**Note.** The sum of columns (B)(i)-(iii) must equal the applicable column (D) or column (E) amounts on Form 990, Part VII, line 1a.

<table>
<thead>
<tr>
<th>(A) Name</th>
<th>(B) Breakdown of W-2 and/or 1099-MISC compensation</th>
<th>(C) Deferred compensation</th>
<th>(D) Nontaxable benefits</th>
<th>(E) Total of columns (B)(i)-(D)</th>
<th>(F) Compensation reported in prior Form 990 or Form 990 EZ</th>
</tr>
</thead>
<tbody>
<tr>
<td>WILLIAM PERRY PENDELEY</td>
<td>(i) 250,237.  0.  0.  0.  0.</td>
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<td>250,237.  250,000.</td>
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</tbody>
</table>
Transactions with Interested Persons

Part I  Excess Benefit Transactions (section 501(c)(3) and section 501(c)(4) organizations only)
To be completed by organizations that answered "Yes" on Form 990, Part IV, line 25a or 25b, or Form 990-EZ, Part V, line 40b

1. (a) Name of disqualified person  (b) Description of transaction  (c) Corrected?
   Yes  No

2. Enter the amount of tax imposed on the organization managers or disqualified persons during the year under section 4958  ▶ $

3. Enter the amount of tax, if any, on line 2, above, reimbursed by the organization  ▶ $

Part II  Loans to and/or From Interested Persons.
To be completed by organizations that answered "Yes" on Form 990, Part IV, line 26, or Form 990-EZ, Part V, line 38a

<table>
<thead>
<tr>
<th>(a) Name of interested person and purpose</th>
<th>(b) Loan to or from the organization?</th>
<th>(c) Original principal amount</th>
<th>(d) Balance due</th>
<th>(e) In default?</th>
<th>(f) Approved by board or committee?</th>
<th>(g) Written agreement?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>To</td>
<td>From</td>
<td></td>
<td>Yes  No</td>
<td>Yes  No</td>
<td>Yes  No</td>
</tr>
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</tr>
</tbody>
</table>

Total  ▶ $

Part III  Grants or Assistance Benefiting Interested Persons.
To be completed by organizations that answered "Yes" on Form 990, Part IV, line 27

<table>
<thead>
<tr>
<th>(a) Name of interested person</th>
<th>(b) Relationship between interested person and the organization</th>
<th>(c) Amount of grant or type of assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

Part IV  Business Transactions Involving Interested Persons.
To be completed by organizations that answered "Yes" on Form 990, Part IV, lines 28a, 28b, or 28c

<table>
<thead>
<tr>
<th>(a) Name of interested person</th>
<th>(b) Relationship between interested person and the organization</th>
<th>(c) Amount of transaction</th>
<th>(d) Description of transaction</th>
<th>(e) Sharing of organization's revenues?</th>
</tr>
</thead>
<tbody>
<tr>
<td>ELISABETH PENDLEY</td>
<td>WIFE OF WILLIAM PER</td>
<td>57,304</td>
<td>CONSULTANT</td>
<td>X</td>
</tr>
</tbody>
</table>

For Privacy Act and Paperwork Reduction Act Notice, see the instructions for Form 990.

SEE SCHEDULE O FOR SCHEDULE L CONTINUATIONS
<table>
<thead>
<tr>
<th></th>
<th>Types of Property</th>
<th>(a) Check if applicable</th>
<th>(b) Number of contributions</th>
<th>(c) Revenues reported on Form 990, Part VIII, line 1g</th>
<th>(d) Method of determining revenues</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Art · Works of art</td>
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<td></td>
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<tr>
<td>2</td>
<td>Art · Historical treasures</td>
<td></td>
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<tr>
<td>3</td>
<td>Art · Fractional interests</td>
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<tr>
<td>4</td>
<td>Books and publications</td>
<td></td>
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<tr>
<td>5</td>
<td>Clothing and household goods</td>
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<tr>
<td>6</td>
<td>Cars and other vehicles</td>
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<tr>
<td>7</td>
<td>Boats and planes</td>
<td></td>
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<tr>
<td>8</td>
<td>Intellectual property</td>
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<tr>
<td>9</td>
<td>Securities · Publicly traded</td>
<td>X</td>
<td>4</td>
<td>52,743     MARKET VALUE</td>
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<td>10</td>
<td>Securities · Closely held stock</td>
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<tr>
<td>11</td>
<td>Securities · Partnership, LLC, or trust interests</td>
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<td>12</td>
<td>Securities · Miscellaneous</td>
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<tr>
<td>13</td>
<td>Qualified conservation contribution (historic structures)</td>
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<td>Qualified conservation contribution (other)</td>
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<td>Food inventory</td>
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<td>Drugs and medical supplies</td>
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<td>Taxidermy</td>
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<tr>
<td>22</td>
<td>Historical artifacts</td>
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<td>23</td>
<td>Scientific specimens</td>
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<td>Archeological artifacts</td>
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<td>25</td>
<td>Other</td>
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<td>27</td>
<td>Other</td>
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<tr>
<td>28</td>
<td>Other</td>
<td></td>
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</table>

29  Number of Forms 8283 received by the organization during the tax year for contributions for which the organization completed Form 8283, Part IV, Donee Acknowledgment  29

30a During the year, did the organization receive by contribution any property reported in Part I, lines 1-28 that it must hold for at least three years from the date of the initial contribution, and which is not required to be used for exempt purposes for the entire holding period?  
   If "Yes," describe the arrangement in Part II  30a  X

31  Does the organization have a gift acceptance policy that requires the review of any non-standard contributions?  31  X

32a Does the organization hire or use third parties or related organizations to solicit, process, or sell noncash contributions?  
   If "Yes," describe in Part II  32a  X

33  If the organization did not report revenues in column (c) for a type of property for which column (a) is checked, describe in Part II

LHA  For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 990.  Schedule M (Form 990) 2008
FORM 990, PART VI, SECTION A, LINE 6: MOUNTAIN STATES LEGAL FOUNDATION HAS MEMBERS.


FORM 990, PART VI, SECTION B, LINE 12C: OFFICERS, DIRECTORS, TRUSTEES AND KEY EMPLOYEES ARE REQUIRED TO SIGN THE MSLF CONFLICT OF INTEREST POLICY STATEMENT. THERE IS REGULAR MONITORING OF THIS POLICY TO ASSURE THE FOUNDATION THAT THE POLICY IS ENFORCED AND ALL OFFICERS, DIRECTORS, TRUSTEES AND KEY EMPLOYEES ARE IN COMPLIANCE. APPROVAL OF NEW CONTRACTS AND CASES ARE PRESENTED TO THE BOARD OF DIRECTORS FOR APPROVAL. IF ANY OF THE OFFICERS, DIRECTORS, TRUSTEES OR KEY EMPLOYEES ARE IN ANY MANNER INVOLVED AS AN INTERESTED PARTY IN THE PROPOSED CONTRACTS OR CASES THEY ARE EXCUSED FROM ANY DISCUSSIONS AND ARE NOT ALLOWED TO EXPRESS AN OPINION OR VOTE ON THE ACCEPTANCE OR REJECTION OF THE CONTRACT OR CASE UNDER CONSIDERATION.
FORM 990, PART VI, LINE 17, LIST OF STATES RECEIVING COPY OF FORM 990:

AR, ME, MI, MN, MS, NM, NY, NC, OK, OR, PA, SC, TN, VA, WA, CO, KY, UT, FL, KS, IL

FORM 990, PART VI, SECTION C, LINE 19: MSLF DOES PROVIDE AUDITED FINANCIAL STATEMENTS TO REQUESTING PARTIES, AS WELL AS STATES WE ARE REGISTERED IN FOR FUNDRAISING PURPOSES.

SCH L, PART IV, BUSINESS TRANSACTIONS INVOLVING INTERESTED PERSONS:

(A) NAME OF PERSON: ELISABETH PENDLEY

(B) RELATIONSHIP BETWEEN INTERESTED PERSON AND ORGANIZATION:

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Fighting for individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system since 1977.
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Page Two

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CASE UPDATE
February 2009

State of ALASKA v. KEMPTHORNE
(Environmental laws) (Amicus) (D.D.C., No. 08cv1352)
(The USFWS did not comply with the ESA when it listed polar bears as "threatened")

This case was approved by the Board of Directors on October 3, 2008. MSLF will file an amicus curiae brief in support of the State of Alaska during the briefing of this case. Polar bears (Ursus maritimus) are marine mammals found throughout ice-covered seas in the Northern Hemisphere. They are adapted to living on sea ice but may also spend significant time on land. Although the federal government recognizes 19 subpopulations of polar bear for management and research purposes, because of ranging behavior, particularly that of male polar bears, and the resultant gene flow, subpopulations are neither distinct nor significant.

Polar bears have endured through previous periods of global warming, notably the Last Interglacial (115,000-140,000 years before present) and the Holocene Thermal Maximum (4,000-12,000 years before present). In the late 1960s, there were an estimated 8,000-10,000 polar bears worldwide; however, now there are 20,000-25,000 polar bears worldwide, and, in the last few years, the worldwide population has not significantly declined. Indeed, some subpopulations of polar bears have declined in number, whereas others have increased or remained stable.

Nonetheless, in response to a petition by the Center for Biological Diversity to list the polar bear under the Endangered Species Act, on January 9, 2007, the U.S. Fish and Wildlife Service published in the Federal Register its finding that listing the polar bear pursuant to the ESA was warranted and its proposed rule to list the polar bear as threatened. The following year, on May 15, 2008, the Secretary of Interior published a Final Rule determining that polar bears are threatened under the ESA, 73 Fed. Reg. 28212-28303, and regulations to protect the polar bears. Id. at 28306-28318. In so doing, the FWS stated that, "Based upon the best available scientific and commercial information, that polar bear habitat—principally sea ice—is declining throughout the species' range, that this decline is expected to continue for the foreseeable future [45 years], and that this loss threatens the species throughout all of its range." It further stated that the ongoing and projected loss of the polar bear's sea-ice habitat threatened the species throughout its range. According to the FWS, productivity, abundance, and availability of ice seals—the polar bear's primary prey—would be diminished by the loss of sea ice and polar bears would be required to expend more energy to obtain food. Additionally, access to traditional denning areas would be affected, which would result in a reduced population. The FWS stated that existing regulations were inadequate because they were not effective in "counteracting the worldwide growth of" greenhouse gasses.
On August 4, 2008, the State of Alaska filed a complaint for declaratory judgment and injunctive relief against Dirk Kempthorne, Secretary, DOI, H. Dale Hall, Director, USFWS, and the USFWS alleging that the listing of the polar bear as threatened did not properly comply with the ESA, the Marine Mammal Protection Act, and the Administrative Procedure Act. The State alleged that the FWS failed to make its listing determinations based on the “best scientific and commercial data available.” The State also alleged that the FWS failed to consider the substantial conservation efforts, programs, and regulatory mechanisms implemented by the State of Alaska and its political subdivisions and within and among foreign nations and the United States, which have contributed to increases in polar bear numbers worldwide to 20,000-25,000 from 8,000-10,000 in the late 1960s. Lastly, the State alleged that the FWS failed to summarize, as required, the data on which the regulation is based and show the relationship between such data and the final regulation.

On August 15, 2008, the Center for Biological Diversity, Natural Resources Defense Council, and Greenpeace filed a motion to intervene. On October 14, 2008, the federal defendants filed their answer. On October 20, 2008, Defenders of Wildlife filed a motion to intervene in the case. On November 3, 2008, the State of Alaska filed its opposition to Defenders’ motion to intervene, and on November 14, 2008, Defenders filed its reply. On December 17, 2008, the Court granted the motions to intervene of the Center for Biological Diversity, Natural Resources Defense Council, and Greenpeace (Intervenor-Conservation Groups) and of Defenders of Wildlife. A status conference was held on February 9, 2009, at which a second status conference was scheduled for April 23, 2009. (Liz Gallaway) (08-6346)

**ALASKA WILDERNESS LEAGUE v. SALAZAR**

(Environmental laws) (Amicus) (Ninth Cir., Alaska, No. 07-71457)
(Exploration plan meets NEPA standards of the Outer Continental Shelf Lands Act)

This case was approved by the Board of Directors on February 13, 2009. In April 2002, the Minerals Management Service established a lease sale schedule for the Outer Continental Shelf (“OCS”) of Alaska that envisioned offering three separate lease sales in the Beaufort Sea. In February 2003, MMS prepared a detailed EIS to evaluate the overall impacts of the potential effects of oil exploration and production on the region’s wildlife, environment, and subsistence activities and mitigation measures developed through the cooperation of federal agencies, the State of Alaska, and Native Alaskans including an extensive bowhead whale monitoring program and a conflict-avoidance process designed to protect subsistence activities.

In 2003, MMS held the first sale, Lease Sale 186, without conducting further environmental analysis. It held two subsequent lease sales in July 2004 (Lease Sale 195), and August 2006 (Lease Sale 202), preparing a supplemental environmental assessment for each. Both EAs were “tiered” to the Multi-Sale EIS. The leases at issue in this case were purchased in July 2004, under Lease Sale 195.

The Outer Continental Shelf Lands Act requires that before beginning exploratory drilling a lessee obtain approval of an exploration plan that includes a project-specific environmental impact analysis assessing the potential effects of the proposed exploration activities. MMS then reviews the exploration plan, conducts its environmental review pursuant to NEPA, and, within thirty days, issues a decision approving, disapproving, or requiring modifications to the exploration plan.
Shell Offshore, Inc.'s proposed drilling activities are the first to be considered for the Beaufort Sea in conjunction with these lease sales. On January 17, 2007, MMS deemed Shell's application was complete and began its approval process. During that process, a number of agencies expressed concern about the potentially significant impacts of drilling on bowhead whales, polar bears, and Inupiat subsistence harvest.

Despite these concerns, on February 15, 2007, MMS issued an 87-page Environmental Assessment and a Finding of No Significant Impact. As a result of this finding, the agency did not prepare an EIS specific to this project.

On April 13, 2007, a group of petitioners consisting of the Alaska Wilderness League, the National Resources Defense Council, and the Pacific Environment and Resources Center filed a petition for review in the Ninth Circuit Court of Appeals. Simultaneously, Petitioners representing the North Slope Borough and the Alaska Eskimo Whaling Commission filed an optional administrative appeal from the agency's decision with the Interior Board of Land Appeals. On May 4, 2007, the IBLA declined to exercise its jurisdiction and stayed the administrative proceedings pending the outcome of the Alaska Wilderness League's petition.

Shell Offshore, Inc., filed a Motion to Intervene on May 14, 2007. On May 15, 2007, the North Slope Borough Petitioners filed an independent Petition for Review. On May 22, 2007, Resisting Environmental Destruction on Indigenous Lands, an organization representing a network of Native Alaskans, filed a petition for review and motion to consolidate. The Ninth Circuit consolidated the matter on July 2, 2007. On August 14, 2007, it granted petitioners' motion to stay, ordering the agency's decision inoperative until this matter could be considered on the merits.

On November 19, 2008, the Ninth Circuit issued its opinion in these consolidated cases. *Alaska Wilderness League v. Kempthorne*, Nos. 07-71457 et al., slip op. at 15,605 (9th Cir. Nov. 20, 2008). A majority of the panel held MMS's approval of Shell's exploration plan unlawful, vacated the approval decision, and remanded so that MMS could conduct the "hard look" analysis required by NEPA. The dissenting judge, Judge Bea, would have upheld MMS's approval of Shell's exploration plan.

On December 18, 2008, Shell and the federal government separately filed motions for an extension of time in which to file a petition for rehearing en banc until February 4, 2009. On December 19 and December 23, 2008, the court granted the motions for extension of time.

On February 5, Shell Offshore, Inc., filed a petition for panel rehearing and petition for rehearing en banc. Shell argues that the majority opinion impermissibly overrules the Ninth Circuit's earlier en banc decision in *Lands Council v. McNair*. On February 9, 2009, the Court requested the appellants filed a response to the petition by February 23, 2009. On February 11, 2009, appellants requested an unopposed extension of time until March 9, 2009, to file their response. On February 13, 2009, the Alaska Oil and Gas Association and the State of Alaska filed amicus briefs in support of the petition. On February 17, 2009, MSLF submitted an amicus brief to the Court in support of the petitions on behalf of itself, the National Association of Manufacturers, and the Chamber of Commerce of the United States of America. (Ron Opsahl) (07-6244)
**ALTA ELDORADO PARTNERS v. CITY OF SANTA FE**

(Private Property) (Counsel for intervenor or amicus) (D.N.M., No. 08cv175)

(Affordable-housing ordinances that require property set asides infringe on property rights)

This case was approved by the Board of Directors on June 6, 2008. In 2005, the City of Santa Fe, New Mexico, enacted Ordinance 2005-30, which imposes upon owners of property within the jurisdiction of the City a variety of conditions that must be met before property owners are permitted to subdivide or otherwise develop their properties. Among those conditions is the requirement that 30 percent of the proposed subdivided lots be improved with road and utility infrastructure and have constructed upon them residences that must be sold to buyers whose income is in the range of between 50 and 100 percent of the average income within a defined area. These lots and residences are required to be sold at far below their market value to such “qualified buyers.”

Under the ordinance, property owners are required not only to dedicate portions of their property to others, but also are obligated to become homebuilders and construct the housing. This requirement subjects property owners, against their will, to the wide variety of risks and liabilities attendant to the homebuilding profession. Should a property owner choose to avoid this condition, the property owner may, at the discretion of the City, be allowed to pay the City money in lieu of providing affordable housing.

To make matters worse, upon the resale of the affordable houses, the difference between the resale price and the original affordable housing price is divided by an ordinance-determined percentage between the City and the qualified buyer. Thus, the original property owner not only creates and sells affordable housing at an initial loss, but also is denied the profits produced by the property owner’s efforts and expenditures when the property is resold.

To have a viable project, the sales price of the remaining subdivided lots must be increased significantly in order to recover the losses created by the ordinance. This, in turn, drives up the price of existing residences in the Santa Fe area.

The County of Santa Fe has a similar ordinance, No. 2006-02. The essential difference in the County ordinance is that, for smaller projects, the affordable housing obligation is 16 percent of the subdivided lots, rather than 30 percent as required by the City. The County ordinance defines a qualified buyer as one who has an income no greater than 121 percent of the ordinance-defined average median income and who has no more than $125,000 in assets.

Because of the difficulty of providing road and utility infrastructure to certain areas of the County, the result of these ordinances is that, if any development is even feasible, the County property owner usually is forced by economic considerations to make a payment in lieu of providing affordable housing. For a 100-lot subdivision, such a fee amounts to $4,960,000.

On February 15, 2008, residents and businesses in the County of Santa Fe filed suit against the City and County in the U.S. District Court for the District of New Mexico alleging, *inter alia*, a “illegal Fifth Amendment taking” and a violation of “substantive due process.”

On April 3, 2008, the County filed an Answer, which it subsequently amended on April 12, 2008. On April 11, 2008, the City filed a motion to dismiss for lack of standing in which it contended that “Plaintiffs have not identified any actual property that is affected by the City’s
Ordinance, or otherwise alleged any specific, concrete injury with respect to an actual property subject to the City’s Ordinance.” Specifically, Plaintiffs failed to allege that they are property owners or landlords. Because, “the effect of the City’s Ordinance can only be determined in an actual factual context . . . Plaintiffs’ claims that the City’s Ordinance effects a takings [or a substantive due process violation] is pure speculation.”

As of this date, the Court has not ruled on the City’s motion to dismiss; however, even if the motion is granted, the case against the County would remain active.

Meanwhile, on April 17, 2008, the Santa Fe Area Home Builders Association moved to intervene as a plaintiff, but neither the City nor the County has filed a response to the motion. Accordingly, the Court has not yet ruled on that motion. MSLF will either represent an intervenor in this case or will file an amicus brief.

On September 12, 2008, the Magistrate Judge handling the case issue proposed findings and recommended disposition in which he recommended that the City’s motion to dismiss all state and federal claims against the City be granted, without prejudice. On October 2, 2008, Plaintiffs filed their opposition to the Magistrate’s proposed findings and disposition, and on October 27, 2008, the City of Santa Fe filed its response to that opposition. A decision by the District Court is pending. (Joel Spector) (Counsel: Garcia, Kienzle) (08-6393)

**In re AMALIA CERILLO v. KENNETH BUCK AND JOHN COOKE**

(Constitutional Issues) (Counsel for Defendant Kenneth Buck)  
(Weld County, Colo., District Court, No. 2009CV100)

(District attorney has a First Amendment right to defend his actions in court of public opinion)

On February 13, 2009, the Board of Directors approved representing Weld County District Attorney Kenneth Buck for defense of a gag order in a civil suit. Plaintiff Amalia Cerrillo, a bookkeeper, translator, and tax preparer (known as a “notario,” in Latin American countries is a quasi-paralegal with authority to file legal documents), opened Amalia’s Translation and Tax Service in Greeley, Colorado in 2000. She prepares tax returns and provides translation services, and her business serves primarily Spanish-speaking clients. Given the elevated stature in which individuals who do not speak English, are unfamiliar with United States immigration and tax laws, and whose legal status in the United States is questionable hold notarios, notarios are able to prey upon the Hispanic immigrant community. Their “services” can be deficient and involve fraudulent representations. Individuals knowledgeable regarding “notarios” believe Ms. Cerrillo likely charged her clients a percentage of the return that they purportedly were due from the IRS and that she benefited illegally from those activities.

Weld County Sheriff’s investigators conducting an identity theft investigation learned from the suspect that in committing the alleged identity theft he had gone to Amalia’s Tax and Translation Service to file a tax return under his assumed identity. He told investigators that it was common knowledge on the street that Ms. Cerrillo would assist in the preparation of federal tax return for illegal aliens, including those filed under assumed identities.

Acting on this information, on October 16, 2008, the Weld County Sheriff’s Office submitted a six-page Affidavit for Search Warrant, approved by the District Attorney’s office, and a three-page proposed search warrant to a Weld County District Court judge. Ms. Cerrillo was not the target of the investigation. The targets were unknown clients who were ineligible to
obtain valid social security numbers and were suspected of receiving wages or other income under a social security number that was not theirs in violation of Colorado’s false impersonation or identity theft laws.

Although these individuals do not have and cannot obtain valid social security numbers, they nevertheless are required to report their earned income by filing tax returns using an Individual Taxpayer Identification Number (ITIN). Their employers, however, must have social security numbers for withholding, and commonly either false numbers or the numbers of others are supplied to the employer. The DA and Sheriff believed that the confidential tax return information that Ms. Cerrillo maintained in these clients’ confidential files might contain evidence that some of them may have violated Colorado statutes prohibiting criminal impersonation and/or identity theft.

On October 16, 2008, Judge Kopcow signed a three-page search warrant. The next day, approximately 10 law enforcement officers appeared at Ms. Cerrillo’s business to execute the warrant. Ms. Cerrillo was provided with the warrant, but the affidavit was not attached. She read paragraph 1 of the warrant, which authorized the seizure of hard-copy files related to tax returns for 2006 and 2007. She explained that her files were not organized by tax year but alphabetically by client name. As a result, the officers seized all hard-copy files relating to all of tax-filing clients for all years, taking 49 file boxes relating to approximately 5,000 clients and dating back to 2000. Some time after the search and seizure, the materials were returned to Ms. Cerrillo, who was informed that the Sheriff and DA had made copies of the materials they wanted.

The Weld County DA’s Office held a press conference on November 14, 2008, and issued a written press release that said the Sheriff and DA were collaborating in an investigation called “Operation Number Games” and that the search and seizure of Ms. Cerrillo’s business was carried out as part of that investigation. Information obtained from a search of approximately 4,900 tax files seized from Ms. Cerrillo’s business suggests that 1,338 of her clients had violated Colorado statutes regarding identity theft or criminal impersonation, and the DA intended to charge more than 1,300 persons.

The ACLU filed a lawsuit alleging that a search and seizure of tax records and numerous other items of Ms. Cerrillo and her clients violated Colorado and federal constitutional provisions regarding search and seizure, the Colorado constitutional right of privacy, and Colorado Rule 41 of the Rules of Criminal Procedure, which provide the requirements for obtaining and lawfully executing a warrant. A briefing schedule has been set and the parties are scheduled to participate in a hearing on preliminary injunction scheduled for March 9 and 10, 2009. Mr. Buck has been led to believe that the ACLU will seek to bar him from discussing the case, notwithstanding that the ACLU has made its actions in this case into a national media event. In fact, one Colorado Public Defender has scheduled a CLE that will focus on the Weld County lawsuit. Mr. Buck’s private attorney, as retained by the County’s insurance carrier, will not defend him against such a gag order, and Mr. Buck asked MSLF to represent him on this First Amendment issue. (Scott Detamore) (Mentors: David Garcia and Christine Mastin, Mark Parker (criminal aspects)) (09-6581)
AMIGOS BRAVOS v. BUREAU OF LAND MANAGEMENT
(Environmental Law) (Counsel for Intervenor IPANM)
(D.N.M., No. 09cv37)
(Environmental groups allege BLM must address climate change as part of NEPA)

This case was approved by the Board of Directors on February 13, 2009. On March 31, 2008, the Western Environmental Law Center filed a formal Protest of the April 16, 2008, Bureau of Land Management ("BLM") oil and gas lease sale on behalf of Amigos Bravos, Natural Resources Defense Council, New Mexico Wilderness Alliance, Oil and Gas Accountability Project, Rocky Mountain Clean Air Action, and San Juan Citizens Alliance. Amigos Bravos alleged that upstream oil and gas production emits greenhouse gas ("GHG") emissions and thereby contributes to global warming and climate change and that the BLM, by failing to address these global warming and climate change issues when issuing oil and gas leases, negatively affected Amigos Bravos' interests.

Amigos Bravos requested that the BLM, prior to awarding lease rights, prepare an EIS to address global warming issues implicated by the lease sales, specifically: (1) quantify past, present and reasonably foreseeable GHG emissions from BLM-authorized oil and gas development; (2) identify, consider, and adopt a GHG emissions limit or GHG reduction objective for BLM-authorized oil and gas activities; (3) identify, consider, and adopt management measures to reduce GHG emissions from BLM-authorized oil and gas activities; (4) track and monitor GHG emissions from BLM-authorized oil and gas operations through time; and (5) consider how climate change affects ecological resiliency, and whether such impacts warrant ecological protections.

Amigos Bravos alleged that the BLM is legally obligated to address climate change because (1) a 2001 Order issued by the Secretary of the Interior creates a legal obligation for the BLM to address climate change; (2) FLPMA and NEPA provide the BLM with the authority and responsibility to address global warming; and (3) the BLM has a "public trust duty" to consider climate change.

On July 11, 2008, the BLM dismissed the Protest stating that Amigos Bravos had not demonstrated that the BLM's decision to offer the parcels in the lease sale violated any law, that Amigos Bravos failed to identify any specific effect on global warming or climate change that would result from the leasing, and that Amigos Bravos failed to identify any change in the affected environment that would alter the BLM's analysis.

On January 14, 2009, Amigos Bravos, Common Ground United, Natural Resources Defense Council, Earthworks' Oil and Gas Accountability Project, San Juan Citizens Alliance, and Southwest Environmental Center filed a lawsuit in the District of New Mexico challenging the April 16, 2008 lease sale, which includes 43 lease parcels totaling 28,729.51 acres, and the July 15, 2008 sale, which includes 49 lease parcels totaling 39,946.12 acres. They requested that the Court: (1) declare that the lease sales violated federal law, (2) set aside the BLM's actions, and (3) void, suspend and/or enjoin the oil and gas leases pending compliance with federal law. Subsequently to the filing of the complaint, Amigos Bravos file a notice of refusal to proceed before a magistrate judge.
MSLF will file a motion to intervene on behalf of the Independent Petroleum Association of New Mexico (IPANM). (Liz Gallaway) (Mentor: Local Counsel) (09-6573)

ASHER v. CARNAHAN
(Limited and Ethical Government) (Counsel for Timothy Asher, or Amicus)
(Cole County (Mo.) Circuit Court)
(Official summary ballot language of Secretary of State is prejudicial, unfair, and insufficient)

This case was approved by the Board of Directors on February 13, 2009. This case involves an issue of Missouri election law concerning initiatives, specifically, the Missouri Civil Rights Initiative, which, like its counterparts in California, Washington, Michigan and Nebraska, seeks to ban racial preferences by governments. In Missouri, as in many States, proponents of an initiative must submit it to the Secretary of State, who formulates a summary of the initiative for use on the ballot and in gathering signatures. That summary must be approved by the Missouri Attorney General as well.


The American Civil Rights Institute (ACRI), an organization created by Ward Connerly, has been successful in placing civil rights initiatives that ban racial preferences on the ballots in a number of States. These initiatives have passed in California, Washington, Michigan, and Nebraska. ACRI formed the Missouri Civil Rights Initiative (MCRI) to place the issue on the ballot in Missouri for the 2008 election. MCRI is the proponent of the initiative and Tim Asher is its designated representative for the purposes of suing and being sued concerning the initiative.

MCRI submitted the following language to the Missouri Secretary of State:

Be it resolved by the people of the State of Missouri that the Constitution be amended.

One new section is adopted to be known as section 34 of Article I, to read as follows:

Section 34. 1. The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

2. This section shall apply only to action taken after the section's effective date.

3. Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

4. Nothing in this section shall be interpreted as invalidating any court order or consent decree that is in force as of the effective date of this section.

5. Nothing in this section shall be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

6. For the purposes of this section, "state" shall include, but not be necessarily limited to, the state itself and any of its departments, agencies, commissions, boards, and other units; any political subdivision and any department,
agency, commission, board, or other unit of a political subdivision; any public institution of higher education, junior college district, and school district; any municipal corporation; any public corporation, public entity, or other instrumentality of the state or a political subdivision, irrespective of the capacity in which the state or any such instrumentality or entity shall be acting.

7. The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing Missouri antidiscrimination law.

8. This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

This language is identical to that presented in Nebraska and Colorado the same year. Colorado’s initiative was narrowly defeated, and Nebraska’s initiative passed. The language is also substantially identical to the initiatives passed in other States.

The Secretary of State proposed the following language for the ballot:

Shall the Missouri Constitution be amended to:

- Ban affirmative action programs designed to eliminate discrimination against, and improve opportunities for, women and minorities in public contracting, employment and education; and

- Allow preferential treatment based on race, sex, color ethnicity, or national origin to meet federal program funds eligibility standards as well as preferential treatment for bona fide qualifications based on sex?

Mr. Asher challenged the Secretary’s ballot title as insufficient, unfair, misleading, and prejudicial and won. Asher v. Carnahan, No. 07AC-CC00648, slip. op. at 6-7 (Cir. Ct. Cole Co. Mo. Jan. 10, 2008). Notably, this is the first time in Missouri history that a court has overturned the ballot language of the Secretary of State. The court rewrote the ballot question.

Shall the Missouri Constitution be amended to:

Ban State and local government affirmative action programs that give preferential treatment in public contracting, employment, or education based on race, sex color, ethnicity, or national origin unless such programs are necessary to establish or maintain eligibility for federal funding or to comply with an existing order.

Using the court’s language, MCRI began collecting signatures. Meanwhile, the Secretary of State appealed the court’s decision. The appeal was briefed fully by both parties, but, because insufficient signatures were collected in the allotted time, the appeals court dismissed the appeal and vacated the lower court’s decision.

In December 2008 MCRI submitted the identical civil rights initiative for the 2010 election. The Secretary of State submitted and the Attorney General approved the identical ballot question language that had been challenged successfully in 2008. MSLF was contacted by MCRI concerning whether MSLF would be interested in filing a challenge on behalf of Mr.
Asher. Unfortunately, MSLF was contacted only five days before the petition filing deadline and had insufficient time to become acquainted with Missouri election law and obtain Board approval. Therefore, MCRI and Mr. Asher went back to the attorneys who had represented him previously and they filed a complaint on behalf of Mr. Asher challenging the Secretary of State’s language. A response to the complaint was filed on January 22, 2009. In the meantime, an independent action was filed challenging the State Auditor’s statement that the costs of passing the initiative were unknown, and third suit was filed challenging the Secretary of State’s language under the “single subject” rule.

Mr. Asher and MCRI are uncertain as to the role they wish MSLF to take. They most likely will continue with their present attorneys and will ask MSLF to file an amicus brief in support of their position in the circuit court and on appeal. In those briefs, MSLF would argue that the official summary ballot language prepared by the Missouri Secretary of State is prejudicial, unfair, insufficient and misleading, thus threatening the eventual success of the initiative. (Scott Detamore) (Mentor: Stewart Wilson) (08-6547)

**BRADY CAMPAIGN TO PREVENT GUN VIOLENCE v. KEMPThORNE**
**NATIONAL PARKS CONSERVATION ASSOCIATION v. KEMPThORNE**
(Limited and ethical government) (D.D.C., No. 08cv2243, No. 09cv0013)
(MSLF defends the National Park Service rule allowing firearms in national parks)

This case was approved by the Board of Directors on June 6, 2008. In 1916, Congress enacted 16 U.S.C. § 3, which provides that “[t]he Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service . . .” 16 U.S.C. § 3. Pursuant to his delegated authority, in 1966, the Secretary of the Interior promulgated a rule regulating the use and possession of firearms in national parks. 36 C.F.R. § 2.4. Under this rule, it is unlawful, subject to limited exceptions, to carry or discharge a firearm in a national park.

In December 2007, 51 U.S. senators, led by U.S. Senator Mike Crapo (R-ID), urged Secretary of the Interior Kempthorne to amend this firearm regulation. In particular, the senators urged Secretary Kempthorne, in effect, to adopt each State’s own firearms laws as the default rule in national parks, much like the default rules that already exist on Bureau of Land Management land and in National Forests. The senators explained that “other federal land management agencies, such as the Bureau of Land Management and the Forest Service allow transporting and carrying of firearms on these lands in accordance with the laws of the host state.”

In response, Secretary Kempthorne directed his department to rewrite the policy for the national parks such that federal regulations would “mirror” State laws on guns in parks. On April 30, 2008, the Department of the Interior issued a proposed rule that provides, in its entirety (73 Fed. Reg. 84):

> A person may possess, carry, and transport concealed, loaded, and operable firearms within a national park area in the same manner, and to the same extent, that a person may lawfully possess, carry, and transport concealed, loaded and operable firearms in any state park, or any similar unit of state land, in the state in which the federal park, or that
portion thereof, is located, provided that such possession, carrying and transporting otherwise complied with applicable federal and state law.

On June 16, 2008, on behalf of itself and its members, MSLF filed comments in support of the proposed NPS rule. The comments period will close on August 8, 2008. If the proposed rule is adopted and a lawsuit is filed to prevent it from going into effect, MSLF would file a motion to intervene and defend the rule.

On December 5, 2008, Assistant Secretary of the Interior Lyle Laverty announced that the following week a new final rule will be published with more liberal firearms rules for National Parks. On December 10, 2008, the new rule was promulgated and will take effect on January 9, 2009. On December 30, 2008, the Brady Campaign to Prevent Gun Violence filed a complaint for declaratory and injunctive alleging that the new rule violates the National Park Service Organic Act, National Wildlife Refuge System Administration Act, NEPA, and APA (D.D.C., No. 08cv2243). On January 6, 2009, the National Parks Conservation Association and Coalition of National Park Service Retirees filed a similar complaint and a motion for preliminary injunction to halt implementation of the new rule (D.D.C., No. 09cv0013). On January 8, 2009, a conference was held by the judge hearing the two cases in which the briefing schedule was modified to allow the Brady Campaign to file a similar motion for preliminary injunction and for briefing of the motions. Oppositions to the motions are due on January 30, 2009, replies on February 5, 2009, and sur-replies on February 13, 2009.

On January 23, 2009, MSLF filed motions to intervene in both cases. On January 26, 2009, the Court instructed plaintiffs in both cases to file notices of intent to file oppositions to those motions by noon, January 27, 2009.

On January 27, 2009, the NPCA and the Brady Campaign each filed a notice of intent to file its opposition to the motion to intervene. The federal defendants filed their notice of intent to oppose intervention as of right and to take no position as of permissive intervention. They also filed, in both cases, a motion for an extension of two weeks, due to the change in administration, in the schedule for the filing of the administrative record and the remainder of the preliminary injunction briefing. Under the proposed schedule, the record would be due on February 5, 2009, oppositions to the preliminary injunction motions on February 13, 2009, replies on February 23, 2009, and sur replies on February 27, 2009, and a hearing, if the Court deems one necessary, scheduled at the Court’s convenience. Later the same day, in both cases, the Court granted the motion for extension of time in the preliminary injunction briefing and issued a briefing schedule for MSLF’s motion to intervene. The federal defendants’ response to the motion is due on February 13, 2009, plaintiffs’ responses are due on February 23, 2009, and MSLF’s reply is due on February 27, 2009.

On January 28, 2009, the National Rifle Association moved to intervene as defendant in the Brady case. On January 29, 2009, the Court included the NRA in its recent scheduling order, giving it the same status as MSLF.

On February 5, 2009, the government filed the administrative record in both cases, and on February 23, 2009, it filed supplements to the record in both cases. On February 6, 2009, the Friends of Acadia and Maine Citizens Against Handgun Violence filed a motion for leave to participate as amicus curiae, together with their amicus brief.
On February 13, 2009, in both cases, the federal defendants filed responses to MSLF’s motions to intervene and to the motions for preliminary injunction. On February 19, 2009, Safari Club International filed a motion for leave to file an amicus brief in both cases.

On February 20, 2009, plaintiffs in the NPCA case filed an amended complaint, adding the Association of National Park Rangers, as a plaintiff. On February 23, 2009, the NPCA plaintiffs and the Brady Campaign filed their oppositions to MSLF’s motion to intervene. The Brady Campaign also filed its opposition to the NRA’s motion to intervene. The NPCA and the Brady Campaign each filed replies to the oppositions to the motions for preliminary injunction. The NPCA also filed a motion for leave to file a supplemental declaration in support of their motion for preliminary injunction.

On February 25, 2009, the National Rifle Association and five individuals filed a motion to intervene as defendants in the NPCA case. On February 27, 2009, replies to the opposition to its motion to intervene were filed by MSLF in both cases and by the NRA in the Brady case.

On March 2, 2009, the plaintiffs in the NPCA case filed a notice with respect to MSLF’s motion to intervene in that case in which they stated their argument about MSLF’s membership was incorrect. (Joel Spector) (08-6370)

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

(Access to Federal Land) (Counsel for Caboose Mining) (USFS Admin. Process)
(Miner with patented mining claims fights Forest Service for access to his valuable property)

This case was approved by the Board of Directors on February 3, 2006. Frank Antonioli and members of his family own Caboose Mining Company, which holds a patented APA lode mining claim dating back almost 100 years in the Rock Creek drainage within the Lolo National Forest. 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, he asked for permission to rebuild an old access road to his property so that he could 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 mineral resources on the land. The Forest Service geologists stated that there are no mineral indications on the property. When Mr. Antonioli asked if sampling 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 to include geological mapping, sampling of float, mine dumps and outcrops, a geochemical soil survey, and a geophysical program. The Forest Service claims that it was reasonable and feasible to conduct these activities without road construction and that there was concern because part of the road would be within in the Sliderock Proposed Wilderness Area.

On September 12, 2005, Mr. Antonioli appealed in a letter the August 4, 2005, letter denying permission to construct/rebuild the road. On October 18, 2005, the Forest Service responded, stating that it was not treating this letter as an appeal because its August 4, 2005,
action did not constitute a "denial decision" regarding the proposed access. Instead, it 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 was inconsistent with the Lolo National Forest Plan guidance management of the area, inconsistent or incompatible with the purposes for which the lands are managed or with other uses, and 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 previous decisions and encouraged Mr. Antonioli to explore possibilities with the local rangers pertaining to the sale or exchange of his property.

ANILCA guarantees private landowners an enforceable right to access their land. 16 U.S.C. §§ 3101-3233 (1980). In 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, 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.

On October 25, 2006, the Forest Service received Mr. Antonioli’s new applications for road easements to provide access to his mining claims.

On October 24, 2008, Caboose sent a cost-recovery fees dispute letter to the Forest Supervisor. The Forest Service’s response was received on November 5, 2008, and Caboose responded to that response on November 26, 2008... The Forest Service response, due on December 26, 2008, was a denial of Caboose’s request. (Ron Opsahl) (05-5812) (Mentor: Joscelyn)

**CANNON v. RUMSFELD**

(Limited and Ethical Government) (Counsel for Cannons)

(U.S. Supreme Court, D.Utah, No. 08-683)

(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 89 1/2 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, as part of “Project Sphinx,” in a corner of the Mr. Cannon’s property near the Yellow Jacket patented mining claim. 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, it 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 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 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 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. An 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 underfunded, 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, and on December 11, 1998, they filed a Federal Tort Claims Act suit in U.S. District Court for the District of Utah for a minimum of $8 million, but they filed no environmental law claims. Shortly thereafter, the Army summarily denied the Cannons’ administrative claim. 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 RCRA contains two remedial provisions providing rights of action for private citizens seeking to clean up contaminated sites. 42 U.S.C. §§ 6972(a)(1)(A)-(B). It makes available injunctive relief but does not provide a private right of action for cleanup costs or for economic, compensatory, or punitive damages.

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 and 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 EPA and the other potential defendants and with the State of Utah, as required by statute prior to filing a citizen suit against under section 7002

On November 4, 2005, the Cannons filed a complaint (D.Utah, No. 05cv922) 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 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 March 29, 2006, the Cannons submitted a first amended complaint adding a claim under the APA for legal wrongs suffered by the Cannons by the Defendants’ failure to complete administrative action on the property, adding more detail to the claims under the Solid Waste Disposal Act, and adding more detail to the prayer for relief. 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, it filed a motion for summary judgment and supporting documents. It 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 the motion. As the result of delays by the government in the production of these documents and the rescheduling of the necessary deposition, the Cannons’ response to the motion for summary judgment was rescheduled several times.

On December 1, 2006, the Cannons filed, under seal, their response to the motion for summary judgment. On December 22, 2006, the government filed its reply brief.

On March 20, 2007, the Court heard arguments on the motion for summary judgment and, ruling from the bench, dismissed the case for lack of jurisdiction. Its written decision was filed on April 5, 2007.

On April 27, 2007, the Cannons filed a notice of appeal. On May 2, 2007, the Tenth Circuit docketed the Cannons’ appeal (No. 07-4107). A mediation assessment conference was held on June 7, 2007, at which it was determined the case was not suitable for mediation.

On July 23, 2007, the Cannons filed their opening brief. On August 20, 2007, the government filed its response brief. It also filed a motion for judicial notice to supplement the record to include the final report, which has been issued. On August 22, 2007, the Court set September 5, 2007, as the date by which the Cannons can file a response to the motion for judicial notice to supplement the record. On August 31, 2007, the Cannons filed their response to the motion. On September 6, 2007, the government filed its reply in support of its motion for judicial notice and/or to supplement the record. On September 18, 2007, the Cannons filed their reply brief. On November 2, 2007, the government filed supplemental authority. On November 8, 2007, the Cannons’ filed their response to the supplemental authority.
Oral arguments were held on January 24, 2007, at the Oklahoma City University, College of Law. On August 26, 2008, the Tenth Circuit, although indicating its sympathy for the Cannons' dilemma, upheld the District Court's decision.

The Cannons filed their petition for writ of certiorari on November 21, 2008. The government's response was due on December 26, 2008, but on December 17, 2008, the Court extended the government's deadline to January 28, 2009, and then to February 27, 2009.

On February 27, 2008, the government filed its response. (Ron Opsahl) (Mentor/Local Counsel: Pos) (05-5621)

**CASITAS MUNICIPAL WATER DISTRICT v. UNITED STATES**
(Private Property) (Amicus) (Fed. Cir., No. 07-5153)
(The federal government should not be able to take water rights to protect listed species)

On October 5, 2007, the Board of Directors approved the filing of an amicus brief in support of the Casitas Municipal Water District arguing that when the federal government denies a water right owner the right to use the water, the government has effectuated a physical taking for which just compensation is due and that, contrary to the court's holding in Casitas, the taking analysis applied to land-use restrictions may not be applied to restrictions placed on the use of water rights.

In March 1956, the Casitas Municipal Water District, in Ventura County, California, entered into a contract with the United States through the Bureau of Reclamation ("BOR") under which Casitas agreed to repay to the United States, with interest, the entire construction cost of the Ventura River Project. Upon completion of the construction, Casitas and the United States agreed that Casitas would operate the Project at its own expense. By August 1959, construction was completed and the Project was transferred to Casitas.

The Project annually delivers part or all of the domestic water supply to approximately 65,000 residents of the District, as well as irrigation water for 5,668 acres of agricultural land within the District. It consists of the Casitas Dam and Reservoir, Robles Diversion Dam, Casitas Canal, and a conveyance system of pipelines, pumping plants, balancing reservoirs, and related structures. Operation of the Project is subject to rules and regulations prescribed by the BOR. Under Casitas' 1956 repayment contract, the federal government agreed that "the District shall have the perpetual right to use all water that becomes available through the construction and operation of the Project." Specifically, Casitas' right to use the water generated by the Project is through a license issued by the California State Water Resources Control Board. This license grants Casitas the right to divert and to use water from the Ventura River and its tributary ("Coyote Creek") for beneficial purposes, subject to specific quantity limitations.

On August 18, 1997, the National Marine Fisheries Service ("NMFS") listed the West Coast steelhead trout as an "endangered species." In response to the NMFS's action, Casitas requested the BOR to pursue an informal consultation with the NMFS pursuant to the ESA to seek advice and guidance from the NMFS in the design, construction, operation, and maintenance of fish protection facilities to assist the upstream and downstream passage of migrating fish at the Robles Diversion Dam located on the Ventura River.
Over the next several years, representatives from Casitas and the BOR met with NMFS biologists and engineers to discuss the various efforts that could be undertaken to preserve and improve the fish habitat in the Ventura River. The results of this process are reflected in a Biological Opinion ("BiOP") issued by the NMFS approving design and construction of a fish passage facility and fish screens at the Robles Diversion Dam and adoption of revised operating criteria for the Project. The revised operating criteria prescribed an increase in downstream river flow volumes that require a decrease in the amount of water Casitas would be allowed to divert.

Thereafter, Casitas agreed to implement the requirements set forth in the BiOP conditioned, however, upon Casitas requesting and receiving from the BOR a directive ordering it to proceed with the construction of the fish passage facility and to implement the revised operating criteria set forth in the BiOP. The BOR provided such a directive on May 2, 2003.

In compliance with the BOR’s directive, Casitas constructed the fish passage facility for a total cost of approximately $9.1 million and implemented the revised operational criteria contained in the BiOP. As a result, Casitas lost up to 3,200 acre-feet of water per year. On January 26, 2005, Casitas filed suit in the U.S. Court of Federal Claims ("CFC") seeking damages for breach of contract and/or just compensation for a taking of its property.

On October 2, 2006, the Court of Federal Claims granted summary judgment in favor of the United States with respect to Casitas’ breach of contract claim. Casitas Muni. Water Dist. v. United States, 72 Fed. Cl. 746, 752 (2006) (No. 05-168L). Specifically, the Court ruled that Casitas’ loss of water from complying with the BiOP was the result of a sovereign act of the government in having to obey the mandates of the ESA and not the independent actions of the BOR as a contracting party.

The United States then moved for partial summary judgment asking the Court to rule that Casitas’ claim must be analyzed as a regulatory as opposed to a physical taking. In other words, the United States wanted the Court to apply the ad hoc factual inquiry in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), instead of the physical taking rules in Loretto v. Telepromter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

On March 29, 2007, the Court granted partial summary judgment in favor of the United States. 76 Fed. Cl. 100 (2007). In so doing, it essentially overruled the decision it had rendered six years earlier in Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001), a case in which the facts were almost identical to those in the instant case. The Court’s flip-flopping appears to be due in part to the criticism its decision in Tulare had garnered from other judges on the Court, see Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 538 (2005), and purported scholars, as well as the Supreme Court’s decision in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). Whether the Court “got it right” in Tulare or Casitas will be determined by the Federal Circuit when it decides Casitas’ appeal.

On November 21, 2007, Pacific Legal Foundation filed an amicus brief. On November 26, 2007, the Casitas Municipal Water District filed its opening brief. On December 1 2007, the Idaho Farm Bureau, Montana Farm Bureau, Okanogan County Farm Bureau, Stevens County Farm Bureau, and Idaho Water Users Association filed an amicus brief. On December 3, 2007, MSLF filed an amicus brief, as did the California Building Industry Association and Building Industry Legal Defense Foundation. On December 11, 2007, amicus briefs were filed, but rejected, by the Stockton East Water District and the Tulare Lake Basin Water Storage District.
Lost Hills Water District, Kern County Water Agency, Tulare Lake Basin Water Storage District, and Wheeler-Ridge-Maricopa Water Storage District. The rejections are believed to be for procedural reasons; if that is the case, the briefs will mostly likely be corrected and refiled. On December 17, 2007, the Tulare Lake Basin District brief was refiled.

On January 22, 2008, the government filed its response brief. On February 20, 2008, amicus briefs in support of the United States were filed by the Natural Resources Defense Council and the California State Water Resources Control Board. Also, on February 20, 2008, Casitas filed its reply brief. Oral arguments were held on May 7, 2008.

On September 25, 2008, the Court issued its opinion, affirming the district court’s grant of summary judgment in favor of the government with respect to Casitas’ breach of contract claim and reversing the district court’s grant of partial summary judgment in favor of the government with respect to a taking under the Fifth Amendment. The Court held that the government directly appropriated Casitas’ water for its own use—the preservation of an endangered species—and that Casitas will never be able to get that water back. Thus, the appropriation should be analyzed as a physical taking. There was a dissent with regard to the this part of the decision. The Court remanded the case for further proceedings consistent with its opinion (Fed. Cl. No. 05-168L).

On October 30, 2008, the United States filed a motion for extension of time to file a petition for rehearing. The motion was granted on October 31, 2008, and the petition is due on December 10, 2008.


On February 17, 2009, the Court denied the government’s petition for rehearing/rehearing en banc. A petition for writ of certiorari would be due on about May 18, 2009. (Scott Detamore) (06-6048)

**CENTER FOR BIOLOGICAL DIVERSITY v. KEMPTHORNE**

(ACCESS TO FEDERAL LAND) (COUNSEL FOR INTERVENOR NWMA) (D.Ariz., No. 08cv8117)

(A House Committee orders withdrawal of a million acres of land from mineral entry)

This case was approved on October 3, 2008, by the Board of Directors, which chose to do so in place of ratification of a case approved by email July 8, 2008. On June 25, 2008, by a vote of 20-2, the Committee on Natural Resources of the U.S. House of Representatives (Chairman Nick J. Rahall, D-WV), with Republican members not participating, approved a resolution, under the auspices of Section 204(e) of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1714(e), ordering the Secretary of Interior to “immediately withdraw” approximately 1,068,908 acres of federal land in Arizona “from all forms of location and entry under the United States mining laws ... for a period not to exceed three years.”

According to the resolution, more than 1,100 uranium mining claims are within five miles of the Grand Canyon and past uranium mining operations in that area have “left a legacy of
debilitating illness and death among Native Peoples” and “resulted in contaminated soil and groundwater which remain unremediated.”

On September 29, 2008, the Center for Biological Diversity, Grand Canyon Trust, and Sierra Club (“Plaintiffs”) filed a complaint for declaratory judgment to order the Secretary to comply with the House Committee’s resolution to withdraw the lands in northern Arizona.

On October 21, 2008, Quaterra Alaska, Inc., filed a motion to intervene as defendants in the case. On October 30, 2008, MSLF file a motion to intervene on behalf of Northwest Mining Association (NWMA). NWMA is alleging that Section 204(e) of FLPMA, which purportedly allows either the Senate Energy Committee or the House Resources Committee to order the Secretary to withdraw lands from operation of the Nation’s public land laws, violates the bicameralism and/or presentment requirements of the U.S. Constitution. Under INS v. Chadha, 462 U.S. 919 (1983), for there to be a legal obligation to withdraw land imposed on the Secretary of the Interior pursuant to Section 204(e), Chadha requires that actions of Congress comply with both the bicameralism and presentment clauses of the Constitution. The single committee resolution contemplated by Section 204(e) does not satisfy these requirements and, therefore, cannot be said to impose any legal obligation on the Secretary to withdraw land.

On November 14, 2008, Uranium One filed its motion to intervene. On November 17, 2008, the plaintiffs filed their opposition to the motions to intervene of Quaterra, NWMA, and Uranium One. They stated that if intervention were granted that the intervenors should be required to file consolidated motions and briefs. Replies to the opposition were filed on November 28, 2008, by NWMA, Quaterra, and Uranium One.

On December 5, 2008, the federal government filed its answer.

On January 16, 2009, the Court granted the motions to intervene of Northwest Mining Association and of Quaterra Alaska. The case management conference is scheduled for March 20, 2009. Initial disclosures must be served by February 27, 2009, and the parties must meet and confer by March 6, 2009, submit their case management report by March 13, 2009.

Plaintiffs filed their first set of discovery requests on February 18, 2009, and initial disclosures on February 25, 2009. Quaterra, Uranium One U.S.A., and Northwest Mining Association each filed initial disclosures on February 27, 2009, and the government filed a notice of exemption from initial disclosures. (Steve Lechner) (08-6464)

**DEFENDERS OF WILDLIFE v. KEMPTHORNE**

(Environmental Laws) (Applicant for Intervention) (D.D.C., No. 00cv2996)

(MSLF challenges the designation of critical habitat for the Canada lynx)

This case was approved by the Board of Directors on February 9, 2007. After more than 10 years, and several lawsuits, on March 24, 2000, environmental groups succeeded in forcing the U.S. Fish and Wildlife Service to list the Canada lynx (*Lynx lynx*) as a threatened species in the contiguous United States pursuant to Section 4 of the Endangered Species Act, 16 U.S.C. § 1533. 65 Fed. Reg. 16,052. After the lynx listing, environmental groups led by Defenders of Wildlife again sued the FWS, alleging that the it violated Section 4 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]. On December 26, 2002, the D.C. District Court set aside and remanded the FWS’s determination.

On July 3, 2003, the FWS issued a “Notice of Remanded Determination of Status for the Contiguous United States Distinct Population Segment of the Canada Lynx.” 68 Fed. Reg. 40,076. This determination bolstered the earlier determination and was not challenged.

On January 15, 2004, the D.C. District Court, on Defenders’ motion, ordered the FWS to designate critical habitat for the lynx by November 1, 2006. On September 11, 2006, the FWS proposed designating more than 18,000 square-miles in Idaho, Maine, Minnesota, Montana, and Washington, a majority of which was private lands, as “critical habitat” and opened a public comment period. 71 Fed. Reg. 53,355. On October 6, 2006, the Board of Directors unanimously approved MSLF’s request to submit comments on this issue, which it did later that same day.

On November 9, 2006, the FWS designated 1,841 square-miles of “critical habitat,” all of which was federal land in Minnesota, Montana, and Washington. 71 Fed Reg. 66,008. It is expected that Defenders of Wildlife will challenge this sharply limited designation. If it does, MSLF will file a motion to intervene in defense of the designation.

On August 22, 2007, the government filed a status report informing the Court that the FWS is completing its review of whether it should revise the critical habitat designation of November 9, 2006, in light of involvement of Julie MacDonald, former Deputy Assistant Secretary for Fish, Wildlife, and Parks. The review will be completed by November 30, 2007, and funding to complete that revision, if deemed necessary, will not be available until Fiscal Year 2009.

On October 12, 2007, the government filed a second status report informing the court that the Fish and Wildlife Service intends to issue a proposed revised rule by August 8, 2008, and a final revised rule by August 8, 2009. On October 26, 2007, the Court ordered the government file a further status report by February 1, 2008.

On November 2, 2007, Defenders of Wildlife filed a response to the government’s second status report. It stated that, in light of the timetable and process for a new rulemaking that is described in that report, Defenders may be forced to seek further judicial relief so that “the lynx does not suffer needlessly from what the Court has succinctly characterized as this ‘tawdry’ business” (referring to the improper involvement of Deputy Assistant Secretary of DOI Julie MacDonald in the designation of critical habitat for the lynx). Defenders alleged that the government has said nothing about mitigation of adverse effects on the lynx and the adoption of interim safeguards during the time it will take for the government to again conduct the rulemaking. It further alleges that, unless a new rulemaking schedule is put into a formal Court order, the FWS may not keep even to its own suggested schedule. Defenders ended their response by stating that it intends to attempt to resolve these problems with the government but, if those attempts do not succeed, it will seek relief from the Court.

On November 13, 2007, the Court ordered that the government is to file a status report by December 15, 2007, addressing all the issues in Defenders’ response of November 2, 2007, to the government’s second status report.

On December 14, 2007, the government filed a status report regarding the final rule designating critical habitat for the Canada lynx. The FWS believes that it can complete a proposed rule by February 15, 2008, and a final rule by February 15, 2009. This schedule will
allow for full public comment and for economic analysis. With regard to interim measures, lynx habitat will receive additional protection pursuant to the conference process in Section 7 of the ESA.

On January 15, 2008, the Court issued an order regarding the final rule designating critical habitat for the lynx. A proposed rule is to be submitted to the Federal Register no later than February 15, 2008, and a final rule no later than February 15, 2009. Beginning March 14, 2008, and every 60 days thereafter, the government is to submit a status report regarding its progress toward the final rule.

On February 28, 2008, the proposed rule was published for revised critical habitat for the contiguous United States distinct population segment of the Canada lynx, and the government notified the Court to that effect. MSLF filed comments on the proposed rule on April 9, 2008.

On May 13, 2008, the government filed its status report in which it described its progress toward the final rule designating critical habitat for the lynx. In July 2008 the Draft Economic Analysis will be completed. A notice of availability will be published in the Federal Register and the public comment period for the rule reopened for 30 days.

On July 14, 2008, the government filed a status report in which it estimates that the Draft Economic Analysis will be completed in August at which time the notice of availability will be published and the public comment period reopened. It still anticipates the final rule to be submitted no later than February 15, 2009.

On September 11, 2008, the government filed a status report in which it states that a notice of availability will likely be published in September announcing the availability of the draft Economic Analysis, draft EA, and two conservation agreements relating to private timber lands. That publication will open a 30-day comment period and allow for additional input through public hearings in Montana and Wyoming. The notice of availability was issued in mid-October and comments are due by November 20, 2008.

On November 20, 2008, MSLF filed comments on the draft Economic Analysis and draft EA. On February 13, 2009, a Final Rule designating critical habitat for the lynx was submitted to the Federal Register. (Ron Opsahl) (Mentor: Wagner) (06-5825)

In the Matter of DESERET POWER ELECTRIC COOPERATIVE
(Environmental law) (Amicus) (EPA Environmental Appeals Board, PSD Appeal No. 07-03) (MSLF opposes inclusion of carbon dioxide as a pollutant under the Clean Air Act)

This case was approved by the Board of Directors on June 6, 2008. Deseret Power Electric Cooperative sought a permit to build a waste-coal-fired generating unit at its existing power plant near Bonanza, Utah. Because the plant is located on an Indian reservation, Region VII of the EPA is the permitting authority. The new 110-megawatt unit will fire waste coal from Deseret's nearby mine (a significant energy resource that would otherwise be wasted) and supply much-needed electricity to several Utah municipalities.

Region VII issued the draft permit on June 22, 2006, and received public comments on July 29, 2006. Seven Utah municipalities submitted comments supporting the project and highlighting their significant need for increased generating capacity. The Sierra Club and a coalition of other environmental organizations submitted comments opposing the project. After
considering the public comments over the course of a year, on August 30, 2007, Region VII issued the final permit, which imposed a number of stringent limitations on the new unit. The Sierra Club then challenged the permit on the ground that the EPA failed to impose a Best Available Control Technology ("BACT") emissions limit on carbon dioxide and failed to consider certain alternatives to the project.

The appeal is currently before the Environmental Appeals Board in Washington, D.C. Oral arguments were heard on May 29, 2008, and a decision is expected within about a year. Once a decision is issued, an appeal is expected.

When this case is appealed to the Court of Appeals, MSLF will intervene on behalf of members of the extractive industry, Utah trade associations, or affected municipalities to make the above and other arguments. Alternatively, if intervention is not possible, MSLF will file an amicus brief in support of Deseret.

On November 13, 2008, the Environmental Appeals Board remanded the case to the Region for a reconsideration of whether to impose a CO₂ BACT limit in the permit. In so doing, the Region shall develop an adequate record for its decision, including reopening the record for public comment. Because this is now an issue of national scope, the Region should consider whether all would be better served by the Agency addressing the BACT limit issue in the context of an action of nationwide, not Regional, scope. Anyone not satisfied with the Region’s decision on Remand may appeal that determination to the Board, after exhaustion of all administrative remedies. (Liz Gallaway) (Mentor: Dragoo) (08-6374)

DYNALANTIC CORP. v. U.S. DEPARTMENT OF DEFENSE
(Constitutional Issues) (Amicus) (D.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 *amici*, including MSLF, submit briefs on the current state of the law and legal thought regarding racial preferences, and he stayed the case pending submittal of those briefs, which are due on December 20, 2004. Unlike the 1996 proceedings, the solicited *amici* here have not been invited to participate in oral arguments.

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.

On February 23, 2007, DynaLantic filed a supplemental authority, a report on diversity in federal contracting.

On August 23, 2007, the Court issued a memorandum opinion and order denying, without prejudice, both plaintiff’s and defendants’ motion for summary judgment. The Court stated that the record before the Court is insufficient to decide the motions because there is no information regarding Congress’s 2006 reauthorization of the program. The parties were directed to propose, by September 21, 2007, future proceedings that will fully supplement the record. MSLF will monitor action in this case for possible future involvement.

On September 20, 2007, the parties submitted a joint recommendation for future proceedings under which they will consult as to the need for further discovery beyond the production of documents requested by the Court to support the legality of the 2006 reauthorization of 10 U.S.C. § 2323 and, by October 12, 2007, notify the Court as to whether they seek an additional discovery period and, if not, they will propose a briefing schedule regarding the 2006 reauthorization.

On October 12, 2007, the parties filed their joint status report in which they state that additional discovery is not necessary at this time. The parties believe that the most efficient procedure to resolve the 2006 reauthorization would be for the parties to simultaneously file, on November 9, 2007, briefs on the effects of the reauthorization and the disparity studies involved, followed by reply briefs on November 30, 2007, and that the Court, upon the filing of these briefs, deem their previous summary judgment motions as resubmitted for resolution. On October 16, 2007, the Court issued a minute order to that effect.

On November 9, 2007, the SBA and DynaLantic filed supplemental briefs on the effect of the 2006 reauthorization of DOD racial preference programs. On November 30, 2007, the
parties each filed responses to those briefs. The Court will now consider the previous summary judgment motions as resubmitted for resolution.

On November 5, 2008, DynaLantic filed a notice of supplement authority, that authority being the Federal Circuit’s decision in Rothe. (Scott Detamore) (04-5545)

**ELKO COUNTY, NEVADA v. UNITED STATES**

(Private Property) (Amicus) (U.S. Supreme Court, D.Nev., No. 08-571)

(Environmental groups may not intervene in quiet title cases involving the United States)

This case was approved by the Board of Directors on October 3, 2008. In October 1999, the U.S. Forest Service sued representatives of a citizens group, seeking declaratory and injunctive relief to stop them from trespassing on Forest Service land to restore a washed-out road. *United States v. Carpenter*, CV-N-99-547 (D. Nev.). (The original Defendants were John C. Carpenter, individually and as agent for Citizens United for the South Canyon Road, O.Q. Johnson, and Grant Gerber.) The road in question, the South Canyon Road in Elko County, Nevada, is adjacent to a river purportedly populated by bull trout, a threatened species, and leads to the Jarbidge Wilderness Area. In November 1999, the U.S. District Court, *sua sponte*, joined Elko County, Nevada, as a party defendant, because it claimed a right to restore the road. Thereafter, the County filed a counterclaim against the United States seeking to quiet title to the road, as a R.S. 2477, under the Quiet Title Act. The District Court then ordered the parties to mediation conducted by a private mediator, which the parties agreed would be confidential.

The parties returned to court after months of unsuccessful negotiations and the District Court ordered further confidential settlement proceedings, before a Magistrate Judge. On March 2, 2001, the parties notified the District Court that they had reached a tentative agreement, and the court lifted the confidentiality order covering the mediation proceedings so that the proposed settlement agreement could be publicly disseminated. The United States agreed that it would not contest that Elko County had a right-of-way to the road but did not waive its authority to manage neighboring federal lands and natural resources in accordance with federal laws. Defendants agreed that the would not do any work on the road without receiving prior approval from the Forest Service and that they would comply with federal environmental laws.

On March 30, 2001, The Wilderness Society and Great Old Broads for Wilderness (collectively “TWS”) moved to intervene, asserting that the proposed settlement agreement improperly ceded a property interest in the road to the County, thereby substantially diminishing the environmental protections for the adjacent wilderness area. The District Court approved the settlement, denied the motion to intervene as untimely, and entered final judgment.

TWS appealed, and, on appeal, a panel of the Ninth Circuit ruled that the motion to intervene was timely because the motion was filed as soon as TWS realized that the United States may not be representing their interest as reflected in the proposed settlement agreement. *United States v. Carpenter*, 298 F.3d 1122, 1124-1126 (9th Cir. 2002) (“Carpenter I”). Based upon this ruling, the panel reversed and remanded with instructions to grant the motion to intervene and for further proceeding consistent with its opinion.

After remand, TWS renewed their motion to intervene and attempted to file cross-claims against the United States, pursuant to the APA, asserting, *inter alia*, that the terms of the proposed settlement agreement violated NEPA and FLPMA. The District Court denied the
motion to intervene as to the County’s Quiet Title Act claim, stating that TWS have neither constitutional nor prudential standing to contest Elko County’s R.S. 2477 claim. It did, however, allow TWS to intervene and to assert their cross-claims against the United States but later dismissed those cross-claims on the ground that the Attorney General’s decision to settle litigation is not reviewable under the APA. Nevertheless, the District Court stayed the settlement approval proceeding until the United States demonstrated that it had complied with the FLPMA, NEPA, and Forest Service regulations.

After the original judge retired and Judge Hunt was assigned the case, TWS moved for reconsideration of the previous order denying intervention. On June 30, 2006, Judge Hunt denied that motion. Subsequently, Judge Hunt held an evidentiary hearing on the merits of the proposed settlement agreement. Although TWS was allowed to participate as amice curiae, they were barred from presenting any evidence. Judge Hunt ultimately approved the settlement agreement and TWS appealed once again (9th Cir., No. 06-15596).

On appeal, TWS argued that the District Court failed to follow the panel’s previous mandate when it denied TWS intervention vis-à-vis the County’s Quiet Title Act claim and, thus, barred TWS from fully participating in the settlement approval process. TWS also argued that the District Court erred in dismissing their APA claims regarding the terms of the settlement agreement. The same panel of the Ninth Circuit essentially agreed with TWS on all counts. United States v. Carpenter, 526 F.3d 1237 (9th Cir. 2008) (“Carpenter II”). First, the panel indicated that the District Court failed to follow the “law of the case” when it denied TWS intervention vis-à-vis the County’s Quiet Title Act claim. Second, as to whether TWS had the requisite interest to intervene, the panel explained the intervenors were entitled to intervene because they had the requisite interest in seeing that the wilderness area be preserved for the use and enjoyment of their members. The panel pointed out that the recent Tenth Circuit decision in San Juan County v. United States, 503 F.3d 1163 (10th Cir. 2007) supports this position. Finally, the panel vacated the settlement because the intervenors had not been permitted to participate in the settlement review proceedings.

Thereafter, Elko County filed a petition for rehearing en banc, which was summarily denied. If Elko County files a petition for writ of certiorari with the U.S. Supreme Court (due on November 1, 2008), MSLF will file an amicus brief in support of that petition arguing that an environmental group that claims no proprietary interest in the real property that is the subject of a Quiet Title Act case does not have “an interest relating to the property . . . which is the subject of the action” so as to justify granting the group intervention as of right.

On October 28, 2008, Elko County filed its petition for writ of certiorari. The case was docketed on October 30, 2008.

MSLF filed its amicus brief in support of Elko County on December 1, 2008. On December 16, 2008, the Court extended the deadline for responses in opposition until January 30, 2009, and then on January 30, 2009, until February 13, 2009.

On February 13, 2009, the United States filed its opposition to the petition for writ of certiorari. The conference on the petition for certiorari is scheduled for March 20, 2009. (Steve Lechner) (08-6428)
EMPRESS CASINO JOLIET CORP. v. GIANNOUILAS  
(Private Property) (Amicus) (Supreme Court, Illinois, No. 08-945)  
(A State’s expropriation of money from a private party may be a taking)

This case was approved by the Board of Directors on February 13, 2009. This case involves a constitutional challenge to an Illinois statute that requires Petitioners, who own four of the nine casinos in the State, to transfer 3 percent of their adjusted gross receipts (“AGR”) to Illinois horse-racing tracks, for the ostensible purpose of improving the financial health of the Illinois horse-racing industry. In 1990, the Illinois legislature authorized riverboat casinos. Riverboat Gambling Act, 230 ILCS 10/1 et seq. Nine riverboat casinos are currently licensed and operating in Illinois. Five Illinois tracks feature live horse racing. On-track betting at these tracks purportedly declined after the Riverboat Gambling Act and the horse-racing industry blamed the lure of riverboat gambling. In response to the horse-racing industry’s concerns, in 1999 the Illinois General Assembly lowered the tracks’ tax burdens by approximately two-thirds. 230 ILCS 5/27.

In May 2006, the Illinois General Assembly passed Public Act 94-804. It requires casinos with AGR over $200 million) to contribute 3 percent of their AGR into the Horse Racing Equity Trust Fund on a daily basis. It further provides that the monies (along with interest) shall be distributed from the Fund as follows. Sixty percent of the proceeds would be distributed to tracks as purses, and the remaining forty percent of the proceeds would be distributed directly to the tracks as an operating subsidy. Eleven percent of the subsidy would go to the one downstate racetrack (Fairmount Park), which is almost 250 miles away from the nearest casino required to pay the surcharge. The remaining 89 percent would be distributed to tracks pro rata according to the proportion of wagering revenues earned on live races in Illinois in 2004 and 2005. Under this distribution scheme, the most successful tracks would receive the largest subsidies.

The Act gives racetracks complete discretion as to how the subsidy would be used in their businesses, providing only that the payments are to be used “to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvement related to live racing and the backstretch.”

Four days after the Act became law on May 26, 2006, Petitioners filed this suit in Illinois state court, challenging the Act’s constitutionality. Petitioners filed the suit against Treasurer of Illinois and the Illinois Racing Board. Subsequently, various horse-racing interests intervened on the side of Defendants. Petitioners contended that the 3 percent surcharge was an unconstitutional taking because it forced them to subsidize their competitors and did not serve a “public use.” On cross-motions for summary judgment, the trial court struck down the Act on state law grounds and enjoined the Act’s enforcement but subsequently stayed its order pending appeal. Accordingly, Petitioners were forced to continue to remit the surcharge on a daily basis for the entire two-year period the Act was in effect, in amounts ultimately exceeding $75 million. The moneys have been maintained in a protest fund, where they remain pending final resolution of this case. The burden imposed on Petitioners during that period may exceed $100 million.

Respondents appealed directly to the Illinois Supreme Court challenging the trial court’s state-law ruling, whereas Petitioners defended the lower court’s decision and reasserted their contention that the Act violated the Takings Clause because it took funds for the support their competitors. The Illinois Supreme Court upheld the Act, reversing the trial court’s state-law

On the takings question, the Illinois Supreme Court declared it “well settled that the takings clause[. . . ] appl[ies] only to the state’s exercise of eminent domain and not to the state’s power of taxation.” The court also opined that this principle precludes a takings challenge to the surcharge, whether the surcharge was considered a fee for services or a fee for licensing. Specifically, the court explained that because the Act “is in no way tied to real property” or any other “identifiable property interest,” a takings analysis was not required. In reaching this conclusion, the Illinois Supreme Court relied heavily on the concurring and dissenting opinions in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). Pointing to those opinions, the Illinois Supreme Court reasoned that a majority of the Court “rejected the theory that an obligation to pay money constitutes a taking.” In short, the Illinois Supreme Court created a per se rule that money cannot be the subject of a taking.

On February 19, 2009, Petitioners filed their opening brief, and on February 27, 2009, amicus briefs were filed by MSLF; Cato Institute; Chamber of Commerce of the United States of America; National Taxpayers Union; American Legislative Exchange Council; and Law Professors. The deadline for the response to the petition has been extended to March 30, 2009. (Steve Lechner) (Mentor: Parker) (08-6545)

**ERNEST K. LEHMANN & ASSOCIATES OF MONTANA v. KEMPTHORNE**

(Limited and Ethical Government)

(Counsel for E.K. Lehmann & Associates, MRJV) (D.D.C., No. 07cv762)

(Miners challenge federal government’s holding that they did not make valid mineral discovery)

This case was approved by the Board of Directors on February 9, 2007. The Sweet Grass Hills Area (“Area”) of plains and volcanic buttes comprises 68,605 federal surface acres and 19,675 federal locatable mineral acres near the Canadian border in Liberty and Toole Counties, north-central Montana. Over the years, gold, silver, copper, lead, zinc, iron, marble, and fluor spar have been discovered on East Butte, Middle Butte, and West Butte and numerous mining claims have been located and patented. As a result, the Area now consists of intermingled private, state, and federal surface and mineral interests; most of the Area is privately owned.

In 1983, E.K. Lehmann & Associates and Mount Royal Joint Venture (hereinafter collectively “ELAM”) undertook extensive geochemical surveys on East Butte, Middle Butte, and West Butte and located numerous mining claims. ELAM also began leasing private and state mineral interests and acquiring fee lands on and around all three Buttes. Subsequently, ELAM discovered a large disseminated gold deposit on East Butte, the “Tootsie Creek Deposit.”

On October 7, 1985, to further delineate the Tootsie Creek Deposit, ELAM filed a Plan of Operations (“1985 Plan”) on fourteen of its unpatented claims with the BLM. The 1985 Plan included the Patricia 7, 8, 14-16, 18, and 20, Butte 47 and 48, East Butte 4, 5, and 6, and Royal East 1 and 2 claims (“Deposit Claim Block”), among which are the “Six Contested Claims.” The BLM approved the 1985 Plan on June 30, 1986.

On February 25, 1992, because the 1985 Plan had been accomplished, ELAM filed another Plan of Operations (“1992 Plan”) for the Deposit Claim Block to further develop the
Tootsie Creek Deposit. The BLM never approved or rejected this Plan; instead, it delayed review and, thus, a decision.

On August 2, 1993, 19,685 acres of federally owned land in the Area, including the Deposit Claim Block containing the Six Contested Claims, was segregated from further mineral entry by the BLM for two years ("First Segregation"). On July 29, 1995, the same acreage was again segregated by the BLM for another two years. Finally, effective April 10, 1997, federal land in the Area was withdrawn from mineral entry for 20 years. (Mount Royal Joint Venture unsuccessfully challenged the BLM's segregations and subsequent withdrawal of the federal lands from mineral entry. *Mount Royal Joint Venture v. Kempthorne*, No. 05-5379 (D.C. Cir. Feb. 16, 2007).)

Following the First Segregation, the BLM suspended processing the 1992 Plan and elected to examine the claims in the Deposit Claim Block for validity. On November 15, 1995, ELAM received the mineral examination validity report, which found eight of ELAM's claims valid and the Six Contested Claims invalid for lack of a discovery. In March 1996, the BLM filed a Notice of Claims Contest challenging the validity of the Six Contested Claims. On April 28, 1999, after a five-day Contest Hearing held in 1998, ALJ Harvey C. Sweitzer ruled that the Six Contested Claims were invalid. ELAM timely appealed that decision to the IBLA, and on March 16, 2004, the IBLA affirmed the ALJ's ruling. *United States v. E.K. Lehmann & Associates of Montana*, 166 IBLA 40 (2004).

On April 26, 2007, ELAM filed its complaint in the District Court for the District of Columbia appealing the IBLA decision asserting that the IBLA incorrectly applied well-established legal principles regarding the proper interpretation of the Mining Law. On June 29, 2007, the Court granted the government's motion of the same date for an extension of time until August 2, 2007, to file its answer.

On August 2, 2007, the federal government filed its answer. On August 8, 2007, the Court ordered the parties to file a joint status report, to include a schedule for briefing of dispositive motions, by August 19, 2007.

On August 17, 2007, the parties filed a joint status report and proposed scheduling order, which the Court granted in full on August 22, 2007. The government is to file the administrative record by September 20, 2007, and ELAM is to move for discovery and/or supplementation of the record by October 19, 2007. If there is no such motion, ELAM's motion for summary judgment is due by November 19, 2007, the government's cross-motion for summary judgment and memorandum in response to ELAM's motion for summary judgment by January 8, 2008, ELAM's response to the cross-motion and reply to the response memorandum by February 4, 2008, and the government's reply to ELAM's response by March 3, 2008.

On September 20, 2007, the administrative record was served and lodged with the Court.


On January 22, 2008, the government filed its response/cross-motion for summary judgment. On February 15, 2008, ELAM filed an unopposed motion for extension of time until

On March 31, 2008, the government filed its reply brief. (Lechner) (07-6107) (Mentor: Joscelyn)

**FISHER v. UNIVERSITY OF TEXAS AT AUSTIN**

(Limited and Ethical Government) (Amicus) (W.D. Tex., No. 08cv263)

(Students challenge race-based admissions policy at state university)

This case was approved by the Board of Directors on June 6, 2008. In 1996, the U.S. Court of Appeals for the Fifth Circuit held that diversity was not a compelling interest, ruling the University of Texas Law School's race-conscious admissions program unconstitutional. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996). In response, the Texas Legislature enacted a law requiring that all Texas students graduating in the top ten percent of their class be admitted to the University of Texas. The Ten Percent Plan is a formulaic system that admits students solely on their class rank. For the remainder of applicants, Texas looks at an Academic Index (AI) and a Personal Achievement Index (PAI) for each applicant. The AI combines high school grades with the SAT/ACT score. The PAI takes into account the applicant's scores on two essays and the applicant's leadership, extracurricular activities, awards and honors, work experience, service to school or community, and other special circumstances. Under the Ten Percent Plan, race is not considered.

This plan was successful in promoting the racial diversity of the University of Texas (“UT”) at Austin's undergraduate student body. In 2003, UT Austin announced that, in the summer/fall 2002 semester, first-time freshmen enrollment for African-American and Hispanic students had “increased to a level above the pre-*Hopwood* figures.” Indeed, UT Austin admitted that the Top Ten Percent Plan "has effectively compensated for the loss of affirmative action."

The University's satisfaction with the new system did not last. On June 23, 2003, the Supreme Court abrogated the Fifth Circuit's decision in *Hopwood in Grutter v. Bollinger*, 539 U.S. 306 (2003), which held that racial diversity could be a compelling interest for the University of Michigan School of Law. Soon thereafter, the University of Texas included race in its Personal Achievement Index.

In 2004, African Americans and Hispanics constituted 21.4 percent of the student body. Moreover, it appears that, though the University seldom mentions it, Asian-Americans are also considered by UT Austin to be “underrepresented minorities.” If this is the case, the underrepresented freshman enrollment at UT Austin in 2004 made up almost 40 percent of the total student body.

In 2007, the Top Ten Percent Plan yielded 63 more African Americans than were admitted in 2004. Additionally, 101 more Hispanics were enrolled. Thus, the race-neutral plan, without race, was accomplishing racial diversity in an amount substantially greater than had race-conscious admissions prior to *Hopwood*.

The Plaintiffs in the instant case, Abigail Noel Fisher and Rachel Multer Michalewicz, applied for and were denied admission. The first was in the top 12 percent of her class, and the
latter was in the top 10.1 percent of her class, though the University recalculated it to be the top 11 percent. They both received offers from other schools but must determine before July 2008 whether to accept and pay tuition there. The Plaintiffs sued in the U.S. District Court for the Western District of Texas in Austin, alleging that they were denied the right to compete for admission on an equal footing with minority students, thus denying them equal protection of the law. They claim that UT Austin has not demonstrated a compelling interest because it has not demonstrated that there is insufficient racial diversity to allow it to utilize race in its admissions policy. The University replied that it is in compliance with Grutter and has a nuanced, highly individualized system of racial preferences that is even more constitutional than that used by the University of Michigan School of Law and approved in Grutter.

Plaintiffs filed a Motion for Preliminary Injunction seeking to compel UT Austin to admit them, pending final determination on the merits. That motion was argued on May 19, 2008, and on May 29, 2008, the Court denied the motion. Plaintiffs have indicated that they will not file an interlocutory appeal but will proceed to the merits. MSLF will file an amicus brief supporting Plaintiffs, perhaps at summary judgment, and, if the court rules against Plaintiffs on the merits, when the matter is appealed to the Fifth Circuit.

On July 10, 2008, the Court entered a scheduling order to allow the scheduling of the liability phase prior to that of remedy, should the defendants be found liable. After completion of discovery, all dispositive motions must be filed by February 2, 2009, beginning with plaintiffs' motion for summary judgment due by January 2, 2009. The parties have requested that oral arguments be held following completion of cross-motions for summary judgment.

On August 13, 2008, the plaintiffs filed a second amended complaint, which asks for recovery of the monies paid to UT Austin as part of the admissions process. On August 22, 2008, the defendants filed an answer.

Plaintiffs' motion for summary judgment on liability was filed on January 23, 2009, and defendants' cross motion for summary judgment and opposition to plaintiffs' motion for summary judgment was filed on February 23, 2009. (Scott Detamore) (08-6427)

FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
(Limited and Ethical Government) (Amicus) (U.S. Supreme Court, D.D.C., No. 08-861)
(Fund seeks ruling that provisions of Sarbanes-Oxley Act are unconstitutional)


The five members of the PCAOB are appointed by the Securities and Exchange Commission ("SEC" or "Commission"). 15 U.S.C. § 7211(e)(4)(A). After its members are appointed, the PCAOB assumes its responsibilities only upon the SEC's determination that the PCAOB has the capacity to carry out the Act's requirements. 15 U.S.C. § 7211(d). The PCAOB's purpose is "to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities

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of which are sold to, and held by and for, public investors.” ***Id.*** The SEC is empowered to vest the PCAOB with certain responsibilities, such as enacting auditing standards, inspecting and investigating auditors of public companies, and setting the PCAOB's budget. 15 U.S.C. § 7211(c). No rule promulgated by the PCAOB becomes effective unless and until it is approved by the SEC, and, to approve a rule the SEC must find that the rule is “consistent with the requirements of [the Act] and the securities law, or is necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 7217(b)(3).

Plaintiffs, The Free Enterprise Fund, a non-profit, public interest organization, and Beckstead & Watts, a small Nevada accounting firm, sued the PCAOB and intervenor the United States in the D.C. District Court seeking an order enjoining the Board from taking further action against Beckstead & Watts and a judgment declaring provisions of the Act unconstitutional. Plaintiffs alleged that the Act violates (1) the separation of powers principal inherent in the U.S. Constitution; (2) the Appointments Clause, U.S. Const. art. II, § 2; and (3) the non-delegation doctrine, U.S. Const. art. I, § 1.

The District Court held for Defendants on summary judgment. The Court found that, contrary to Plaintiffs’ argument that PCAOB members are “Officers of the United States” under the Appointments Clause, they instead are “inferior officers” because they “ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.” ***Free Enterprise Fund v. Public Company Accounting Oversight Board, 2007 WL 891675 *4*** (D.D.C. 2007). The Court also held that the Act does not unlawfully delegate legislative power to the PCAOB because Congress had provided “intelligible standards” regarding the auditing, quality control, and ethics standards of the PCAOB. ***Id.*** Finally, the Court held that “[t]he Supreme Court has never held that the Constitution requires the President to maintain direct removal power over inferior officers” and that, because “SEC Commissioners can be removed by the President for cause and PCAOB members can be removed by the SEC for good cause shown,” the President retains his ability to remove PCAOB members. ***Id at *5*** (internal citations omitted).

In its ruling, however, the Court left the door open regarding whether the method of appointing PCAOB officers is constitutional. Specifically, Plaintiffs argued that PCAOB members should be appointed by the SEC Chairman rather than by the entire Commission. The Court recognized that, under the Appointments Clause, the power of appointment must be vested properly in an individual, in this case the SEC Chairman, and not the entire Commission. The Court held, however, that Plaintiffs lacked standing on this particular issue. It explained that Plaintiffs’ injury was “not traceable to this infirmity, since the SEC Chairman has voted for each PCAOB member, and [Plaintiffs] do not allege that their injuries are in any way attributable to the current membership of the PCAOB, so it is not clear how a favorable outcome would redress their complaint.” ***Id.***

On August 10, 2007, MSLF filed a motion for leave to file an amicus curiae brief on behalf of itself and its members in support of Plaintiff-Appellants (D.C. Cir. No. 07-5127). MSLF will argue that the District Court was in error and that the PCAOB is unconstitutional because it violates the Appointments Clause of the U.S. Constitution. On August 31, 2007, the court issued an order allowing MSLF to file a joint amicus brief with the Washington Legal Foundation.
On October 19, 2007, the Court issued the briefing schedule. The appellants' opening brief and appendix are due on December 14, 2007, and amicus briefs in support of appellants are due on December 31, 2007.


On January 16, 2008, the PCAOB filed a motion for extension of time until February 14, 2008, to file its response brief, and the Free Enterprise Fund filed its opposition to the motion. The motion was granted on February 23, 2008.


On August 22, 2008, the D.C. Circuit upheld the District Court's decision, ruling 2-1 in favor of the PCAOB and the United States. On September 19, 2008, the Free Enterprise Fund filed a petition for rehearing en banc. On September 23, 2008, the Court ordered the PCAOB to file a response to the petition by October 8, 2008, then extended to October 22, 2008. On October 22, 2008, response briefs were filed by the United States and by the PCAOB. On November 17, 2008, the petition for rehearing hearing en banc was denied, by a 5-4 vote, and the petition for rehearing was denied, by a vote of 2-1.

The petition for writ of certiorari, due on February 16, 2009, was filed early on January 5, 2009. On February 9, 2009, amicus briefs were filed by MSLF, Washington Legal Foundation, and the ACLU. The PCAOB's opposition to the petition is now due on March 11, 2009. (Liz Gallaway) (07-6201)

GONZALEZ v. STATE OF ARIZONA
(Constitutional Issues) (Counsel for Amici Yes On Prop. 200, Randall Pullen)
(Ninth Cir., D.Ariz., Nos. 08-17094, 08-17115)
(Proponents of Arizona law barring illegal aliens from voting fight attempts to weaken that 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. 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, 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. 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.

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 attorney 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 the issues in that case are essentially the same as, though somewhat narrower than, those in the Gonzalez cases.

On July 5, 2006, the parties (absent applicants intervenors) filed a stipulated discovery and briefing schedule for the preliminary injunction. On July 11, 2006, the Court granted the schedule as proposed by the parties; however, it set the hearing on preliminary injunction matters for August 30, 2006.

On July 12, 2006, the ITCA 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, and consolidated The Navajo Nation v. Brewer with Gonzalez. On August 11, 2006, Yes On Prop. 200 filed a notice of appeal of the decision denying intervention, and on August 21, 2006, the appeal was docketed (No. 06-16521).


On September 11, 2006, the District Court denied both motions for preliminary injunction and 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 a notice of appeal of the denial of their motion for preliminary injunction (No. 16702), and on September 12, 2006, the ITCA plaintiffs filed a similar 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 enjoined implementation of Proposition 200's voting requirement in connection with the November 2006 election and its registration proof of citizenship requirements, pending disposition of the merits of the appeals. On October 6, 2006, the County appellees and the State appellees filed emergency motions for reconsideration, which were denied on October 9, 2006.

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. On October 31, 2006, the District Court, 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," vacated its hearing on the Navajo statutory claims and rescheduled the hearing for February 8, 2007.

On October 27, 2006, the Ninth Circuit, sua sponte, consolidated Yes On Prop. 200's appeal of the denial of its motion to intervene with the appeals of denial of the motions for preliminary injunction.

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 4, 2007, Gonzalez filed their opposition to Yes On Prop. 200’s motion for clarification, and Gonzalez and ITCA filed a joint reply brief. Also on January 4, 2007, the Ninth Circuit granted Yes On Prop. 200 10 minutes in which to argue the appeal of the denial of intervention and the parties in the main appeal 20 minutes per side in which to argue.

On January 4, 2007, amicus briefs were filed in the intervention appeal by Protect Arizona Now, Trent Franks, and Washington Legal Foundation, and in the main appeal by Protect Arizona Now, Trent Gransk, Allied Educational, and Washington Legal. 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.

On February 8, 2007, the District Court held a hearing on the Navajo claims. On February 16, 2007, post-hearing briefs were filed, and on February 23, 2007, responses were filed. On May 3, 2007, the Court denied the Navajo Nation’s motion for preliminary injunction.

On April 20, 2007, the Ninth Circuit affirmed the District Court’s denial of Yes on Prop. 200’s motion to intervene and upheld the District Court’s denial of the plaintiffs’ various motions for preliminary injunction.

On June 4, 2006, the State of Arizona filed a motion for partial summary judgment challenging Plaintiffs' claims that Arizona’s proof of citizenship requirements violate the National Voter Registration Act, constitute a poll tax, and violate Arizona statutory laws and that the difference between identification requirements for those who vote at the polls and those who
vote early violates the Civil Rights Act. On July 12, 2007, the Navajo Nation filed a response in opposition, in which it was joined by all other defendant parties.

On August 28, 2007, the Court granted the State’s motion for summary judgment challenging Plaintiffs’ claims that Arizona’s proof of citizenship requirements violate the National Voter Registration Act, constitute a poll tax, and violate Arizona statutory laws and that the difference between identification requirements for those who vote at the polls and those who vote early violates the Civil Rights Act.

On October 16, 2007, the State filed a motion to dismiss the first, third, eighth, ninth, and tenth causes of action of the Gonzalez plaintiffs’ first amended complaint because the Court has granted summary judgment in favor of the State on those claims. It also moved to dismiss the sixth and eleventh causes of action because the complaint fails to state a claim upon which relief can be granted as to those causes of action and because the plaintiffs lack standing to bring those claims. Granting of this motion would leave four causes of action outstanding. The second cause of action alleges that implementation of the documentary proof of citizenship requirement of Sections 3 and 4 of Proposition 200 violates the Supremacy Clause of the U.S. Constitution. The fourth cause of action alleges that requiring voters to pay a fee to acquire necessary identification documents impermissibly burdens those voters’ fundamental right to vote and places a greater burden on naturalized voters, thus violating the Equal Protection Clause of the Fourteenth Amendment. The fifth cause of action alleges that Proposition 200’s requirements that (1) county recorders reject applications for registration that do not include satisfactory evidence of citizenship and (2) that voters possess certain forms of identification to vote both disparately affect Latin voters, dilutes their right to vote, and provides them with less opportunity to participate in the political process, violation of Section 2 of the Voting Rights Act. Last, the seventh cause of action alleges that the State’s implementation of Sections 3 and 4 of Proposition 200 excludes Plaintiffs from participation in, denies Plaintiffs the benefits of, and subjects Plaintiffs to discrimination under Arizona election-related programs and activities receiving federal financial assistance, on the basis of Plaintiffs’ national origin, and thus violates Title VI of the Civil Rights Act of 1964.

On October 22, 2007, the Court issued a scheduling order for matters leading to the final pretrial order and conference. All fact discovery is to be completed by January 18, 2008, and all expert discovery by February 22, 2008. All dispositive motions are due no later than March 14, 2008, no more than one motion to be filed by each party. Oppositions are due no later than April 14, 2008, and if no opposition is filed to a motion or if counsel fails to appear for a hearing on the motion, that non-compliance shall be deemed a consent to the denial or granting of the motion. The joint proposed pretrial order and each party’s proposed findings of fact and conclusions of law are due by May 16, 2008, or, if dispositive motions have been filed, 30 days following resolution of those motion, whichever date is later. The final pretrial conference will be held promptly after filing of these last documents, at which time the Court shall set the matter for trial. MSLF will continue to monitor this case for any possible involvement on its part.

On October 30, 2007, the Plaintiffs filed their response to the State’s motion to dismiss certain of the claims. On November 9, 2007, the State filed a reply in support of its motion to dismiss. On November 16, 2007, the State moved to dismiss all of the individual plaintiffs except one for lack of standing. Recent depositions of these plaintiffs indicate that they either never had or do not now have standing; they have no injury, for most asserted to be the ability to vote, that can be redressed by a favorable decision of the Court.
In a status report, filed on March 14, 2008, by all of the Plaintiffs, Plaintiffs agreed with the Court’s statement of September 27, 2007, that it will wait for a decision by the U.S. Supreme in *Crawford* (see this report) before setting a trial in the instant case. Defendants do not want any delay in the provisional trial date of July 2008. On March 21, 2008, the Court filed a scheduling order setting dispositive motions due on April 4, 2008.

On March 27, 2008, the Court filed a final amended scheduling order setting dispositive motions addressing issues other than those raised by the decision of the Supreme Court in *Crawford* due on June 6, 2008, responses due June 16, 2008, and replies due June 26, 2008. Trial in the case begins on July 29, 2008.

On May 6, 2008, the Court ordered the parties to file briefs, by May 13, 2008, on the impact of the Supreme Court’s decision in *Crawford*. Those briefs were filed on May 13, 2008. Despite motions for continuances to the contrary, the Court moved the trial date forward to July 1, 2008.

Motions for summary judgment were filed by the parties on June 6, 2008. On July 18, 2008, the Court completed a 6-day bench trial with numerous witnesses and motions and took the matter under advisement. On July 25, 2008, the State of Arizona filed its trial brief, twelve County Defendants filed their trial brief, and Inter Tribal Council of Arizona, *et al.*, filed their trial brief and proposed findings of fact and conclusions of law. Plaintiffs Gonzalez, *et al.*, filed their post-trial memorandum on July 28, 2008, their proposed findings of fact on July 29, 2008.

On August 20, 2008, the Court issued its findings of fact and conclusions of law, ruling in favor of the defendants and against the plaintiffs.

On September 16, 2008, a notice of appeal to the Ninth Circuit was filed by Bernie Abeytia, Arizona Hispanic Community Forum, Chicanos Por La Causa, Inc., Friendly House, Jesus Gonzalez, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, and Project Vote. The case was docketed by the Ninth Circuit on September 24, 2008 (*Gonzalez v. State of Arizona*, No. 08-17094), and a scheduling order was issued. The appellants' opening brief is due on January 2, 2009, the State’s response brief is due on February 2, 2009, and amicus briefs in support of the State are due on February 11, 2009.

On September 19, 2008, a notice of appeal was filed by the Inter Tribal Council of Arizona, Arizona Advocacy Network, Steve M. Gallardo, Hopi Tribe, League of United Late American Citizens Arizona, and League of Women Voters of Arizona. The case was docketed by the Ninth Circuit on September 29, 2008 (*Gonzalez v. State of Arizona*, No. 08-17115), and a scheduling order was issued.

On October 22, 2008, the State of Arizona and the Arizona Secretary of State filed a motion for consolidation of the two appeals. On October 31, 2008, the appellants in the two appeals filed their opposition to the motion. On November 5, 2008, the appeals were consolidated for purposes of calendaring.

On December 4, 2008, the Ninth Circuit modified the briefing schedule in which opening briefs in the two cases are due on January 20, 2009, at 11:00 p.m., answer briefs on February 19, 2009, and reply briefs 14 days after service of the answer briefs. On December 5, 2008, the cases were rejected from the Circuit Mediation Program.

The draft opening brief of appellants Inter Tribal Council was filed on January 5, 2009, and the final version on January 7, 2009. The opening brief of Gonzalez, *et al.*, was submitted
for review on January 21, 2009, and rejected as deficient the following day. It was filed in final form on January 23, 2009. On January 28, 2009, the League of Women Voters of the United States and the National Association of Latino Elected and Appointed Officials Educational Fund (NALEO) filed amicus briefs in both cases in support of appellants. On January 29, 2009, Members of Congress filed a motion for leave to file an amicus brief in both cases in support of appellants. The Members of Congress include Congressmen Robert A. Brady (Pa., Chairman, Committee of House Administration), Charles A. Gonzalez (Tex.), Raul M. Grijalva (Ariz.), and Jose E. Serrano (N.Y.), and Congresswoman Zoe Lofgren (Cal., Chair, Committee on House Administration, Subcommittee on Elections).

The response brief of the State of Arizona, et al., in the Inter Tribal case was filed on February 3, 2009. On February 13, 2009, MSLF filed an amicus brief in support of the State appellees. On February 17, 2009, the State filed for an extension of time until March 23, 2009, to file its answer brief in the Gonzalez case. (Joel Spector) (Mentors: West, Garcia, Kienzle) (06-5907)

**HAPNER v. TIDWELL**

(Enviornmental Laws) (Counsel for Intervenors Ronald and Janet Hartman)

(Ninth Cir., No. 08-35674; D.Mont., No. 08cv92)

(Residents defend Forest Service fire mitigation project)

On August 7, 2008, the Board of Directors approved this case and on October 3, 2008, the Board ratified their approval of this case. In May 2005, the United States Forest Service completed the Shields River Watershed Risk Assessment. The landscape-level assessment evaluated the risk of wildfire and insect loss to approximately 44,000 acres in the area of Smith Creek and the Shields River in the Gallatin National Forest of Montana. The analysis concluded that there was a high risk of wildfire in the area. This risk, coupled with limited access, combined to form unsafe conditions for the public and firefighters. Further, the Park County Wildfire Protection Plan, completed in the spring of 2006, identified the Smith Creek area as a priority wildland-urban interface area at high risk from wildfire and a priority for fuels reduction projects. In response to these assessments, the Forest Service developed the Smith Creek Vegetation Treatment Project to address the dangerous fuel buildups and mitigate the risk of catastrophic wildfire.

The Smith Creek Project was developed with comments from adjacent private homeowners and state, county, and local officials and groups. Under the Project, the Forest Service intends to reduce fuel loads through several, targeted approaches: thinning medium- and 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. In total, the Project will reduce fuel loads on a maximum of 1,110 acres, in ten separate units, of the Gallatin National Forest.

After unsuccessful administrative appeals, on July 1, 2008, two environmental groups, the Alliance for the Wild Rockies and the Native Ecosystems Council, and a summer resident of the Project area, Sharon Hapner, filed suit against the Forest Service challenging the Smith Creek Project. **Hapner v. Tidwell**, No. 08cv92 (D.Mont.). The suit alleges violations of the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA").
July 2, 2008, the environmental groups moved for a preliminary injunction to prevent the Forest Service from implementing the Project. Because the Forest Service was not scheduled to begin implementing the Project until November 2008, at the earliest, on July 18, 2008, Judge Molloy denied the preliminary injunction motion and placed the case on an expedited briefing schedule. Under the expedited schedule, the environmental groups’ opening brief is due August 22, 2008, and defendants’ cross motion/opposition is due September 19, 2008. Plaintiffs’ opposition/response is due on September 30, 2008, and the federal defendants indicated that they did not intend to file a reply.

On August 13, 2008, MSLF filed a motion on behalf of Janet and Ronald Hartman to intervene as defendants. Mr. and Mrs. Hartman are full-time residents and property owners within the Smith Creek Project area. They participated in the public review process by filing comments on the proposed Project with the Forest Service.

On August 14, 2008, the plaintiffs filed a notice of appeal of the denial of their motion for preliminary injunction and an urgent motion for injunction, having earlier, on August 2, 2008, filed a motion for stay pending appeal. The appeal was docketed by the Ninth Circuit on August 15, 2008 (No. 08-35674). The opening brief is due on September 11, 2008, and the response brief on October 9, 2008, or 28 days after the opening brief, whichever is sooner. Failure of plaintiffs to timely file their opening brief will result in automatic dismissal of the appeal. On September 2, 2008, the Forest Service filed its response to the plaintiffs’ motion for urgent injunction with the Ninth Circuit. On September 12, 2008, the plaintiff-appellants filed a motion to stay the appellate proceedings pending action by the District Court. That same date the Court filed an order granted the motion and ordered that within 45 days (on or before October 27, 2008) appellants must file a status report on the district court proceedings, a motion to reset the briefing schedule for the appeal, or a motion for voluntary dismissal of the appeal.

On August 18, 2008, the Forest Service filed its response to the plaintiffs’ motion for stay pending appeal and, on the same date, the District Court denied the motion for stay. On August 19, 2008, the Court granted the Hartmans permissive intervention. On August 22, 2008, the Hartmans filed their answer.

On August 21, 2008, the plaintiffs filed a motion for summary judgment and brief in support. On September 2, 2008, the Forest Service filed the first supplement to the administrative record. On September 19, 2008, both the Forest Service and the Hartmans filed responses to plaintiffs’ motion for summary judgment and cross-motions for summary judgment. On September 30, 2008, the plaintiffs filed responses to the cross-motions for summary judgment of the Forest Service and the Hartmans and a reply to the responses of the Forest Service and the Hartmans. Briefing is complete in the case.

On October 22, 2008, the Ninth Circuit mediator ordered that counsel for appellants notify the mediator of a district court decision on the motions for summary judgment within five days of counsel’s receipt of that decision.

On October 30, 2008, the Court granted in part and denied in part Plaintiffs’ motion for summary judgment. The motion was granted only with regard to the mapping of key habitat components for elk. That matter was remanded to the Forest Service to conduct that mapping and the Forest Service was enjoined from beginning the project. The Court granted defendants’ and defendant-intervenors’ motions for summary judgment regarding all other claims. Final
judgment was entered regarding all claims. Any appeal of this decision would be due by December 29, 2008.

On November 5, 2008, appellants filed a motion to dismiss their appeal; the motion was granted on November 12, 2008, and the case closed.

On November 20, 2008, the Forest Service issued supplemental EA addressing the defects identified by the Court and a 30-day comment period was opened. A new record of decision based on the supplemental EA is pending. (Ron Opsahl) (08-6471)

**State of HAWAII v. OFFICE OF HAWAIIAN AFFAIRS**

(Limited and ethical government) (Amicus) (U.S. Supreme Court, Hawaii, No. 07-1372)
(Congress may not deprive Hawaii of land to benefit Native Hawaiians)

On December 3, 2008, the Board of Directors approved this case. In 1993, Congress marked the 100th anniversary of the overthrow of the Hawaiian monarchy by enacting a joint resolution—the Apology Resolution—expressing the federal government's regret for its role in that incident. Subsequently, the Supreme Court of Hawaii held that this symbolic Resolution tacitly, but materially, impairs the State's sovereign authority over its own lands. Specifically, the court held that the Resolution should be read to prohibit the State from selling, exchanging, or transferring approximately 1.2 million acres of State land, almost all of the land owned by the State and about 29 percent of the total land area of the State, until it has struck a political settlement with Native Hawaiians who assert aboriginal rights to that land.

Nothing in the Apology Resolution remotely supports that outcome; indeed, the Resolution does not even purport to address Hawaii's sovereign powers in general or its authority over State lands in particular. By construing this federal apology to impair Hawaii's sovereign prerogatives, the Hawaii Supreme Court badly misconstrued congressional intent and raised grave federalism concerns. Moreover, by concocting a basis for its decision under federal law, the court wholly insulated its controversial decision from correction by the state political process.

In 1893, with the involvement of certain United States officials, the Hawaiian monarchy was overthrown. The United States annexed Hawaii in 1898, and the interim Hawaiian government ceded 1.8 million acres of former crown, public, and government lands to the federal government. Hawaii became a United States territory in 1900 joined the Union in 1959 as the fiftieth State.

Under the terms of the statute admitting Hawaii as a State, the federal government granted title to Hawaii to most of the previously ceded lands (keeping some 350,000 acres) and mandated that these ceded lands be held by Hawaii in public trust. Section 5 of the Admission Act provides that these lands, which now total 1.2 million acres, "together with the proceeds from the sale or other disposition of [these] lands and the income therefrom," must be used by the State for one or more of five purposes: public schools and other public educational institutions; betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act; development of farm and home ownership on as widespread a basis as possible; public improvements; and provision of lands for public use.
In 1978, a state constitutional convention established the Office of Hawaiian Affairs (OHA) to receive and manage a portion of the income from the ceded lands for the benefit of Native Hawaiians (the second of the permitted five purposes). Under state law at the time, OHA received 20 percent of all “funds” derived from the ceded lands.

In 1993, Congress enacted the Apology Resolution and summarized its purpose as follows:

[It is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians.]

Section 2 of the Apology Resolution defines the term “Native Hawaiian” to include “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” It then provides that “Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.” Nothing in the Apology Resolution explicitly or implicitly impairs Hawaii’s sovereign right to control or alienate any of the lands it owns.

This case began in 1994, shortly after President Clinton signed the Apology Resolution into law. The dispute began over a 500-acre parcel of land in West Maui referred to as the “Leilali’i parcel.” Since 1987, the State’s affordable housing authority, the Housing Finance and Development Corporation (HFDC), had been working to procure the Leilali’i parcel. HFDC sought to turn this land into a residential development because it was located in an area with a critical shortage of affordable housing. Home ownership is one of the five explicit purposes for which ceded land (or proceeds from the sale of such land) may be used pursuant to Section 5 of the Admission Act.

In 1989, HFDC filed a petition with the Land Use Commission to reclassify the parcel from agricultural to urban use. The Commission granted the petition, with respondent OHA’s approval, in 1990. For the next four years, OHA and HFDC tried to agree on the compensation due to OHA when the State transferred the land to HFDC. In 1992, the Hawaii legislature established that OHA would receive 20 percent of the fair market value of the land to be transferred. The parties, however, disputed the parcel’s fair market value. While negotiation continued, HFDC spent $31 million developing the parcel, including building roads, hooking up utilities, and grading the lots.

After the Apology Resolution was enacted in 1993, OHA demanded, for the first time, that HFDC attach a disclaimer to the Leilali’i transfer stating that the conveyance would not waive or diminish Native Hawaiian claims to ownership of the land. HFDC rejected this proposed disclaimer because it obviously would have clouded the title to the land and thus would have undermined the interests of would-be homeowners. On November 4, 1994, HFDC purchased the land from the State for consideration of $1.00 and transmitted a check to OHA for $5,573,604.40, 20 percent of the fair market value OHA had said previously it would consider accepting. OHA refused the check.

OHA filed this suit on November 4, 1994, arguing that the Apology Resolution had changed the legal landscape and had restructured the rights and obligations of the State, and requested: (1) an injunction prohibiting the State from selling any ceded lands and (2) an
injunction barring the sale of the Leiiali‘i parcel specifically. In the alternative, OHA requested a declaration that any sale of the lands would violate the state constitution and the federal Admission Act, and would not release or limit the claims of Native Hawaiians.

After a bench trial in November and December 2001, the trial court ruled for the State on the grounds of waiver, collateral estoppel, sovereign immunity, ripeness, and the political question doctrine. It also held that the State had the authority to transfer the ceded lands. OHA appealed.

On January 31, 2008, the Hawaii Supreme Court issued its decision. The primary question on appeal was “whether, in light of the Apology Resolution, [the] court should issue an injunction to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the Native Hawaiian people to the ceded lands are resolved.” The court answered that question in the affirmative.

The court construed the text of the Apology Resolution to recognize the “unrelinquished claims” that native Hawaiians have asserted in the lands at issue. From this, the court inferred that the Apology Resolution subjects the State to a new and specific fiduciary duty to preserve the lands until some undefined future date. The court found support for this interpretation in Congress’s statement that it intended “to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.” The court enjoined the State from transferring any of the ceded lands, including the Leiiali‘i parcel, pending a reconciliation between the United States and the Native Hawaiian people and until the claims of the Native Hawaiians to the ceded lands have been resolved. It did not set out a standard for determining what type or extent of “reconciliation” would be sufficient to warrant lifting the injunction. It held only that injunctive relief is proper pending final resolution of Native Hawaiian claims through the political process.

On October 1, 2008, the U.S. Supreme Court granted Hawaii’s Petition for Certiorari. MSLF will file an amicus brief in support of the State of Hawaii. As used here, the terms Hawaiian and Native Hawaiian clearly are based on ancestry and as such constitute a racial classification. The Supreme Court of Hawaii ruled that Congress had taken land from Hawaii and imposed a trust on that land in favor of a certain favored racial group, Native Hawaiians. This classification must be subjected to strict scrutiny, which it cannot pass. Congress is not empowered by the Constitution or by historical relationships to deal specially with Native Hawaiians. It has neither plenary power over them nor any unique trust relationship with them, such as the Supreme Court has determined that Congress has with American Indian tribes and their members. The only past discriminatory acts that can be identified that might constitute a compelling interest constitute generalized societal discrimination, which may not be addressed by racial preferences, because it is an amorphous concept of injury that may be ageless in its reach into the past and timeless in its ability to affect the future. No narrowly tailored remedy may be devised that addresses such discrimination.


Oral argument was held on February 25, 2009. (Scott Detamore) (08-6539)

HORNE v. FLORES

(Limited and ethical government) (Amicus) (U.S. Supreme Court, Arizona, No. 08-294)
(A federal court’s authority to control a State’s educational funding system is limited)

This case was approved by the Board of Directors on February 13, 2009. In 2000, a class action lawsuit against the State and Thomas Horne, the Superintendent of Public Instruction, for failing to provide English Language Learner (“ELL”) students of the Nogales Unified School District (“NUSD”) with a program reasonably calculated to teach them English, in violation of the Equal Education Opportunity Act (“EEOA”) (“No state shall deny equal educational opportunity to an individual on account of his or her race color, sex, or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” 20 U.S.C. § 1703(f). In January 2000, the District Court held that Arizona’s system for financing education at that time was arbitrary and had led to a series of ELL deficiencies. A number of remedial orders followed, all instructing Arizona to “rationally fund” its ELL programs. In December 2005, the District Court imposed a graduated sanction against the State that leveled off at $2,000,000.00 per day until and unless the legislature passed a law that “appropriately funded ELL programs.”

Defendant-Petitioners’ Rule 60(b)(5) motion to have the original 2000 order declared satisfied was denied in April 2006 and an appeal taken from that denial resulted in a remand and subsequent evidentiary hearings to determine whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy.

The evidence presented at the evidentiary hearing demonstrated that, between 2000 and 2006, there had been infusions of new money for education resulting from State voter initiatives, State legislative action, new local taxes, and federal funding. No Child Left Behind (“NCLB”), enacted in 2001, made State compliance with detailed federal ELL programs a prerequisite for federal funding. Nevertheless, both the District Court and then the Ninth Circuit downplayed these changes and denied Rule 60(b)(5) relief. The District Court and the Ninth Circuit focused entirely on whether Arizona’s school funding scheme specifically earmarked sufficient money to cover the incremental costs of ELL programs (a requirement not imposed by the EEOA).

On August 29, 2008, Petitioner-Defendant Thomas Horne, Superintendent of Public Instruction for the State of Arizona, appealed the Ninth Circuit’s ruling. The United States
Supreme Court granted certiorari on January 9, 2009. (Note: a related petition (No. 08-294), filed by the Speaker of the Arizona House, appeals the financial sanction levied against the State and will be heard by the Court together with this case.)

On February 19, 2009, the Mr. Horne filed his opening brief. On February 25, 2009, amicus briefs were filed by American Unity Legal Defense Fund, et al.; Eagle Forum Education & Legal Defense Fund, Inc.; and Pacific Legal Foundation, et al. On February 26, 2009, amicus briefs were filed by Education-Policy Scholars; American Legislative Exchange Council, et al.; Washington Legal Foundation; and MSLF. Oral arguments are scheduled for April 20, 2009. (Scott Detamore) (Mentor: Kate Mead) (08-6521)

**KANSAS FARM BUREAU v. U.S. FISH AND WILDLIFE SERVICE**
(Environmental Laws) (Counsel for Farm Bureau) (D.Colo.)
(Farm Bureau opposes the reintroduction of black-footed ferrets onto private lands in Kansas)

This case was approved by the Board of Directors on November 12, 2007. In 1982, Congress amended the Endangered Species Act by adding section 10(j), which provides for the establishment of “experimental populations.” 16 U.S.C. § 1539(j). Previously, the U.S. Fish and Wildlife Service had the authority to reintroduce populations into unoccupied portions of a listed species’ historical range if doing so would foster the conservation and recovery of the species. Landowners and other interest holders within the reintroduction areas often opposed a reintroduction because of concerns about possible restrictions and prohibitions on federal and private lands. The 10(j) “experimental population” provision was enacted to ease many of the restrictions and prohibitions that would accompany a traditional reintroduction.

In August 2007, the FWS issued a Draft Environmental Assessment for Black-Footed Ferret Reintroduction on Private Property, Logan County, Kansas (“Draft EA”), in which it proposes to “reintroduce” endangered black-footed ferrets (Mustela nigripes) into three sites in Kansas, all on private lands. The owners of these lands, including the Nature Conservancy, requested this reintroduction over the protests of their ranching neighbors and the Logan County Commissioners. On October 19, 2007, the FWS released the Draft EA for public comment, comments to be filed no later than November 19, 2007.

The proposed reintroduction would be the seventh reintroduction of ferrets into unoccupied “historical” range. In each of the previous reintroductions (southeastern Wyoming, southwestern South Dakota, north-central Montana, Aubrey Valley, Arizona, northwestern Colorado and northeastern Utah, north-central South Dakota), the “reintroduced” population was designated as an “experimental population,” following procedures mandated by section 10(j).

With this most recent reintroduction, however, the FWS proposes to introduce the ferrets as a section 10(a)(1)(A) population, i.e., a traditional reintroduction. Thus, the population may not legally be designated an “experimental population” and therefore all of the ESA’s protections and prohibitions will be afforded this purported “experimental” population. Moreover, under the proposal, the reintroduced population apparently would be designated “experimental” for only five years, after which time, the full protections of the ESA would be in force. Despite the critical distinctions between sections 10(j) and 10(a)(1)(A), the FWS maintains that the Kansas population will be “experimental.”
On November 16, 2007, on behalf of itself and its members, MSLF filed comments on the Draft EA. On December 14, 2007, the Final Environmental Assessment and FEIS was issued, and on December 18, 2007, the ferrets were released.

On April 21, 2008, the Board of Directors approved filing a lawsuit on behalf of the Kansas Farm Bureau and landowners Byron D. Sowers, the Eve L. Woods Trust, and Mesco, Inc. (hereinafter, jointly, “the Farm Bureau”), challenging the reintroduction of black-footed ferrets onto private lands in Kansas. The Farm Bureau will assert that the FWS may not introduce a population of black-footed ferret as an “experiment” without completing proper rulemaking to designate the population as an “experimental population” under section 10(j) of the Endangered Species Act.

On June 9, 2008, the Farm Bureau filed a 60-day notice of intent to sue. (Ron Opsahl) (07-6274)

LARGE v. FREMONT COUNTY, WYOMING

(Constitutional Issues) (Counsel for Fremont County) (D.Wyo., 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 (“VRA”) and the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

This case is very similar to the VRA cases brought by the United States against Blaine County, Montana, and Alamosa County, Colorado. Here, in a complaint filed on October 20, 2005, five American Indian voters (James E. Large, Garry Collins, Emma Lucille McAdams, Patricia Bergie, and Pete Calhoun), represented by the ACLU, allege that the County’s at-large system of electing Commissioners violates Section 2 of the VRA by diluting American Indian votes. Simply put, it alleges that non-Indians and Indians usually vote for different candidates and that, because there are more non-Indians than 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. The ACLU seeks an order requiring the establishment of single-member districts in which Indian voters constitute a majority in at least one district.

Fremont County comprises 9,266 square miles in central Wyoming. The Wind River Indian Reservation, comprising 3,281 square miles, is located primarily within Fremont County. The Eastern Shoshone Tribe and the Northern Arapahoe Tribe both reside on the Reservation. Though they have separate governments, the Tribes have a joint “Business Council” that coordinates Reservation activities. As a result of 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 using 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 coincide with national elections. Commissioners may reside anywhere within the County and the entire County votes for each Commissioner. Commissioners serve for four years and their terms are
staggered such that three Commissioners are elected in one election and two in the next. Each voter has one vote for each Commissioner position and bullet voting is not allowed; that is, in the three-commissioner election, a voter may not cast his three votes for a single candidate.

The population of Fremont County is 35,804 comprising 74.6 percent Non-Hispanic whites and 19.7 percent American Indians. The American Indians population is concentrated primarily on the Reservation. An American Indian has never been elected Commissioner, although at least one is known to have run. When the Complaint was filed, all five Commissioners were Republicans. One Commissioner estimates that approximately 60 percent of the registered voters are registered as Republicans and about 40 percent as Democrats. This Commissioner says that Fremont County is generally conservative and believes that Indian-supported candidates probably are too liberal for the majority of Fremont County voters.

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

On October 20, 2005, a complaint was filed. 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 initial pre-trial conference, Magistrate Judge Beaman granted Fremont County's motion to declare the case a complex case. Written discovery was completed on March 24, 2006. 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.

Discovery ended January 5, 2007. Pretrial memoranda and a joint stipulation of facts were filed on January 9, 2007. The final pretrial conference was held on January 16, 2007. Trial briefs were filed on January 26, 2006. That same date, the Court denied Fremont County's motion for summary judgment, upholding the constitutionality of Section 2 of the Voting Rights Act.

Trial was held in Casper on February 5-9, 12-15, 2007. On May 22, 2007, the parties filed proposed findings of fact and conclusions of law. (Scott Detamore) (05-5688)

LOZANO v. City of HAZLETON, PENNSYLVANIA
(Constitutional Issues) (Co-Counsel for Hazleton) (Third Cir., No. 07-3531)
(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 2000 to now more than 31,000; many of the new residents are individuals who entered the United States illegally.
On July 13, 2006, frustrated by the federal government’s failure to address the problems of small cash-strapped towns posed by illegal immigration, 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 Mieles, Casa Dominicana of Hazleton, Inc., Hazleton Hispanic Business Association, and Pennsylvania Statewide Latino Coalition (“Plaintiffs”) (M.D. Pa., No. 06cv1586). This lawsuit asserts that the City 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 case was stayed after the City agreed to delay enforcement of the ordinance.

Subsequently, on September 12, 2006, the City adopted two new 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 city officials and the public time to be educated as to the provisions of the new ordinances. Then, on September 25, 2006, the City repealed the original ordinance.

In a stipulation and order filed October 2, 2006, the City agreed to give 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 temporary restraining order and preliminary injunction. Following conferences of the parties and the Court on October 31, 2006, on October 31, 2006, the Court issued a temporary restraining order, to remain in effect until November 14, 2006, prohibiting the City from implementing Illegal Immigration Relief Act Ordinance 2006-18 and Registration Ordinance 2006-13.


On December 4, 2006, the City filed a motion to dismiss Plaintiffs’ first amended complaint 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 relating to 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 petitioned for certification of an immediate appeal of two orders regarding the protection of the John and Jane Doe plaintiffs. On January 8, 2007, the Court denied the petition; it held that the orders dealt with discovery disputes and as such were not eligible for immediate interlocutory appeal.

Also, on January 8, 2007, the Court issued a scheduling order disposing of the parties’ stipulation of December 22, 2006, to modify the schedule. It rescheduled the pretrial conference for February 22, 2007, set trial for March 12, 2007, and ordered the temporary restraining order of October 31, 2006, to remain in effect until disposition of the preliminary injunction.
On January 12, 2007, Plaintiffs filed a second amended complaint. On January 23, 2007, the City filed a motion to dismiss or, in the alternative, for summary judgment asserting that Plaintiffs lack standing, cannot succeed on the merits of their case, and may not proceed anonymously.

Discovery ended February 6, 2007. On February 9, 2007, Plaintiffs filed two motions in limine and supporting briefs and the City filed six motions in limine and supporting briefs. On February 12, 2007, Plaintiffs filed their opposition to the motion to dismiss and a cross-motion for summary judgment. On February 15-16, 2007, briefs in opposition to the various motions in limine were filed. On February 16, 2007, the parties filed pretrial memoranda. On February 27, 2007, the Court denied all of the motions in limine except for one, a motion by the City asking the Court to order one John Doe to provide full information regarding his immigration status because his testimony on the subject indicated that he might not be an illegal resident of the United States and, if that were the case, he would not be eligible to participate in this lawsuit.

On March 1, 2007, the City filed a stipulation regarding the City’s “Official English Ordinance,” No. 2006-19, enacted September 23, 2006, in which the parties agree that: (1) any City forms and notices that had been translated into a foreign language prior to passage of the ordinance will continue to be made available and utilized by the Code Enforcement Office; (2) the City will not improperly limit materials that are set forth within the exceptions in the ordinance; (3) the ordinance does not prohibit City officials or employees from providing assistance to member of the public in any language other than English; and (4) the stipulation does not create any binding legal obligation on the City to provide assistance in any language other than English. On March 2, 2007, the Court approved the stipulation.

On March 2, 2007, the City filed its response in opposition to the Plaintiffs’ statement of uncontested facts filed with their cross-motion for summary judgment. It also filed a memorandum of law in support of an oral motion in limine made during the pretrial conference that raised objections to the large number of newspaper and journal articles, op-ed pieces, studies, and reports listed as trial exhibits in the plaintiffs’ pretrial memorandum. The City argued that these exhibits constitute inadmissible hearsay and were not disclosed either initially or as supplements during discovery.

On March 2, 2007, the Court ordered that a designee of the U.S. Department of Homeland Security, USCIS, testify as a witness at trial, as well as for deposition by Plaintiffs’ counsel before trial, regarding: (1) the ability of the federal government to meet its statutory obligation that it respond to an inquiry by a State or local government agency seeking to verify citizenship and/or immigration status; (2) whether the Systematic Alien Verification for Entitlements (S.A.V.E.) is operationally functional and capable of meeting the preceding obligation; (3) any other ways in which the Department could meet the preceding obligation; (4) whether the Basic Pilot Program is a functional and effective way of determining a person’s authorization to work lawfully in the United States; and (5) the verification of whether an alien is lawfully present in the United States.

On March 2, 2007, both Plaintiffs and the City filed proposed findings of fact and conclusions of law. On March 5, 2007, the Chamber of Commerce of the United States filed an amicus brief in support of the Plaintiffs. On March 6, 2007, Judicial Watch filed an amicus brief in support of the City.
On March 7, 2007, the Court issued an order declaring that its earlier order that a
designee of the Department of Homeland Security be made available to testify had been
impropriently granted. Subsequently, the Department refused to make an official available, and
this issue ultimately was dealt with by the City calling as a witness a retired INS Senior Special
Agent. On March 8, 2007, the City filed a supplemental pretrial memorandum. On March 9,
2007, the Court, on Plaintiffs’ motion of the same date and the City’s response, ordered that the
Doe Plaintiffs in the case would be allowed to testify through deposition. On March 13, 2007,
the Court denied the City’s motion for protective order to prevent the Plaintiffs calling the City
Council President to testify.

Trial was held from March 12 through March 22, 2007, and post-trial briefs were filed by
the parties on May 14, 2007. On May 22, 2007, the Pennsylvania Immigrant Rights Coalition
filed an amicus brief. On June 7, 2007, the City filed a letter notifying the Court of the Farmers
Branch, Texas, ordinance and relevant distinctions to the Hazleton ordinance.

On July 26, 2007, the Court declared the Hazleton ordinances at issue unconstitutional
and enjoined the City from enforcing them. On August 13, 2007, the Plaintiffs filed a motion for
extension of time until August 31, 2007, to file their application for attorneys’ fees and expenses.
The City opposed the motion but on August 16, 2007, the motion was granted.

On August 23, 2007, the City filed a notice of appeal, and on August 30, 2007, the Third
Circuit docketed the appeal (No. 07-3531).

On August 31, 2007, the Plaintiffs filed their petition for attorneys’ fees in the amount of
almost $2.5 million and a bill of costs. On September 6, 2007, the City filed a motion for
extension of time to file its brief in response, which the Plaintiffs opposed on September 11,
2007. On September 14, 2007, the Court issued an order staying the City’s response until the
Court issues its decision on the motion for extension of time. On September 19, 2007, the court
granted the City’s motion for an extension of time to file its response to the petition for
attorneys’ fees until 60 days after final action on the City’s appeal.

On November 16, 2007, the Third Circuit set the opening brief due on December 26,
2007. On December 5, 2007, the City was granted an extension of time to file its brief until

On January 23, 2008, the City filed a motion to file an overlong brief of 40,000 words,
which was sent to the motions panel for disposition. That motion was denied on January 24,
2008, and a brief no longer than 20,000 words was due on February 7, 2008. On February 7,
2008, the City filed its opening brief. An amicus brief in support of the City was filed on
February 14, 2008, by Judicial Watch; on February 19, 2008, by the Allied Education
Foundation and Washington Legal Foundation and on March 11, 2008, by the Eagle Forum
Education & Legal Defense Fund.

Oral arguments were held on October 31, 2008. (Liz Gallaway) (Mentor: Stubbs) (06-
5969)
MANN v. UNITED STATES
(Private Property) (Counsel for Mann) (Fed. Claims, N. Mex., No. 98-312)
(Federal lessee seeks compensation for having his valuable lease illegally cancelled)

On November 1, 1981, the Bureau of Land Management 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 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 February 2, 1996, the Board of Directors approved this case.

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 U.S. Court of Federal Claims (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 (No. 03-5013). On December 30, 2002, Mann’s opening brief was filed and served and the appendix was sent to the government counsel for inclusion of the government’s materials. The United States filed its response brief on February 19, 2003, and Mann filed his reply brief on March 10, 2003. The joint appendix was filed on March 17, 2003. Oral arguments were held on June 3, 2003, in Washington, D.C.

On June 27, 2003, the Federal Circuit issued its decision. It held that the United States had breached the lease by failing to provide Mr. Mann with notice prior to terminating his lease, and it reversed and remanded the case for a determination of damages. On July 10, 2003, MSLF filed a bill of costs. On October 17, 2003, the U.S. Treasury paid that bill.

On December 15, 2003, a scheduling conference was held and order issued under which discovery ends on September 24, 2004. 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)

**MARSTON v. U.S. FOREST SERVICE**

(Property Rights) (Counsel for Marstons) (Administrative agency appeal)

(Federal government may not take governmental action that damages property or impairs its use)

The Board of Directors approved this case on February 8, 2008. Judy and Arron Marston own three unpatented mining claims in the Black Hills National Forest, South Dakota. The claims were located in the 1920s, and Mrs. Marston inherited them in the 1970s. Subsequently, the Marstons began developing the claims, building 11 shafts. Assays from the shafts indicate that valuable mineral deposits exist in the claims, specifically gold and other valuable minerals.

On May 9, 2005, the United States Forest Service ("Forest Service") sent a letter to Mr. Marston soliciting comments regarding the Forest Service’s desire to install a gate on one of the mine’s adits to protect public safety and “sensitive” bat species allegedly hibernating in the mine. Following receipt of the letter, the Marstons met with the Forest Service, and all parties agreed that a gate would not be installed at that time.

On August 2, 2006, the Forest Service bulldozed 11 shafts on the D&R claims, and on October 25, 2006, the Forest Service installed a locked gate on one of the shafts. On June 15, 2007, Mr. Marston visited the D&R claims and discovered the damage done by the Forest Service. Not only has the Forest Service caused extensive damage to the Marstons’ claims, but all mining has been prevented.

On June 16, 2007, the Marstons met with a Forest Ranger who allegedly admitted that the damage was done by the Forest Service because it believed the mines to be abandoned. Additionally, the Forest Service provided the Marstons with a key to the gate. The Forest Service also retains a key to this gate and allegedly has trespassed on the Marstons’ property at various times since the gate was installed. After months of attempted communication with the Forest Service, the Marstons have been unsuccessful in their request that the Forest Service correct the damage it caused. Additionally, the Marstons have been notified that they are not allowed to continue, or begin, any mining activity on the D&R claims.
MSLF plans to file suit on behalf of Judy and Arron Marston against the Forest Service, seeking either injunctive relief ordering the Forest Service to repair the damage it caused the Marstons’ mining claims or compensation for the entire value of the mining claims or the value of the damage. The Marstons appear to have two types of claims against the United States: (1) claims for tort damages under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671–2680, and (2) takings claims under the Fifth Amendment to the U.S. Constitution.

On July 31, 2008, the Marstons served their FTCA tort claim on the U.S. Forest Service, as required by that Act prior to the filing of any lawsuit. The 180-day notice period expired on January 28, 2009. (Joel Spector) (Mentor: Main) (07-6269)

**McFarland v. United States**

(Access to Federal Land) (Counsel for McFarland) (U.S. Supreme Court, D.Mont., No. 08-825) (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 the NPCA 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 motion to dismiss. On July 22, 2003, MSLF filed a motion for reconsideration, which was denied on September 15, 2003, as without merit. Again, the Court 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, Mr. McFarland filed a 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.

On February 24, 2006, the parties filed a written status report and joint management plan in district court to govern all further matters in the case.


On October 2, 2006, defendant-intervenor NPCA filed a motion to reschedule oral arguments and 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 a day later, on November 17, 2006, the court ruled against McFarland on all issues. On November 22, 2006, the federal government and the NPCA requested publication of the decision.

On December 7, 2006, Mr. McFarland filed a notice of appeal. On December 28, 2006, the Ninth Circuit docketed the appeal (No. 06-36106). On March 26, 2007, McFarland filed his
opening brief. Response briefs were filed on June 8, 2007, and Mr. McFarland’s reply brief was filed on June 25, 2007. Oral arguments were held on May 7, 2008, in Seattle.

On October 2, 2008, the Ninth Circuit panel rejected Mr. McFarland’s appeal and upheld the District Court’s ruling. On December 22, 2008, MSLF filed Mr. McFarland’s petition for writ of certiorari and it was docketed by the Court on January 5, 2009.

On February 4, 2009, both the government and the NPCA waived their right to respond to the petition. Conference on the petition will be held on March 6, 2009. (Ron Opsahl) (Mentors: Hill, Kimball) (00-4615)

**MONTANA ENVIRONMENTAL INFORMATION CENTER v. BLM**
(Environmental Law) (Counsel for Intervenor IPAMS)
(D.Mont., No. 08cv178)

(Environmental groups allege BLM must address climate change as part of NEPA)

This case was approved by the Board of Directors on February 13, 2009. On March 31, 2008, the Western Environmental Law Center filed a formal Protest of the April 8, 2008, June 17, 2008, August 26, 2008, and November 4, 2008, BLM oil and gas lease sales on behalf of The Natural Resources Defense Council, Earthwork’s Oil and Gas Accountability Project, and Rocky Mountain Clean Air Action (Protestors) Protestors alleged that upstream oil and gas production emits greenhouse gas (“GHG”) emissions and thereby contributes to global warming and climate change and that the BLM, by failing to address these global warming and climate change issues when issuing oil and gas leases, negatively affected Protestors’ interests.

Protestors requested that the BLM, prior to awarding lease rights, prepare an EIS to address global warming issues implicated by the lease sales, specifically: (1) quantify past, present and reasonably foreseeable GHG emissions from BLM-authorized oil and gas development; (2) identify, consider, and adopt a GHG emissions limit or GHG reduction objective for BLM-authorized oil and gas activities; (3) identify, consider, and adopt management measures to reduce GHG emissions from BLM-authorized oil and gas activities; (4) track and monitor GHG emissions from BLM-authorized oil and gas operations through time; and (5) consider how climate change affects ecological resiliency, and whether such impacts warrant ecological protections.

Protestors alleged that the BLM is legally obligated to address climate change because (1) a 2001 Order issued by the Secretary of the Interior creates a legal obligation for the BLM to address climate change; (2) FLPMA and NEPA provide the BLM with the authority and responsibility to address global warming; and (3) the BLM has a “public trust duty” to consider climate change.

On October 27, 2008, the BLM dismissed the environmental groups’ April 8, 2008, June 17, 2008, and August 26, 2008 Protests; and on December 3, 2008, it dismissed their November 4, 2008 Protest, stating that Protestors had not demonstrated that the BLM’s decision to offer the parcels in the lease sale violated any law, that Protestors failed to identify any specific effect on global warming or climate change that would result from the leasing, and that Protestors failed to identify any change in the affected environment that would alter the BLM’s analysis.
On December 17, 2008, the Montana Environmental Information Center, Oil and Gas Accountability Project, and Wild Earth Guardians (MEIC) filed a lawsuit in the District of Montana challenging the April 8, 2008, lease sale, which includes 10 lease parcels within the State of Montana totaling 6,050.34 acres; the June 17, 2008, lease sale, which includes 24 lease parcels within the State of Montana totaling 11,289.77 acres; the August 26, 2008, lease sale, which includes 12 of 15 lease parcels within the State of Montana totaling 7,957.42 acres; and, the November 4, 2008, lease sale, which includes 17 leases within the State of Montana totaling 14,879.31 acres. MEIC requested that the Court: (1) declare that the lease sales violated federal law, (2) set aside the BLM’s actions, and (3) void, suspend and/or enjoin the oil and gas leases pending compliance with federal law. On January 15, 2009, the MEIC filed an amended complaint. The court issued a preliminary pretrial conference order under which a preliminary pretrial statement is due on March 3, 2009, and a case management plan is due on March 17, 2009.

MSLF will file a motion to intervene on behalf of the Independent Petroleum Association of Mountain States (IPAMS). (Liz Gallaway) (Mentor: Local Counsel) (09-6572)

**MONTANA WILDLIFE FEDERATION v. MONTANA BOARD OF OIL & GAS CONSERVATION**

(Private Property) (Counsel for Intervenor Montana Petroleum Association)

(16th J.D. (Fallon County) Mont., No. DV 2008-34)

(The Oil & Gas Board complied with environmental laws in approving drilling applications)

This case was approved by the Board of Directors on February 13, 2009. In 1915, a natural gas field was discovered in the Cedar Creek Anticline in Fallon and Carter Counties of far-eastern Montana. In 1925, gas production began, and, by 1995, the Cedar Creek gas field consisted of 150 wells producing approximately 10 billion cubic-feet of natural gas per year. Since 1995, both the number of wells and the gas produced has expanded significantly. Before 1997, gas well spacing rules limited development to one well per 320 acres. In 1997, well spacing was increased to one well per 160 acres, and in 2003 to one well per 32 acres, spacing that continues today. As of 2008, more than 1,100 wells had been drilled, and the Montana Board of Oil and Gas Conservation (the “Board”) estimates an average of an additional 71 wells will be added to the field per year.

In 1989, the Board prepared a programmatic environmental impact statement analyzing oil and gas development, statewide, in Montana. Since 1989, traditional oil and gas development has been governed by this EIS. In 2003, the Board prepared a second programmatic EIS analyzing coalbed methane development in southeastern Montana. This EIS, however, did not update the 1989 statewide EIS regarding traditional oil and gas development, such as that occurring in the Cedar Creek gas field. On August 11 and 12, 2008, the Board issued EAs for 12 new gas wells proposed by Fidelity Exploration and Production Company in the Cedar Creek gas field. The twelve environmental assessments tier to the 1989 programmatic EIS.

On October 9, 2008, two environmental groups, the Montana Wildlife Federation and the National Wildlife Federation, filed suit in state court challenging the Board’s environmental assessments associated with the Board’s approval of Fidelity’s gas well permits. Fidelity has been granted intervention in this case.
In their lawsuit, the environmental groups allege that (1) the Board’s EAs were inadequate, and thus violated the Montana Environmental Policy Act ("MEPA"); (2) the Board was required to prepare a programmatic EIS for oil and gas development in the Cedar Creek Anticline; and (3) the Board’s actions in this case violate the provisions on the Montana Constitution protecting the environment. See Mont. Const. art. II, § 3, art. IX, § 1.

On February 26, 2009, MSLF filed a motion to intervene in the case on behalf of the Montana Petroleum Association. (Ron Opsahl) (Mentor: Steve Ruffatto; Local counsel: Colby Branch, Steven W. Jennings, Crowley Fleck) (09-6580)

**MOODY v. THE GREAT WESTERN RAILWAY**

(Private Property) (Counsel for Rodney Nelson) (Weld County District Court, 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 that is traversed by a 100-foot-wide railway easement formerly occupied by the Great Western Railroad dating from 1905. The easement 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 ("the Railway") applied to the Surface Transportation Board ("STB") for permission to abandon 11.7 miles of track near Severance, Windsor, and Eaton, Colorado, on which, it admitted, for "more than ten years, rail service has not operated thereon." On November 25, 2003, the towns filed a request, under 49 C.F.R. § 1152.29(a)(3), to "rail bank" the right-of-way for use as recreational trail. Title 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. If such an entity is prepared to assume full responsibility for managing such a trail, the STB must grant the application and deny the proposal for "abandonment."

Under Colorado law, the Railway had a duty to report any rail-line abandonment to the Colorado Transportation Legislation Review Committee for possible acquisition by the State, 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.

In July 2006, it was determined that Mr. Nelson’s predecessor-in-interest, J. Gale Moody, had filed a quiet title action against the Railway and Western Construction Company before he sold part of the property that is the subject of that suit to Mr. Nelson. Weld County District Court, No. 03cv779. The suit had been 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, Mr. Nelson filed an unopposed motion to intervene, complaint, and cross-claim. On August 7, 2006, the Court granted Mr. Nelson’s motion to intervene.
On February 13, 2007, Mr. Nelson received a letter addressed to “Dear Neighbor” and a brochure from the Great Western Trail Authority (“GWTA”), an entity existing pursuant to an intergovernmental agreement between the towns of Severance, Windsor, and Eaton. In the letter GWTA claimed an ownership interest in the Railway’s right-of-way, alleging that it received that ownership interest from the Railway in a deed dated November 13, 2006. On February 16, 2007, MSLF filed an amended complaint, request for temporary and permanent injunction, and cross-claim on behalf of Mr. Nelson adding the GWTA, its officers, and Board members. MSLF also requested a prompt hearing on the preliminary injunction because the GWTA letter indicated that agents of the GWTA would soon be surveying the right-of-way, including Mr. Nelson’s private property, and anecdotal evidence suggested that surveying was already underway, in some cases against the desires of the property owners.

On February 20, 2007, the Court set a preliminary injunction hearing. The hearing was set for April 19, 2007.

On March 2, 2005, the GWTA defendants filed a notice of removal to the U.S. District Court for Colorado (No. 07cv427-LTB). As grounds for removal, the GWTA argues that the reversionary interests under which Nelson claims ownership of the subject property require determination of whether the Great Western Railway Company has abandoned or discontinued use of the property as a railroad and that those claims present issues of federal law. Nelson seeks only to quiet title and does not contest abandonment of the railroad and, in fact, without such abandonment Nelson would have no right to claim a reversionary interest in order to quiet title. Nelson’s motion for remand is due on April 2, 2007.


On April 18, 2007, GWTA filed its reply in support of their motion to dismiss, in which the asked the Court to dismiss Mr. Moody from the suit for failure to file a response to the motion. On April 23, 2007, the Railway filed its reply in which it concurred with the reply filed by GWTA. On April 20, 2007, GWTA and the Railway filed their joint response to Mr. Nelson’s motion for remand.

On May 8, 2007, Mr. Nelson filed his reply in support of the motion for remand. On May 24, 2007, the Colorado federal district court denied GWTA’s motion to dismiss and granted Mr. Nelson’s motion for remand. On May 29, 2007, that court forwarded the case to the Colorado district court for Weld County. The last scheduled action in that Court was a hearing on Mr. Nelson’s request for a preliminary and permanent injunction. Answers to his amended complaint, request for preliminary and permanent injunction, and cross-claim are also due.

On June 11, 2007, the GWTA filed a motion for reconsideration with the federal district court of its order granting Mr. Nelson’s motion to remand the case to state court and denying GWTA’s motion to dismiss. On that same date, the Railway filed a motion to join the previous motion. On June 12, 2007, the federal district court denied the motion for reconsideration.

On June 11, 2007, the GWTA filed a motion to dismiss the case in state court. That same date, the Railway filed a motion for extension of time until June 21, 2007, to file a responsive
pleading to Mr. Nelson's amended complaint. On June 22, 2007, the Railway filed a joinder with GWTA's motion to dismiss. On June 29, 2007, Mr. Nelson filed his response to the motion to dismiss and a second amended complaint. On July 19, 2007, the Court granted the filing of the second amended complaint and set a hearing on Mr. Nelson's request for a preliminary injunction for November 16, 2007. That same date the GWTA filed a reply in support of their motion to dismiss and on July 26, 2007, the Railway filed a joinder with that reply.

On July 11, 2007, the GWTA filed a notice of appeal in federal court of that court's order denying GWTA's motion to dismiss and granting Mr. Nelson's motion for remand to state court and that court's order denying GWTA's motion for reconsideration (10th Cir. No. 07-1285). On July 12, 2007, the Railway filed a similar notice of appeal (10th Cir. No. 07-1287).

On August 13, 2007, after unopposed extensions of time to file, the GWTA and the Railway filed a joint motion to dismiss in state district court in response to Mr. Nelson's second amended complaint.

On August 15, 2007, a telephone mediation conference was held in both cases at the Tenth Circuit. On August 17, 2007, the federal district court certified that the record in the two appeals is complete. Opening briefs are due on September 26, 2007.

On August 20, 2007, Mr. Nelson filed a motion in state court to continue and reset the preliminary injunction hearing set for November 16, 2007, due to his absence from the State on that date. That motion was granted on August 27, 2007. On August 28, 2007, Mr. Nelson filed his opposition to the joint motion to dismiss and a motion to file a third amended complaint. On September 20, 2007, the GWTA and the Railway filed their reply to Mr. Nelson's opposition to their motion to dismiss.

On September 26, 2007, the date opening briefs were due, the Tenth Circuit Mediator's Office granted an extension until October 3, 2007, for the GWTA and the Railway to file opening briefs. Also on that date the appellants filed a motion to consolidate the cases, which the Court granted on September 28, 2007. The Court strongly urged both appellees and appellants to each file a single brief in the consolidated cases.

On October 4, 2007, the GWTA and the Railway filed their opening brief, not requesting oral argument. On October 12, 2007, the Rails to Trails Conservancy filed an amicus brief in support of the GWTA and the Railway. On October 26, 2007, Mr. Nelson and Mr. Moody filed responses to the opening brief. The GWTA-Railway reply brief was due on November 13, 2007, but no brief was filed. On November 16, 2007, the circuit mediator granted the GWTA until November 21, 2007, to file their brief, and on November 21, 2003, the brief was filed.

On December 13, 2007, the state court ruled that it lacked jurisdiction to hear Mr. Nelson's lawsuit because federal law placed railroad abandonment issues under the authority of the STB, and, as a result, the court may not hear Mr. Nelson's claims that the railroad easement reverted to him or that he owns the easement as a result of adverse possession. The court agreed that it has jurisdiction to hear Mr. Nelson's challenge to the claim by the railroad that it owns mineral rights beneath the easement. The court ordered Mr. Nelson to file a motion for summary judgment on the remaining issues by January 2, 2007, which he did. After several extensions, the Railway-GWTA filed its response on February 22, 2008.

In the Tenth Circuit case, the case was submitted on the briefs to its panel on January 30, 2008. On March 13, 2008, despite that fact that appellants did not request oral argument, the
Court issued a notice scheduling oral arguments for May 13, 2008. On April 3, 2008, Mr. Nelson filed in the Tenth Circuit case, as supplemental authority, the state court’s motion to dismiss. Oral arguments were held in the Tenth Circuit case on May 13, 2008.

On March 17, 2008, Mr. Moody and Mr. Nelson each filed replies in support of their motions for summary judgment in the state court case. On April 7, 2008, the state district court granted in part and denied in part Mr. Nelson’s motion for summary judgment. The Court held that the railroad received only an easement over the property in question. A trial on the issue of ownership is now required to determine whether Mr. Nelson or Mr. Moody owns the property.

On July 22, 2008, the state district court issued an order that a status report and proposed order regarding the remaining issues be filed by August 21, 2008.

On August 12, 2008, the Tenth Circuit ruled for Mr. Moody and the Nelson, holding that it did not have jurisdiction to hear the case.

On August 12, 2008, in state court, the defendants filed a Rule 54 motion requesting issuance of final judgment in respect to their position in the case. On August 22, 2008, the Nelsons filed their opposition to the defendants’ motion for rule 54(b) certification. On August 21, 2008, the Nelsons filed a status report in the state case asking for a 60-period in which Mr. Moody and the Nelsons would discuss settlement of the ownership issue prior to filing motions for summary judgment. The Nelsons will file a motion to quiet title on or before October 20, 2008.

On October 10, 2008, the state court granted defendants’ Rule 54 motion requesting issuance of final judgment with respect to their position in the case. An appeal of that order is due by November 24, 2008. Also, on October 10, 2008, the court set Mr. Nelson’s summary judgment motion regarding the ownership issue due on November 10, 2008.

On November 7, 2008, the Nelsons filed their motion for summary judgment to quiet title together with supporting documents. On November 25, 2008, defendants filed their response to Moody’s and Nelsons’ motions for summary judgment. Thereafter, and before the Court issued a decision on the summary judgment motions, the parties reached an agreement as to the rights of the respective parties. On December 10, 2008, a jointly proposed entry of judgment for the southeast quarter of Section 32 was submitted to the Court, and on January 22, 2009, the Court entered that judgment. On February 6, 2009, a similar entry of judgment for the southwest quarter of Section 32 was submitted to the Court, and on February 10, 2009, the Court entered that judgment. As a result, the Nelsons have been able to quiet title to the fee interests and mineral rights in the land underlying the railroad right-of-way in the southeast and southwest quarters, subject to the railroad right-of-way itself and subject to Mr. Moody’s fee and mineral interests. (Joel Spector) (06-5852)

**MOUNTAIN STATES LEGAL FOUNDATION v. SALAZAR**
(Environmental Laws) (Plaintiff) (D.Colo., No. 08cv2775)
(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 ("PMJM") as a threatened
species pursuant to the 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 PMJM should not have been listed, primarily because the species, *Zapus hudsonius preblei*, is almost indistinguishable from its nearest relative, *Zapus princeps princeps*. Because the PMJM 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 PMJM 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 PMJM, 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 PMJM, and, even if it had, because there are no accurate methods for determining PMJM 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 PMJM, FWS chose the third option. 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 delist the PMJM 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 delisting, 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 delist.

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 delist. 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 FWS Director, and the Director of FWS Region 6 (D.Wyo., No. 03cv250). The suit challenged the PMJM 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 PMJM from the threatened species list based on a genetic and morphological study of the PMJM 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 PMJM 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 delist the PMJM 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 published 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 would issue its final rule regarding delisting on December 22, 2006, in the Federal Register. 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 would not be able to issue its final rule regarding delisting of the PMJM until June 29, 2007.

On January 24, 2007, the State of Wyoming filed a petition for review of final agency action and to compel the DOI/FWS to publish a final rule regarding delisting of the PMJM (Case No. 07cv25, D.Wyo.). The State asserted that the DOI failed to publish a final rule following a positive 12-month fining on the State’s petition to delist the PMJM and acted arbitrarily in
extending the time to respond to the State’s petition. The State asked the Court to order DOI to
take action within one month, declare that DOI acted arbitrarily in extending the time frame, and
order DOI to immediately publish a final rule removing the PMJM from the list of endangered
and threatened species. On March 7, 2007, the DOI filed a motion to strike, or in the alternative,
dismiss, the State’s petition, and on March 21, 2007, the State filed its response. At the initial
pretrial conference on April 17, 2007, the Court set a briefing scheduled with the State’s opening
oral arguments for October 26, 2007. On June 22, 2007, the Court signed an order approving
settlement and dismissing the delisting case without prejudice. Under the settlement, the FWS
was to submit for publication in the Federal Register, by June 30, 2008, a new proposed
regulation to implement a determination or revision with respect to the status of the PMJM and
address whether the PMJM is properly classified as a subspecies under the ESA and whether the
1998 listing determination for the PMJM was made in error. If appropriate, the FWS shall issue
a notice of withdrawal of the February 5, 2005, proposed rule to delist the PMJM.

On July 10, 2008, the FWS issued a final rule listing the PMJM in Colorado and delisting
it in Wyoming. The rule will become effective on August 9, 2008. On August 1, 2008, in light
of the new final rule, MSLF sent a 60-day notice of intent to sue.

As a result of the filing of the final rule and the dismissal of Action No. 07cv25 without
prejudice, the District Court in MSLF v. Norton ordered that the parties meet with the court on
September 18, 2008, for purposes of scheduling future events.

On September 19, 2008, the Court held a telephone status conference regarding the future
of this case. On September 23, 2008, the court issued a scheduling order for the case.
Oppositions to the motion to intervene of WildEarth Guardians (formerly Forest Guardians) are
due on October 15, 2008; replies thereto are due on November 1, 2008. MSLF may file an
amended petition for review by October 15, 2008, the administrative record is due by December
15, 2008. Opening briefs are due on February 15, 2009, response/answer briefs on April 15,
2009, and replies on May 15, 2009. Motions regarding venue or transfer to another jurisdiction
are due by December 15, 2008.

On October 15, 2008, MSLF filed a motion for change of venue to the District of
Colorado, that District being the only location where the PMJM listing now is at issue; its
opposition to the motion to intervene of WildEarth Guardians; and its amended petition for
review. On October 20, 2008, the Court filed the amended petition for review. On October 29,
2008, the federal respondents filed their response to MSLF’s motion for change of venue,
arguing that the case should assigned, though venued in Colorado, to Wyoming Judge Johnson
(the current judge), who also maintains a Colorado docket. On October 30, 2008, WildEarth
Guardians filed a response to the motion for change of venue, agreeing to a change of venue but
stating that Judge John Kane should be given the case in that he already is handling a related case
in the District of Colorado.

On October 31, 2008, WildEarth Guardians filed its reply brief in support of its motion to
intervene. That same date, the federal defendants filed their answer to MSLF’s amended petition
for review.

On December 3, 2008, federal defendants filed a motion for extension of time until
January 30, 2009, to file the administrative record, which is far larger than originally thought.
As part of that motion, which was not opposed, briefing dates would all be moved by the same amount of time, 46 days.

On December 17, 2008, the Court granted MSLF’s motion for change of venue to the District of Colorado, and did not maintain jurisdiction over the case as part of its Colorado docket. On December 22, 2008, the District of Colorado docketed the case and all of its filings.

On January 23, 2009, the parties filed a joint status report informing the Court as to the outstanding motions that had been transferred and requesting a scheduling conference. On January 26, 2009, the Court issued an order granting the motion to extend the date for filing of the administrative record to January 30, 2009, and the motion to intervene of WildEarth Guardians. The Court denied the motion to transfer as moot. The opening brief is due on April 2, 2009, response brief on June 1, 2009, and reply brief on June 30, 2009. A status conference is set for February 17, 2009, to be held in conjunction with the related case, Greeley v. U.S. Fish and Wildlife Service, No. 03cv1607. The Court instructed the parties in both cases to be prepared to discuss whether these related cases can and should be coordinated in some fashion. On January 30, 2009, the administrative record was filed.

On February 17, 2009, a status conference was held in this and the related cases. The Court ordered all matters to be delayed by 30 days to allow time for settlement discussions.

(Ron Opsahl) (Mentor: David Smith) (03-5380)

**MOUNTAIN STATES LEGAL FOUNDATION v. U.S. FISH AND WILDLIFE SERVICE**

(Environmental Laws) (Plaintiff) (Rulemaking)

(MSLF opposes addition of the greater sage-grouse to the list of endangered/threatened species)

The Board of Directors approved this case on May 5, 2008. The greater sage-grouse (*Centrocercus urophasianus*) is the largest grouse species in North America: adult males can weigh over 7 pounds, grow to nearly 30 inches in length, and have a wingspan of 3 feet or more. This grouse species can be found in 12 U.S. states and 3 Canadian provinces and is entirely dependant upon sagebrush habitats for successful reproduction and winter survival. Since 1999, greater sage-grouse have been petitioned for listing under the Endangered Species Act ("ESA") at least seven times. Each petition effort resulted in a U.S. Fish and Wildlife Service ("FWS") finding that the species was not warranted for inclusion on the list of threatened or endangered species. The most recent finding, issued January 12, 2005, however, was the subject of legal challenge. **70 Fed. Reg. 2244 (Jan. 12, 2005)** (listing not warranted); **Western Watersheds Project v. United States Fish and Wildlife Service**, 535 F.Supp.2d 1173 (D.Idaho 2007).

In **Western Watersheds**, an environmental group sued challenging the FWS's decision that listing the sage-grouse as a threatened or endangered species was not warranted. On December 4, 2007, Judge Lynn Winmill held in favor of the environmental group and set aside the FWS's "not warranted" decision. *Id.* Specifically, Judge Winmill found that the process used by the FWS to reach its decision was fatally flawed because no record was kept of any of the scientific discussions. Without supporting information in the administrative record, according to the court, the final decision was unsubstantiated. *Id.* Further, the decision was one in which Deputy Assistant Secretary Julie MacDonald purportedly interfered with the listing process. *Id.* Ms. MacDonald's interference with FWS processes has been highly publicized and
resulted in the FWS revisiting several additional decisions, including the designation of critical habitat for Canada lynx.

In accordance with a stipulated schedule, the FWS is again opening for public comment the listing petitions for greater sage-grouse. 73 Fed. Reg. 10,218 (Feb. 26, 2008). Comments are due no later than May 27, 2008. A sage-grouse conservation assessment should also be made available for public comment in December 2008. Western Watersheds, No. 06-CV-277 (D.Idaho), Stipulation on Remand, Doc. No. 130. The FWS anticipates a final listing decision in May 2009. (Ron Opsahl) (08-6387)

**NAVAJO NATION v. UNITED STATES FOREST SERVICE**

(Constitutional Issues (Amicus) (U.S. Supreme Court, D.Ariz., No. 08-846)

(American Indians oppose the use of recycled effluent for snowmaking on religious grounds)

This case was approved by the Board of Directors on November 5, 2007. The Arizona Snowbowl is a ski area on Humphrey’s Peak, near Flagstaff, Arizona. After preparing an Environmental Impact Statement (“EIS”), the United States Forest Service approved a proposed expansion of Snowbowl’s facilities, one component of which enables Snowbowl to make artificial snow from recycled sewage effluent.

Organized skiing has existed at Arizona Snowbowl since 1938. In 1977, the then-owner of Snowbowl requested authorization to clear 120 acres of new ski runs and to do additional development. In 1979, after preparing an EIS, the Forest Service authorized clearing of 50 of the 120 requested acres, construction of a new lodge, and some other development. An association of Navajo medicine men, the Hopi tribe, and two nearby ranch owners brought suit under, *inter alia*, the Free Exercise Clause of the First Amendment and the National Environmental Policy Act (“NEPA”), but, ultimately, the D.C. Circuit upheld the Forest Service’s decision. *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

Snowbowl has always depended on natural snowfall. In dry years, the operating season is short, with few ski able days and few skiers. The driest year in recent memory was 2001–2002, when there were 87 inches of snow, 4 skiable days, and 2,857 skiers. In another dry year, 1995–1996, there were 113 inches of snow, 25 skiable days, and 20,312 skiers. By contrast, in wet years, there are many skiable days and many skiers. For example, in 1991–1992, there were 360 inches of snow, 134 skiable days, and 173,000 skiers; in 1992–1993, there were 460 inches of snow, 130 skiable days, and 180,062 skiers; in 1997–1998, there were 330 inches of snow, 115 skiable days, and 173,862 skiers; and, in 2004–2005, there were 460 inches of snow, 139 skiable days, and 191,317 skiers.

ASR, the current owner, purchased Snowbowl in 1992 for $4 million. In September 2002, ASR submitted a facilities improvement proposal to the Forest Service. In February 2004, the Forest Service issued a Draft EIS and, in February 2005, a Final EIS (“FEIS”) and Record of Decision (“ROD”). The ROD approved “Alternative Two” of the FEIS, the alternative preferred by Snowbowl. Alternative Two included development of snowplay and snow tubing area, construction of a high-speed ski lift, relocation and upgrading of three existing lifts, addition of 66 new acres of skiable terrain, recontouring of 50 acres of trails, recontouring and development of a 3-acre beginners’ area, renovation of an existing lodge, and construction of a new lodge.
Alternative Two also included a proposal to make artificial snow using treated sewage effluent; that is, waste-water discharged by households, businesses, and industry that has been treated for certain kinds of reuse. The City of Flagstaff would provide Snowbowl with as much as 1.5 million gallons per day of treated sewage effluent from November through February. A 14.8-mile pipeline would be built between Flagstaff and Snowbowl to carry the treated effluent. At the beginning of the ski season, during November and December, Snowbowl would cover 205.3 acres of Humphrey’s Peak with artificial snow to build a base layer. Snowbowl would then make additional artificial snow, using treated effluent, as necessary during the rest of the season, depending on the amount of natural snow.

The San Francisco Peaks in the Coconino National Forest, and Humphrey’s Peak in particular, have purported religious significance to numerous American Indian Tribes. Due to the perceived desecration of their religious sites, several Indian Tribes, individual Indians, and environmental groups brought suit against the Forest Service for its approval of Snowbowl’s expansion and use of recycled effluent. Navajo Nation v. United States Forest Service, 408 F.Supp.2d 866 (D. Ariz. 2006); rev’d 479 F.3d 1024 (9th Cir. 2007), en banc review granted 2007 WL 3010747 (9th Cir. No. 06-15371, Oct. 17, 2007).

The Ninth Circuit did not call for additional briefing on the merits of the en banc petition; however, pursuant to the appellate rules, on November 7, 2007, MSLF filed a motion for leave to file an amicus brief in support of the U.S. Forest Service and ASR.

Also, on November 7, 2007, the National Ski Areas filed a motion for leave to file an amicus brief. On November 23, 2007, the motions for leave to file amicus briefs were granted. In its brief, MSLF argued that the Religious Freedom Restoration Act (“RFRA”) is an unconstitutional overstep by Congress and thus places unlawful burdens on private business endeavors that require a federal permit and that the application of RFRA impermissibly favors the practice of religion by certain religious groups over the beliefs of others. Oral arguments were held on December 11, 2007.

On August 8, 2008, the Ninth Circuit, sitting en banc, overturned the ruling of the Court’s three-judge panel and upheld the decision of the U.S. Forest Service permitting Arizona Snowbowl to make snow using recycled wastewater. A petition for writ of certiorari would be due on November 8, 2008. On October 3, 2008, the Board of Directors approved the filing of amicus briefs at the Supreme Court if certiorari is filed.

The Navajo Nation requested an extension of time, until December 8, 2008, in which to file a petition for writ of certiorari was requested and granted, and then a second extension until January 5, 2008, was requested and granted. At the request of respondents, Arizona Snowbowl, MSLF will not file an amicus brief at the petition stage, but will file one if certiorari is granted.

On January 5, 2009, the Navajo Nation filed its petition for writ of certiorari. The response in opposition was due on February 6, 2009, but the Court extended the time for the filing of responses until March 9, 2009, and then to April 8, 2009. On February 6, 2009, amicus briefs were filed by Religious Liberty Law Scholars; Friends Committee on National Legislation, et al.; and National Congress of American Indians, et al. (Scott Detamore) (02-5179)
State of NEW MEXICO ex rel. GOVERNOR BILL RICHARDSON v. BLM/
NEW MEXICO WILDERNESS ALLIANCE v. LINDA RUNDELL
(Access to Federal Land) (Counsel for Defendant-Intervenor IPANM)
(Tenth Cir., N. Mex., Nos. 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 (No. 05cv460) and New Mexico Wilderness Alliance, et al. v. Linda Rundell, et al. [federal defendants] (No. 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.

On September 1, 2005, the Conservation plaintiffs and the State of New Mexico filed responses to the Public Lands Commission’s motion to intervene. 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, however, 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, and on May 17, 2006, an evidentiary hearing on the aplomado falcon was held. On August 14, 2006, the IPANM filed supplementary authority, Northern Alaska Envl. Center v. Kempthorne, __ F.3d __, 2006 WL 2061246 (9th Cir. 2006), a recent Ninth Circuit decision that provides further support for IPANM’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 the 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 their reply.
On November 22, 2006, the federal government filed its notice of appeal of the Court's order of September 27, 2006 (No. 06-2351), and on November 27, 2006, the IPANM (No. 06-2352) and the Conservation plaintiffs (No. 06-2353) filed notices of appeal. The IPANM appealed 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 (No. 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, the State of New Mexico, Conservation plaintiffs, and BLM filed jurisdictional memoranda. On January 5, 2007, the Tenth Circuit issued an order in response to the memoranda, holding that the notices of appeal were 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 had disposed of those motions.

On January 11, 2007, the District Court denied the motions for reconsideration. On January 18, 2007, the Conservation plaintiffs filed notice of those decisions with the Tenth Circuit.

On February 2, 2007, the Court lifted the order of abatement and reactivated the cases, setting principal opening briefs due on March 14, 2007. On February 28, 2007, a mediation conference was held and the briefing schedule extended by 21 days. After subsequent extensions by the Court, the opening brief for the intervention appeal and principal opening briefs for the merits appeal were due on September 13, 2007.

On August 24, 2007, the federal appellants moved for voluntary dismissal of their appeal (No. 06-2351). On September 5, 2007, the Court granted voluntary dismissal of the federal government's appeal.

On September 13, 2007, IPANM filed its opening briefs on the merits and in its intervention appeal. On November 20, 2007, the state plaintiffs filed their opening brief and their response brief on the cross-appeal, and the Conservation plaintiffs filed their opening brief and their response brief on the cross-appeal. On December 20, 2007, the federal defendants filed their brief on cross-appeal, which was deemed deficient, and was then refiled on December 28, 2007.

On February 4, 2008, IPANM filed its response/reply brief. On February 7, 2008, the Conservation plaintiffs filed a motion for extension of time until March 11, 2008, to file their reply brief. On February 8, 2008, the state plaintiffs filed a response supporting that motion and asking that the deadline for filing their reply also be extended if the Conservation plaintiffs'
motion is granted. On February 13, 2008, the Court granted the extension for all appellees/cross-appellants.

On March 11, 2008, both State plaintiffs and Conservation plaintiffs filed reply briefs. The Conservation plaintiffs also filed a supplemental appendix, for which the motion for leave to file was granted on March 12, 2008.

Oral arguments were heard on September 24, 2008, in Denver. (Ron Opsahl) (Mentor: Haas) (Local Counsel: Jason Bowles) (04-5420)

**NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE v. HOLDER**
(Limited and ethical government) (Amicus) (U.S. Supreme Court, W.D. Tex., No. 08-322)
(Utility district challenges the constitutionality of Section 5 of the Voting Rights Act)

On October 3, 2008, the Board of Directors approved this case in which MSLF is supporting a challenge to the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, as reauthorized by the “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006,” Pub. L. No. 109-246. Section 5 has been in place, unchanged, for 41 years. Though its constitutionality was upheld in 1966, of the three previous reauthorizations only the 1975 reauthorization was challenged and upheld. The current, and fourth, reauthorization is for 25 years. A Board Approval Request proposing that MSLF challenge this fourth reauthorization was tabled by the Board of Directors in June 2007.

The Northwest Austin Municipal Utility District No 1 (“the District”) is a political subdivision of Texas, located within the boundaries of the City of Austin and Travis County but independent of both. The District performs certain governmental functions including bond issuance for infrastructure construction and assessment of taxes to service bond debt. Because the entire State of Texas is a “covered jurisdiction” under Section 5, so too is the District.

The District challenged Section 5, as reauthorized by the 2006 Act. A three judge panel of the U.S. District Court for the District of Columbia held Section 5 constitutional as reauthorized. The District appealed directly to the Supreme Court, as required by statute (because it also had asked a three judge panel to determine that the district could “opt out” of Section 5 coverage, which was denied as well). On September 8, 2008, the District has filed its Jurisdictional Statement with the Supreme Court, and amicus curiae briefs regarding that Statement are due on October 10, 2008.

Section 5 is, perhaps, the most intrusive piece of legislation into State sovereignty that this Nation has ever seen. It provides that any “covered jurisdiction” must submit any new voting “standard, practice, or procedure” for preclearance by the United States Attorney General, who must clear the proposed change unless it would lead to “retrogression” in the position of racial minorities with respect to their effective exercise of the electoral franchise. That is, the Attorney General must ensure that “such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.” Indeed, Section 5 was made even more intrusive in the 2006 reauthorization because it overrules two Supreme Court cases that sought to limit its reach.

In its Statement, the District asserts that Congress’s reauthorization of Section 5 relied on generalized findings that did not specifically identify evidence of continuing discrimination in

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covered jurisdictions or take into account that discriminatory conditions may now exist in jurisdictions that are not covered by Section 5. Moreover, argued the District, the conditions that caused Texas to be covered by Section 5 have long been remedied or are not sufficiently severe to merit such a severe remedy. Nonetheless, Texas and every one of its political subdivisions continue to be covered by Section 5.

The Section 5 preclearance process is costly and burdensome and applies to even the most minute of changes. For example, Section 5 applies, not only to large changes in statewide redistricting, but also to plans by a local political unit to move a polling place across the street from a church to a school. In addition to the cost of the submission, most proposed changes are delayed by at least 60 days awaiting approval. Virtually all submissions are precleared on or close to the last day of the 60-day period allowed. Moreover, because of the cost and delay involved in submitting a request for preclearance, governmental units must weigh the benefit of a proposed change against the significant cost of seeking the Attorney General’s approval; thus, routine and beneficial changes are not made because of the cost and delay of asking the Attorney General’s permission.

If the Attorney General files an objection to a requested change, the burden is on the covered jurisdiction to devise another plan and again submit it and wait for another determination. Although the Attorney General almost never objects to proposed changes in local voting practices or procedures, the process imposes substantial costs on local government units that can be measured not only in monetary costs, but also in terms of the federal government’s infringement on the sovereignty interests of State and local governments. This process represents a vast waste of public monies and resources, but usually results in preclearance after an unnecessary but inevitable delay.

On October 10, 2008, MSLF filed its amicus brief. On November 26, 2008, both the Attorney General and appellees intervenors Texas State Conference of NAACP, et al., filed motions to affirm the District Court panel’s decision.

The jurisdictional statement was considered at the conference of January 9, 2009, and on January 12, 2009, the Court decided to hear the case.

On February 19, 2009, Northwest Austin District Number One filed its opening brief. On February 25, 2009, an amicus brief was filed by the Scharf-Norton Center for Constitutional Litigation Goldwater Institute. On February 26, 2009, amicus briefs were filed by Dr. Abigail Thernstrom and Former Justice Department Officials; Honorable Bob Riley, Governor of Alabama in support of neither party; Nathaniel Persily, Stephen Ansolabeher, and Charles Stewart III in support of either party; Georgia Governor Sonny Perdue; Pacific Legal Foundation, et al.; Mountain States Legal Foundation; and Southeastern Legal Foundation.

Oral arguments are scheduled for April 29, 2009. (Scott Detamore) (08-6469)
PENNACO ENERGY CO. v. EPA, WYOMING v. EPA, PENNACO ENERGY v. EPA, ANADARKO PETROLEUM CO. v. EPA

(Private Property) (Amicus) (D.Wyo., Nos. 06cv-100, -228, -229, -235)
(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 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 (“MBER”) 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 MBER 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.

On April 25, 2006, Pennaco Energy Company, Marathon Oil Company, and Devon Energy Corporation filed suit in Wyoming federal district court against MBER 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 (No. 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 (No. 06cv229). On September 19, 2006, Anadarko Petroleum Corporation filed a similar suit against the EPA (No. 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 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 amici 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 coal-bed 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. On August 7, 2007, the Court extended the stay until October 1, 2007. On October 12, 2007, the Court extended the stay until November 30, 2007.

On December 20, 2007, respondent-intervenor Tongue River Water Users’ Association notified the Court of the Montana State Court’s decision in Pennaco v. Montana Board of Environmental Review, supra, in which that Court held the State’s rulemaking to be lawful.

On January 11, 2008, the parties submitted a status report. On November 21, 2007, the State of Wyoming had distributed a refined list of potential principles of agreement to the respective counsel for review and comment by all interested stakeholders. On January 4, 2008, the status report states that the Governor of Montana has indicated he will not sign those principles in their current form. On January 8, 2008, representatives from Wyoming, Montana, and the EPA discussed whether future negotiations are warranted. Officials from Montana will meet with the Governor to determine if Montana will continue discussions with Wyoming and the EPA.

On April 17, 2008, the petitioners jointly filed an unopposed motion for leave to file an amended and consolidated petition for review. The main purpose of this amended petition is to update the pleadings to account for the fact that in a letter dated February 29, 2008, from the EPA Regional Administrator, the EPA approved MBER’s water quality standards. The amended petition also includes the grounds for the challenge to the water quality standards, consistent with the Court’s August 29, 2006, order that the parties define the issued to be raised. On April 23, 2008, the Court granted the motion to file the amended, consolidated petition for review.

On June 23, 2008, the federal government filed two administrative records. On June 27, 2008, the industry petitioners/petitioner-intervenors, in light of the failure of mediation, filed a request for a status conference, which they assert is essentially unopposed, the purpose being to discuss the recently filed amended pleadings and to set a briefing schedule.

On July 9, 2008, the Court set a scheduling conference for July 31, 2008, in Cheyenne. On July 15, 2008, Plaintiff-Intervenor Anadarko filed a motion to file an amended and consolidated petition for review. On July 16, 2008, the Court granted the motion. On July 28, 2008, the scheduling conference was vacated and Judge Brimmer will reschedule that conference at a later date.

On December 12, 2008, the industry petitioners filed a request for the scheduling of a status conference in order to set a briefing schedule. On January 16, 2009, the Court set a case scheduling conference for March 2, 2009.

At the scheduling conference held on March 2, 2009, the Court set opening briefs due on April 15, 2009, answer briefs due May 29, 2009, and a hearing on July 9, 2009. (Ron Opsahl) (Mentor: Joscelyn) (05-5743)

**RICCI v. DESTEFANO**

(Constitutional Issues) (Amicus) (Supreme court, 2nd Cir., Conn., No. 08-328)

(To racially balance work force, City, lacking evidence of discrimination, refused to fill jobs)

This case was approved by the Board of Directors on February 13, 2009. In 2003, the City of New Haven, Connecticut, sought to fill captain and lieutenant vacancies in its fire department. The City Charter required that job-related examinations and merit-selection rules determine who is qualified for promotion. Petitioners in this case, all white with one Hispanic, are those who passed the examinations and were qualified for promotion to those positions. The examinations consisted of a written job-knowledge examination followed by a comprehensive, structured oral assessment of the applicant’s skills and abilities to command others in emergency responses. The examinations were created by a company that specializes in creating job-related, non-discriminatory examinations that do not disproportionately exclude minority applicants. In creating the examinations, the company solicited comments from fire departments in other areas and consulted with the Fire Chief and Assistant Chief, the latter being African American. Individuals from outside the department were brought in to judge the oral evaluations, and the examining panels had appropriate minority members.

The results were not acceptable to the City because the process did not produce any African American candidates for captain or lieutenant. Therefore, the City voted 2-2 (the tie-breaking vote having recused himself) not to certify the examinations and not to fill the positions, thus refusing to appoint the Petitioners, who were qualified by the examinations.

Four hearings were held to determine what to do about the disproportionate results. Both Mr. Ricci, the lead plaintiff, who scored highest on the exams, and others called for a validation test to be performed, but the City refused. Moreover, the City had no evidence before it that the examination was in any way invalid. Great care had been taken to assure that the examination was job related, that it produced qualified applicants who were promoted on merit, and that it did not discriminate in any way against minority candidates. Although three “experts” testified at the hearings, no credible evidence was presented to suggest the testing was not completely...
adequate. Moreover, no credible evidence was presented that some other alternative to
determine qualifications, which would not produce a disparate impact, was available. In any
event, any such alternative would have violated the City Charter. Finally, no evidence was
presented of intentional discrimination in any phase of the examinations or otherwise within the
fire department.

The District Court held the City’s actions constitutional. It stated that the City was
concerned that the test would have “a statistically adverse impact on African-American and
Hispanic examinees,” would “undermine [the City’s] goal of diversity in the Fire Department,”
“would fail to develop managerial role models for aspiring firefighters, . . . would subject the
City to public criticism,” and “could subject . . . the City ‘s leadership to political consequences.”
The District Court found for the City for two basic reasons: (1) a “good-faith” attempt to comply
with Title VII is a defense against race-conscious action, and (2) no race-conscious action took
place because all candidates were treated the same—no one was promoted and the positions were
not filled.

On appeal, the Second Circuit panel issued a Summary Order, having no precedential
effect, and a statement that it substantially agreed with the decision of the District Court. Shortly
thereafter, a Second Circuit judge, sua sponte, called for a vote on en banc determination. After
that call, but before the vote, the panel issued a per curiam decision, which was identical to the
Summary Order, except that the word “substantially” was struck from the phrase “substantially
agreed.” The Second Circuit then denied en banc rehearing by a vote of 7-6. Judge Jorge
Cabrantes, writing for the six dissenters, stated that this was a serious case, with difficult and
complex issues not decided previously, and arguing that the action of the City was overtly racial
in character and might constitute a quota system.

On September 8, 2008, Mr. Ricci and other firefighters filed a petition for writ of
certiorari. The petition was granted on January 9, 2009, and the case consolidated with No. 07-
1489 dealing with related procedural issues. Mr. Ricci filed petitioners’ opening brief on
February 19, 2009. On February 24, 2009, an amicus brief was filed by Concerned American
Firefighters Association, Philadelphia Chapter. On February 25, 2009, amicus briefs were filed
by the Cato Institute; Pacific Legal Foundation, et al.; and Kedar Bhatia. On February 26, 2009,
amicus brief were filed by Mountain States Legal Foundation; the United States (supporting
vacatur and remand); Claremont Institute Center for Constitutional Jurisprudence; Eagle Forum
Education & Legal Defense Fund; American Civil Rights Union; Bridgeport Firefighters for
Merit Employment, Inc.; Anti-Defamation League; Joe Oakley, et al.; National Association of
Police Organizations; Law Professors and Other Academics; and Center for Individual Rights, et
al.

In its amicus brief, MSLF argued that government may not take race-conscious action
without strong evidence of intentional, invidious discrimination by that body to provide a
compelling interest, even in the context of disproportionate impact discrimination under Title
VII. (Scott Detamore) (Mentor: John Runft) (09-6561)
SAN LUIS VALLEY ECOSYSTEM COUNCIL v. U.S. FISH & WILDLIFE SERVICE
(Environmental Laws) (Amici)(D.Colo., No. 07cv945)
(Property owners seek to develop energy on their lands)

This case was approved by the Board of Directors on June 8, 2007. In 1860, in exchange for a 500,000-acre Spanish grant, Congress conveyed to Luis Maria Cabeza de Baca five land grants. Grant Numbers 1 and 2 were in New Mexico, Numbers 3 and 5 in Arizona, and Number 4, the subject of this case, in the San Luis Valley of Colorado. Baca Grant Number 4 was composed of 100,000 acres and the last of the five grants to remain in private possession.

In 2003, what became known as the Baca Ranch (the remnants of Baca Grant Number 4) was conveyed to the Nature Conservancy by the Cabeza de Vaca Land and Cattle Company. Only the surface estate passed by this conveyance because the mineral estate had been severed at some point during the property’s ownership. In 2004, the Nature Conservancy conveyed the Baca Ranch to the United States and the Ranch became part of the Baca National Wildlife Refuge. Despite the conveyance of the surface estate to the United States, the mineral estate remains in private ownership; 100 percent of the hard minerals and 75 percent of the oil and gas estate are owned by Toronto-based Lexam Explorations, Inc., and the remaining 25 percent of the oil and gas estate is owned by Conoco Phillips.

Between 1992 and 1995, Lexam drilled several exploration wells on the Baca Ranch that contained “strong” showings of oil and gas. Between 1996 and 2004, Lexam collected or otherwise acquired, processed, and interpreted seismic data covering the Baca Ranch area. According to Lexam, this data supports further exploration drilling on the Baca Ranch. On April 3, 2007, the Colorado Oil and Gas Conservation Commission granted Lexam a permit to drill two wells on the Baca Ranch.

On May 8, 2007, the San Luis Valley Ecosystem Council, an environmental group, filed suit against the United States Fish and Wildlife Service. The environmental plaintiff alleges that FWS is required by the National Environmental Policy Act (“NEPA”) to conduct an environmental analysis before the FWS could “permit” surface occupancy by Lexam. The FWS purportedly takes the position that, because the FWS may not prohibit mineral development, NEPA analysis is not required. With its suit, the environmental group seeks an injunction barring the FWS from permitting Lexam’s surface use until such time as a NEPA analysis has been conducted. On June 1, 2007, Lexam filed a motion to intervene. The FWS’s Answer to the Complaint was due on July 13, 2007; however, the Court set a preliminary scheduling conference for August 16, 2007.

MSLF intends to file an amicus curiae brief on behalf of itself and its members in support of the FWS and the private mineral estate owners. MSLF would argue that NEPA does not apply to situations in which the mineral estate is owned by private parties, even though the surface estate is owned by the United States. In such cases, the United States stands in no greater position than any other landowner and may not impose conditions beyond that of “reasonable” surface occupancy. Moreover, the United States, as proprietor, may not prescriptively impose restrictions upon the reasonable use of the surface estate and, instead, must rely, as would any other surface owner, upon the statutory and common law remedies available (such as injunctive relief and/or damages) after a mineral holder “unreasonably” burdens the surface estate.
On June 19, 2007, Lexam filed a motion to withdraw its motion to intervene, and, on that same date, the Court granted the motion.

On July 18, 2007, the FWS filed a motion for remand of the agency decision at issue to the FWS for further consideration so that the FWS can comply with NEPA and the implementing CEQ regulations. The Ecosystem Council was reported not to oppose the remand in principle but to oppose the legal basis of the motion and the relief requested, though in a response filed later it indicated a number of disagreements with the legal basis for remand.

On August 16, 2007, a scheduling conference was held at which the motion for remand was discussed but not disposed of. The administrative record is to be submitted by August 31, 2007, and the Ecosystem Council’s opening brief by October 1, 2007. On August 17, 2007, the FWS filed its answer. On August 21, 2007, the FWS filed a motion for stay of all proceedings pending disposition of its motion for remand. On August 23, 2007, the Ecosystem Council filed its opposition to the motion for stay and motion for remand.

On September 21, 2007, the Magistrate Judge stayed the briefing schedule pending disposition of the outstanding motion for remand. The Court agreed, however, with the Ecosystem Council’s contention that production of the administrative record is necessary for the Court to determine whether voluntary remand is appropriate. Therefore, the Court ordered production of the record by October 1, 2007.

On September 26, 2007, the FWS appealed the Magistrate’s decision to District Court Judge Walker Miller, objecting to that part of the decision that requires the FWS to produce the administrative record. The FWS asserts that the record as is now stands is what was used to take the action objected to in the Complaint and that if the motion for remand is granted that record will be obsolete. Also on September 26, 2007, the Ecosystem Council filed its objection to FWS’s appeal. On October 2, 2007, the FWS filed its reply.

On November 28, 2007, the District Court ordered that remand is appropriate and that judicial efficiency is served by maintaining jurisdiction pending completion of the NEPA process. The Court ordered the government to file a status report by February 15, 2008, setting forth its compliance with NEPA and its regulations concerning the oil and gas exploration proposed by Lexam in the Baca NWR. It ordered the parties to file a status report by February 29, 2008, setting forth their positions as to whether the litigation should continue and, if so, in what manner. It then administratively closed the case. On February 15, 2008, the FWS filed a status report describing the agency’s NEPA activities. A draft EA has been completed and was available for public comment until March 3, 2008. MSLF filed comments on February 27, 2008.

On February 26, 2008, the parties filed a joint status report stating that after comments are received and analyzed, FWS will determine whether a Final EA, FONSI, and ROD can be issued or whether further NEPA analysis is required before FWS can issue a decision regarding Lexam’s proposed oil and gas exploration project.

On May 9, 2008, the parties filed a status report stating that the comments and public meeting minutes on the draft EA are being compiled and a decision will be made on whether a Final EA could be issued or more NEPA analysis is required. On October 22, 2008, the FWS released its Final EIS and a FONSI concerning Lexam’s proposed oil and gas activities.

On November 3, 2008, the Ecosystem Council filed a motion to reopen litigation and for a status conference. It maintained that the Final EA/FONSI does not comply with NEPA and
that its issuance constitutes good cause for reopening this administratively closed case. The Council indicated that it wishes to supplement its complaint to challenge the lawfulness of the NEPA process, is considering whether or not to bring Lexam into the litigation, and indicates that other parties may seek to join the litigation as Plaintiffs. The Council is actively considering the possibility of filing a TRO/PI motion to maintain the status quo during litigation.

On December 4, 2008, the Ecosystem Council filed a motion for permanent injunction barring USFWS reliance on the Final EA/FONSI in approving oil and gas operations of Lexam.

On February 5, 2009, the Court set a status conference for February 11, 2009. On February 6, 2009, the FWS filed its response to the Ecosystem Council’s motion to reopen litigation, stating that it did not oppose the motion. At the status conference the Court granted the Ecosystem Council’s motion to reopen litigation and its motion to supplement its complaint, with the amended complaint due by March 30, 2009, and the response due 30 days thereafter. It also granted Lexam’s oral motion to intervene. The issue of recusal was discussed and the Court ordered the parties to file their positions on recusal by February 18, 2009. The Court also ordered a supplement to the motion for preliminary injunction to be filed by February 23, 2009, the response to the supplement to be filed 30 days thereafter, and the reply 15 days thereafter.

On February 13, 2009, the parties filed a stipulation under which, until July 31, 2009, Lexam will cease all activities on the Lexam Road in the Baca Refuge, will not begin road or well pad construction related to Baca #5, #6, or #7, and will remove all construction equipment from the Refuge within 15 days, and the parties shall proceed with litigation of Plaintiff’s motion for a preliminary injunction.

On February 18, 2009, all the parties indicated no objection to the continuation of Judge Miller as presiding judge in the case. On February 23, 2009, the Ecosystem Council filed an amended motion for preliminary injunction. (Ron Opsahl) (07-6165)

(Constitutional Issues) (Counsel for Intervenor or Amicus Elko County)
(9th Cir., No. 09-15230; D.Nev., No. 08cv00616)
(Indian tribes do not have a veto right on productive uses of public lands)

This case was approved by the Board of Directors on February 13, 2009. Barrick Cortez, Inc. (“Barrick”), manages the Cortez Joint Venture, a gold mining and processing operation in Lander County, Nevada, approximately 24 miles south of Beowawe, Nevada. Prior to December 2005, Barrick proposed to the Bureau of Land Management (“BLM”) an expansion to the Cortez Joint Venture. The proposal would allow Barrick to expand two existing pits, develop one new pit, mine underground, construct two new heap leach pads and processing facilities, expand two existing waste rock disposal areas, construct three new waste rock disposal areas, expand an existing mill, expand an existing tailings facility, construct an overland conveyor and associated crusher and stockpile, and relocate portions of two county roads and a transmission line. The expansion would involve approximately ten years of active mining, followed by as many as three years of ore processing, site closure, and reclamation. It would occur primarily on BLM-managed public lands, with a small portion occurring on Barrick’s private property. The
expansion would allow the recovery of approximately eight million ounces of gold and create more than 800 jobs.

The BLM permitting process began on December 2, 2005, when BLM published a Notice of Intent to Prepare an EIS for the Project. In response to public comments during the Draft EIS period, the Final EIS issued October 3, 2008, included a new alternative, the Revised Cortez Hills Pit Design Alternative, which the BLM would select as its Preferred Alternative. The BLM subsequently issued The ROD, issued on November 12, 2008, approved the mining plan of operations.

Also, on November 12, 2008, Barrick announced a Collaborative Agreement with several local Western Shoshone communities. The Agreement improves education, business, and employment opportunities for the Western Shoshone and funds scholarships tied to mine revenues. Barrick Cortez, Inc., Press Release, Barrick Receives Record of Decision (Nov. 12, 2008).

On November 20, 2008, the South Fork Band Council of Western Shoshone of Nevada, a California branch of the Shoshone tribe; Timibisha Shoshone Tribe; Western Shoshone Defense Project; and Great Basin Mine Watch filed suit against the BLM alleging violations of NEPA, FLPMA, federal trust responsibility to Indians, and RFRA (D.Nev., No. 08cv00616). The RFRA claims are based on the fact that the site of the proposed expansion, Mount Tenabo, has purported religious significance to the Western Shoshone. On November 24, 2008, Barrick filed a motion to intervene, which was granted on December 5, 2008.

On November 24, 2008, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction. Thereafter, the parties entered into a joint stipulation to allow some work to progress at the mine site pending a hearing on the motion for preliminary injunction, which occurred on January 20, 2009. On January 26, 2009, the District Court denied the motion for preliminary injunction. On February 6, 2009, Plaintiffs filed a notice of appeal to the Ninth Circuit (No. 09-15230). Their emergency motion for an injunction pending appeal was denied by the Ninth Circuit on February 18, 2009. The opening brief is due on March 6, 2009, the answer brief is due April 3, 2009, and amicus briefs in support of the BLM and Barrick are due on about April 10, 2009.

MSLF will seek to file an amicus curiae brief on behalf of Elko County at the Ninth Circuit. On remand to the District Court, MSLF will represent Elko County, Nevada, in an attempt to intervene. (Jim Manley) (Mentor: Alan Joscelyn) (08-6513)

SOUTH WEST SAND & GRAVEL, INC. v.
CENTRAL ARIZONA WATER CONSERVATION DISTRICT
(Free Enterprise) (Amicus)(Arizona Supreme Court, Ariz. Ct. App. No. 1 CA-CV 07-0435)
(A State water conservation district is not immune if it damages a lawful business)

This case was approved by the Board of Directors on February 13, 2009. South West Sand & Gravel, Inc. ("SWS&G"), an Arizona corporation, owns two small sand and gravel mines on properties near the former Agua Fria River in Maricopa County, Arizona. Since construction of the Waddell Dam in the 1920s, the river channel near SWS&G's properties has been substantially dry. As a result, at the time SWS&G bought the properties in 1997 and
commenced mining operations, the natural groundwater level was very deep, thus permitting mining of sand and gravel far beneath the surface.

The Central Arizona Water Conservation District ("CAWCD") manages the Central Arizona Project ("CAP"), which delivers water from the Colorado River to Arizona’s largest cities. In 1999, CAWCD obtained permits from the Arizona Department of Water Resources ("ADWR") to begin a groundwater "recharge" project on the Agua Fria River near SWS&G’s properties. In the project, a manmade diversion structure transports surplus CAP water into the dry riverbed, and the water is then allowed to flow downstream for four miles, during which time it infiltrates the riverbed and the underlying soil. At the end of the four-mile stretch, a manmade headworks and concrete-lined canal diverts and conveys the remaining water from the active channel to a number of unlined storage basins. The storage basins, in turn, confine the water and force it to seep into the soil. The SWS&G property is about 700 feet south of this storage basin.

Diverting vast amounts of water into the river and then preventing the water from flowing downstream has raised the water table near the SWS&G properties, and, as a result, subsurface water has infiltrated SWS&G's sand and gravel pits and flooded the resources therein, making mining in the small pits prohibitively costly. Evidence introduced in the trial court indicates a rise in the water table of approximately 150-200 feet on the SWS&G properties as a result of the recharge project, and SWS&G's pits have been continuously or intermittently flooded since at least October 2003. As a result, SWS&G was forced to abandon all mining operations in September 2004.


On November 10, 2008, the Arizona Court of Appeals affirmed the trial court decision, and SWS&G filed a motion for reconsideration. If this motion is denied, SWS&G intends to file a Petition for Review with the Arizona Supreme Court, and MSLF would file an amicus brief in support of SWS&G. (Joel Spector) (Mentor: Stewart Wilson) (08-6356)

**STUDENTS FOR CONCEALED CARRY ON CAMPUS v. REGENTS OF THE UNIVERSITY OF COLORADO**

(Constitutional Liberties) (Counsel for SCCC, Martha Altman, Eric Mote, John Davis)

(El Paso District Court, Colo., No. 2008CV6492)

(Students challenge university's ban on licensed carrying of concealed firearms on campus)

This case was approved by the Board of Directors on October 3, 2008. In 1994, under the auspices of their general supervisory authority, the Regents of the University of Colorado adopted a policy banning the possession of firearms, explosives, or other dangerous or illegal weapons on or within any University of Colorado campus, leased building, other area under the jurisdiction of the local campus police department or areas where such possession interferes with the learning and working environment. Regents Policies, 14-1 (March 1994); available at https://www.cu.edu/regents/Policies/Policy141.htm

In 2003, Colorado Senate Bill 03-24 was enacted to remedy inconsistencies among jurisdictions regarding permits to carry concealed firearms. The Concealed Carry Weapons Act declares a statewide purpose, creates standards for permits to carry concealed weapons, adopts a
narrow list of exclusions where the Act does not control, and prohibits local governments from enforcing contradictory laws and policies. Colo. Rev. Stat. §§ 18-12-201 to -216.

Shortly after enactment of the Act the University of Colorado Regents sought then-Attorney General Ken Salazar’s opinion as to whether the Regents could continue to enforce their weapons ban. See Op. Atty. Gen., No. 03-3 (June 17, 2003); available at http://www.ago.state.co.us/pr/061703pr.pdf. Attorney General Salazar concluded the CCW Act did not preempt the Regents’ authority to regulate weapons and concealed carry on campus.

MSLF will challenge the Regents’ policy banning concealed firearms on campuses of the University of Colorado on behalf of Students for Concealed Carry on Campus (“SCCC”) and Martha Altman, Eric Mote, and John Davis, who are now or recently have been students at the University of Colorado. SCCC is a national grassroots advocacy group organized in 2007 to fight weapons bans like that of the University of Colorado.

On December 11, 2008, MSLF filed the lawsuit. On January 30, 2009, the defendants filed a motion to dismiss for failure to state a claim. On February 17, 2009, the SCCC filed its response to the motion to dismiss; defendants’ reply is due 7 days later, on about March 2, 2009.. (Jim Manley) (08-6494)

UNITED STATES v. ENO

(Access To Federal Land) (Counsel for Don Enro) (IBLA, 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 Enro 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. Enro at the hearing, and (2) to attempt to remove the legal impediments to Mr. Enro’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 May 24, 2002, and a P.L. 359 hearing held in Sacramento on June 3-7, 2002.

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 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 (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.

On February 13, 2007, the IBLA affirmed in part and reversed in part the ALJ decision and granted Mr. Eno permission to engage in placer mining. On March 14, 2007, MSLF filed Eno’s application for attorney fees and expenses and memorandum in support thereof. On April 20, 2007, the Forest Service filed its response. On May 7, 2007, Mr. Eno filed his reply in support of his application for fees and expenses under EAJA. (Steve Lechner) (Mentor: Ruffatto) (01-4807)

**UNITED STATES v. WYOMING AND COLORADO RAILROAD COMPANY**

(Private Property) (Counsel for Marvin M. Brandt Revocable Trust) (D.Wyo., 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 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 contended here." The Court consolidated the cases, with the government's case, 06cv184, as lead.

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.

On January 29, 2007, the Court issued an order setting the initial pretrial conference for February 22, 2007. On February 22, 2007, that conference was held and a scheduling order issued. The Court ordered the parties to exchange initial disclosures and comply with all other
requirements of Local Rules 16.1(a) and 26.1(c) by March 9, 2007. Also by that date the United States may file an amended complaint. The discovery cutoff date is July 2, 2007, by which all written discovery must be served and received and all discovery depositions must be completed. Proposals for stipulations as to facts (Local Rule 16.1(b)) must be exchanged by July 9, 2007. The parties shall simultaneously file cross-motions for summary judgment, together with briefs and affidavits in support thereof, by August 6, 2007, responsive briefs and affidavits by September 7, 2007, and reply briefs by September 21, 2007. The cross-motions for summary judgment shall be decided without oral argument. Finally, the parties stipulated to, and on February 28, 2007, the Court ordered, staying and bifurcating the takings claims pending resolution of the quiet title claims.

On March 9, 2007, the government filed an amended complaint, primarily to add additional defendants. Original defendants may either let their original answers stand or file new answers.

On July 13, 2007, Mr. Brandt filed a motion for a modification of the summary judgment briefing schedule under which cross-motions would be due on September 10, 2007. That motion was granted on July 19, 2007. On September 5, 2007, several defendants filed another motion for extension of time to file cross motions for summary judgment, which motion was granted on September 6, 2007.

On October 10, 2007, Mr. Brandt filed a motion for summary judgment, memorandum in support of the motion, and proposed findings of fact and conclusions of law. On that same date, the United States filed two motions for summary judgment and accompanying memoranda, the first motion on Mr. Brandt’s second counterclaim and the second on United States’ claims for a judicial declaration of abandonment and an order quieting title in favor of the United States.

On November 13, 2007, Mr. Brandt filed his response in opposition to the government’s motion for summary judgment. That same date, the government filed its response to Mr. Brandt’s motion for summary judgment and a proposed findings of fact and conclusions of law in regard to its motions for summary judgment. On December 4, 2007, the United States and Mr. Brandt filed replies in support of their motions for summary judgment. On December 21, 2007, Mr. Brandt filed a motion for oral arguments on the cross-motions for summary judgment.

On January 9, 2008, the United States filed a response to the motion for oral arguments stating, in essence, that it would follow the will of the Court in the matter.

On January 24, 2008, the Court entered judgment on claims of the United States, declaring abandonment and quieting title to the railroad right-of-way, against David and Marilyn Yeutter; Ray L. Waits, Juan and Susan Torres; Michael and Sally Palmer, Roger L. Morgan; Duane and Patricia King; Duane and Elizabeth Keeney; Donald and Wanda Graff; Marilyn Flint and Marjorie Secrest; Board of Commissioners of Albany County, Wyoming; and the Bunn Family Trust. On January 29, 2008, the Court entered judgment on claims of the United States, declaring abandonment and quieting title to the railroad right-of-way, against Ronald and Helen Yeutter. A number of defendants still remain in the case, although Marvin Brandt is the only defendant who has filed summary judgment against the government.

On April 8, 2008, the Court granted the government’s motion for summary judgment and denied Mr. Brandt’s motion for summary judgment. On April 9, 2008, the Court ordered the parties to submit a proposed judgment.
On April 18, 2008, Mr. Brandt filed a motion to transfer his third counterclaim (takings claim) to the U.S. Court of Federal Claims. Immediately thereafter, the government filed a motion to dismiss the third counterclaim for lack of subject matter jurisdiction and its opposition to the motion to transfer. The parties submitted a proposed judgment, as had been requested by the Court. On April 23, 2008, Mr. Brandt filed a response to the government’s motion to dismiss and in support of his motion to transfer the third counterclaim.

On January 14, 2009, the government filed two complex motions for entry of judgment, covering most of the remaining defendants in the case except for Mr. Brandt. On January 21, 2009, the government filed another such motion, covering the defendants in the Mountain Home area.

On March 2, 2009, at the instigation of government attorneys, a telephonic status conference was held at which the court was informed as to the status of the case. (Joel Spector) (Mentor: Hill) (06-5858)

[WESTERN VOTING DISTRICT] v. GONZALEZ
(Limited and Ethical Government) (Counsel for Western Voting District)
(U.S. District Court, [Western State] or D.D.C.)
(County challenges federal law that mandates bilingual ballots)

This case was approved by the Board of Directors on June 8, 2007. The Voting Rights Act ("VRA") of 1965, 42 U.S.C. § 1973aa, prohibited state and local governments from denying or abridging the right to vote "on account of race, color, or previous condition of servitude," a right guaranteed by the Fifteenth Amendment to the Constitution. It applied to political jurisdictions that had a history of denying to African Americans the right to register, vote, and run for office—"covered jurisdictions"—and was to be a temporary remedy.

In 1975, in § 203, Congress broadened the VRA to include special protections for "language minorities," specifically American Indians, Asian Americans, Alaskan Natives, and citizens of Spanish Heritage. Although, like other provisions of the VRA, these remedies were to be temporary, they were renewed in 1982, 1992, and 2007.

Under §§ 203(c) and 4(f)(4) of the VRA counties and other jurisdictions must provide multilingual election materials if one or more of the following conditions is met: (1) more than 5 percent of the jurisdiction's total voting-age citizens are members of a protected "language-minority" group; (2) the illiteracy rate of such language-minority group citizens is higher than the national illiteracy rate, or (3) more than 10,000 of the jurisdiction's voting-age citizens are members of a protected language-minority group. In 1980, there were covered jurisdictions in only 21 States; in 1992 there were 248 covered jurisdictions in 29 States; and, today, there are 296 covered jurisdictions in 30 States.

Meeting these § 203 requirements imposes substantial costs. In San Juan County, Utah, the cost of providing multilingual election materials for the 1996 election cycle was 64 percent of the County's total election budget. Bingham County, Idaho, spent more than four times as much on bilingual assistance in 1996 as it had in 1992. Failing to absorb these costs exposes counties to legal action by the U.S. Department of Justice. For example, in 2004, the Justice Department ordered Briny Breezes, Florida, to print notices for a local election in Spanish because the town is in a county covered by § 203. This order was issued even though Census
data show that 98 percent of the town’s residents are life-long U.S. citizens and 99 percent speak English “very well.” Moreover, in 2005, the Justice Department proudly announced that it had filed more bilingual ballot lawsuits in the previous 4 years than it had in the 26-year history of the VRA.

Language assistance settlement decrees imposed on local governments by the Justice Department require hiring of bilingual election workers, coincidently increasing the risk of election fraud, voter intimidation, and voter manipulation. In addition, many argue that, because individuals who wish to become citizens must speak English—a requirement since 1907—the only possible rationale for bilingual ballots, especially in Spanish, is to facilitate voting by illegal aliens.

MSLF would represent a Western U.S. county and/or its commission or another voting district in challenging whether, by requiring local governments to provide ballots in languages other than English, Congress has exceeded the authority granted to it by § 2 of the Fifteenth Amendment to the Constitution. (Scott Detamore) (07-6159)

State of WYOMING v. U.S. DEP’T OF AGRICULTURE
COLORADO ROADLESS RULE RULEMAKING
(Access To Federal Land) (Amicus) (Tenth Cir., No. 8061; D.Wyo., No. 07cv17)
(The State of Wyoming challenges reinstatement of the Clinton Roadless Rule)

On October 3, 2003, the Board of Directors approved the filing of an amicus curiae brief in defense of a district court’s decision overturning the Clinton Roadless Rule. State of Wyoming v. USDA, No. 01cv86 (D.Wyo. July 14, 2003) (MSLF File No. 03-5315). 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. 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, 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.”

On July 14, 2003, the Wyoming federal district court issued a nationwide permanent injunction against the Roadless Rule. The Forest Service declined to appeal the ruling and the
environmental groups appealed. On May 5, 2005, one day after the Tenth Circuit heard oral arguments 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 Forest Service and the State Petition Rules. California v. U.S. Department of Agriculture, Nos. 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 (No. 06-16810). On October 6, 2006, the Board of Directors approved the filing of an amicus brief in support of Silver Creek Timber Co.

On October 31, 2006, Silver Creek filed a motion for voluntary dismissal of its appeal. Because the environmental groups had dropped their opposition to the timber sales, choosing to focus instead on fighting oil and gas leasing, Silver Creek no longer had any interests at stake. On December 6, 2006, the Ninth Circuit granted Silver Creek’s motion to dismiss without prejudice.

On September 22, 2006, in State of Wyoming v. USDA, No. 01cv86 (D.Wyo.), the State filed a motion pursuant to Fed. R. Civ. P. 60(b) for relief from the Court’s January 3, 2006, order dismissing the case without prejudice. The State requested that the Court reinstate its original order in the case in which it had 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 that the Court set an immediate hearing on motion for reinstatement. On September 29, 2006, the environmental group intervenor-defendants filed an opposition brief. On October 13, 2006, the federal defendants also filed an opposition brief, stating that the State should either file a new Complaint or request relief from the Tenth Circuit.

On December 5, 2006, the State of Wyoming filed a “notice” informing the Court of the Northern District of California’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 that order and it requested the Wyoming District 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 reinstate its order enjoining the 2001
Roadless Rule. That hearing was postponed twice due to the serious illness of Judge Brimmer. Arguments were heard on May 25, 2007, and on June 7, 2007, the Court denied the motion for relief from judgment. The Court stated that the Plaintiff’s only option would be to inform the Tenth Circuit of the California court’s decision and ask it to recall its mandate overturning Brimmer’s decision.

Meanwhile, on January 12, 2007, the State of Wyoming filed a second suit, *State of Wyoming v. U.S. Department of Agriculture*, No. 07cv17 (D.Wyo.). In its complaint for declaratory and injunctive relief, the State asked the Court to declare the Roadless Rule arbitrary, capricious and an abuse of discretion and unlawful pursuant to NEPA, NFMA, the Wilderness Act and the WWA, MUSYA, and the APA and to enjoin enforcement and implementation of the Rule. On February 16, 2007, the Biodiversity Conservation Alliance, Defenders of Wildlife, National Audubon Society, Natural Resources Defense Council, Pacific Rivers Council, Sierra Club, Wilderness Society, and Wyoming Outdoor Council filed a motion to intervene as defendants, which was granted on February 21, 2007. The Court set briefing under the Tenth Circuit provisions of *Olenhouse*. Opening briefs are due on August 16, 2007, response briefs on September 17, 2007, and reply briefs on October 1, 2007.

On July 17, 2007, the BlueRibbon Coalition, California Association of 4-Wheel Drive Clubs, United Four-Wheel-Drive Associations and American Council of Snowmobile Associations filed an amicus brief. On July 18, 2007, the States of California, New Mexico, Oregon, and Montana filed an amicus brief.

On August 16, 2007, the State of Wyoming filed a supplemental brief in support of declaratory and injunctive relief. Also, on August 16, 2007, MSLF filed a motion for leave to file an amicus brief in support of the State of Wyoming and lodged its brief. That same date the Court granted the motion, and, on August 17, 2007, the Court filed the brief.

On August 23, 2007, the State of Idaho filed an amicus brief. On August 29, 2007, the Colorado Mining Association filed a motion to intervene as plaintiff or, in the alternative, to file as amicus curiae. On September 14, 2007, the environmental intervenors filed an opposition to the motion to intervene, asserting, among other arguments, that the motion is far from timely. On September 17, 2007, the Court ordered the applicant intervenors to file a response to that opposition by September 21, 2007.

On September 17, 2007, the federal government filed a brief in opposition to the Colorado Mining Association’s motion to intervene. On September 17, 2007, the federal government also filed a brief in response to the State of Wyoming’s supplemental brief in support of declaratory and injunctive relief. On September 21, 2007, the Colorado Mining Association filed its reply in support of its motion to intervene.

On September 24, 2007, the environmental intervenors filed their brief in opposition to the State’s supplemental brief in support of declaratory and injunctive relief and a 10-volume appendix of exhibits.

On September 25, 2007, Mineral County, Montana, Grant and Harney Counties, Oregon, and Siskiyou County, California ("the Counties"), filed a motion for leave to file an amicus brief regarding the scope of injunctive relief should the Roadless Rule should be set aside. The Counties stated that inventoried roadless areas within the counties have been burned by recent wildfires and are in need of recovery that cannot be done under the current Rule. The Counties...
argued that the Court should impose a nationwide injunction against the Roadless Rule. On October 12, 2007, the Court granted the Counties leave to file its amicus brief. On October 19, 2007, the environmental intervenors file a response to the Counties’ amicus brief arguing that a nationwide injunction against the Roadless Rule is not in the public interest because, in part, it would eliminate consistent national standards, promote financially unsustainable road-building on the National Forests, eliminate the option of maintaining the environmental status quo, and result in more degradation of Forest Service roadless areas. They assert that the Counties are misinformed as to both the Rule’s prohibitions and its effects on specific projects.

On October 9, 2007, the State filed its reply brief. On October 18, 2007, the environmental intervenors file a motion to strike an affidavit in the State’s reply brief or, in the alternative, for leave to file a sur-reply to the State’s reply.

On October 15, 2007, the Court denied the Colorado Mining Association’s motion to intervene and granted its motion to participate as amicus, with its brief to be filed by October 19, 2007, and responses to it by October 26, 2007. On October 18, 2007, the Association filed Rule 72 objections to the magistrate’s order denying the motion to intervene arguing, among other things, that (1) absent its intervention in the case, the Association would file, in the District of Colorado, another suit challenging the Roadless Rule, an action not in the interests of judicial economy, and (2) the position of the Tenth Circuit on intervention is quite liberal. On October 19, 2007, the Association filed its brief.

On October 19, 2007, a hearing on the State’s complaint for declaratory and injunctive relief was held at which counsel for the State, federal government, amici Blue Ribbon coalition, et al., and amicus Colorado Mining Association all presented arguments. In regard to the Association’s motion to intervene, which had been denied by the Magistrate Judge, the Court indicated that it would reverse the Magistrate’s order.

On October 24, 2007, the Court denied the environmental intervenors’ motion to strike the State’s reply and granted their motion to file a sur-reply stating that it was doing so because the sur-reply was already before the Court.

On November 1, 2007, the federal defendants filed a response to the Association’s Rule 72 objections to the Magistrate’s denial of the Association’s motion to intervene (which motion the Court indicated at arguments on October 19, 2007, it would reverse). The federal defendants stated that, to the extent the Court’s comments at argument were intended as a ruling reversing the Magistrate’s order, they wished to preserve their objection to the Court’s reversal. On November 5, 2007, the Wyoming Outdoor Council filed a similar response requesting that the District Court not reverse the Magistrate’s denial of the Association’s motion to intervene. On November 6, 2007, the environmental defendant-intervenors also filed a similar response.

Also on November 6, 2007, the environmental defendant-intervenors filed a notice of supplemental authority regarding remedy in support of their argument that no injunction is necessary, but, if one is issued, it should apply only within the State of Wyoming. A similar remedy issue was recently addressed by the Ninth Circuit in Northern Cheyenne Tribe v. Norton (2007 WL 2595476).

On July 25, 2008, the Forest Service issue a notice of proposed rulemaking and call for comments on proposed regulations for roadless areas in Colorado developed under the state petition process. Comments are due by October 23, 2008.
On August 12, 2008, the District Court issued its decision granting the State’s motion for declaratory judgment and injunctive relief, holding that the Roadless Rule was promulgated in violation of NEPA and the Wilderness Act and was a “thinly veiled attempt” to designate “wilderness areas.” On August 13, 2008, Intervenor Defendants Biodiversity Conservation Alliance, Defenders of Wildlife, National Audubon Society, Natural Resources Defense Council, Pacific Rivers Counsel, Sierra Club, Wilderness Society, and Wyoming Outdoor Council filed a notice of appeal. The appeal was docketed on August 21, 2008 (No. 08-8061). Opening briefs are due on about October 29, 2008.

On August 20, 2008, the federal defendants filed a motion for reconsideration and stay pending reconsideration. They assert that the Court’s ruling creates an untenable position for the federal government, given the Northern District of California’s ruling, in that the two rulings are contradictory. They asked the Court to either stay its ruling or limit its extent only to Wyoming pending resolution of the motion to reconsider and of their concurrent motion to modify the injunction in the Northern District case. On August 28, 2008, the Colorado Mining Association filed its opposition to the motion for reconsideration.

Responses to the federal government’s motion for reconsideration and motion for stay pending reconsideration to limit the injunction only to the State of Wyoming were filed on September 4, 2008, by the State of Wyoming; amicus parties Mineral County, Montana, et al.; defendant-intervenors Biodiversity Conservation Alliance, et al.; and amicus party State of Idaho.

On September 19, 2008, the Tenth Circuit abated the appeal pending the District Court’s decision on the federal defendants’ motions for reconsideration and for stay pending reconsideration. The previously filed notice of appeal will ripen to appeal the final judgment after the District Court enters an order disposing of the motion. If the federal defendants intend to appeal the District Courts order on the motion, they must file an amended notice of appeal or a new notice of appeal. If the motion is not disposed of, the parties shall file simultaneous status reports. Status reports are due on November 18, 2008, by Biodiversity Conservation Alliance, Dale N. Bosworth, Colorado Mining Association, Defenders of Wildlife, Mike Johanns, National Audubon Society, Natural Resources Defense Council, Pacific Rivers Council, Sierra Club, State of Wyoming, The Wilderness Society, United States Department of Agriculture, United States Forest Service and Wyoming Outdoor Council. The federal defendants’ failure to file a timely status report may result in dismissal of this appeal without further notice for failure to prosecute.

On October 23, 2008, MSLF filed comments regarding a related matter, the Forest Service’s July 25, 2008, notice of proposed rulemaking for roadless areas in Colorado developed under the state petition process.

On November 4, 2008, the Wyoming District Court scheduled a hearing on the federal government’s motion for reconsideration and motion for stay pending reconsideration for November 18, 2008. On November 13, 2008, the Court vacated the scheduled hearing.

On December 3, 2008, federal defendants filed a notice of supplemental information notifying the Court that the Northern California federal district court, on December 2, 2008, stayed, outside of the Ninth Circuit and the District of New Mexico, its ruling reinstating the 2001 Roadless Rule and prohibiting the Forest Service from taking any action contrary to that rule. (Ron Opsahl, Jim Manley) (03-5315) (06-6014)
YOUNG AMERICA’S FOUNDATION v. GATES
(Limited and Ethical Government)
(Counsel for Young America’s Foundation) (D.C. Cir., D.C., No. 08-5366)
(Student group sues to compel federal official to provide military recruiters equal access)

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, 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 made it impossible for interested students to enter the facility and within minutes the military personnel were forced to flee. One automobile belonging to a uniformed recruiter was damaged.

Then-Secretary Rumsfeld never responded to a written request made on April 6, 2006, by MSLF that he cut funding to UCSC pursuant to the Solomon Amendment.

On July 25, 2007, MSLF filed suit in the federal district court for the District of Columbia on behalf of Young America’s Foundation (YAF), some of whose constituents are UCSC students, against Secretary of Defense Gates (D.D.C., No. 07cv1351). The primary issues in the case are 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. On October 9, 2007, Secretary Gates filed a motion to dismiss arguing that: (1) no waiver of sovereign immunity exists to permit YAF’s suit; (2) YAF lacks associational standing; and (3) mandamus is an immunity remedy. YAF’s response to the motion was due on October 23, 2007, but on October 17, 2007, the Court granted YAF’s unopposed motion for extension of time until December 7, 2007, to file its response.

On December 7, 2007, YAF filed its response to the Secretary’s motion to dismiss and a motion for leave to file an amended complaint adding an APA claim. On December 10, 2007, Secretary Gates filed an unopposed motion for extension of time until January 14, 2008, to file a reply to the opposition and a response to the amended complaint and for enlargement of the page limit of the brief. The motion was granted the same day and the Court also ordered that YAF may file a sur reply by January 28, 2008.

On January 14, 2008, Secretary Gates filed a renewed motion to dismiss. On January 25, 2008, YAF filed its response, and on February 1, 2008, the Secretary filed his reply.
On June 12, 2008, the Court granted Secretary Gates’ motion to dismiss and closed the case. On August 8, 2008, YAF filed its notice of appeal, and on August 21, 2008, the case was docketed by the D.C. Circuit Court of Appeals.

On September 2, 2008, the D.C. circuit issued a scheduling order under which numerous preliminary documents must be filed by October 2, 2008, and any dispositive motions by October 17, 2008. Preliminary documents in the case were filed on October 1, 2008.

On November 4, 2008, the Court issued a briefing schedule by which appellant YAF’s opening brief and appendix are due on December 15, 2008. On December 15, 2008, YAF filed its opening brief and appendix.

On January 14, 2009, the Secretary filed his response brief, and YAF’s reply brief is due on February 2, 2009. (Liz Gallaway) (Mentor: Garcia) (06-5941)

BEN YSURSA, Idaho Sec. of State v. POCATELLO EDUCATION ASS’N
(Freedom of Enterprise) (Amicus) (U.S. Supreme Court, Idaho, No. 07-869)
(Freedom of speech does not allow a union to collect dues in the most expeditious manner)

The Board of Directors approved this case on April 21, 2008. In 2003, the Idaho State legislature enacted the Voluntary Contributions Act ("VCA"), which provides, in part: "Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee." Idaho Code § 44-2004(2). "Political activities" are defined as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." Idaho Code § 44-2602(1)(e). However, "[n]othing in this chapter shall prohibit an employee from personally paying contributions for political activities. . . ." Idaho Code § 44-2004(3).

The Pocatello Education Association, Idaho Education Association, International Association of Fire Fighters Local 743, Professional Fire Fighters of Idaho, Inc., Service Employees International Union Local 687, Idaho State AFL-CIO, and Mark L. Heideman, Bannock County Prosecuting Attorney ("Pocatello Education Association") filed suit challenging the constitutionality of the VCA seeking declaratory and injunctive relief from enforcement of § 44-2004(2), which purportedly violates their rights to free speech and equal protection under the First and Fourteenth Amendments. On cross-motions for summary judgment, the district court held that the payroll deduction prohibition violated the First Amendment to the extent it applied to local government employers and private employers. It also held, however, that the payroll deduction ban could be appliedconstitutionally to the State’s own payroll system, i.e., to employees of the State of Idaho. Accordingly, the court granted in part and denied in part both motions. Pocatello Educ. Ass’n v. Heideman, 2005 WL 3241745 (D.Idaho 2005).

On appeal, the Ninth Circuit affirmed this decision. Pocatello Education Association v. Heideman, 504 F.3d 1053 (9th Cir. 2007). It first concluded that the payroll deduction prohibition was a content-based restriction on the union’s speech. It then held that such a restriction was permissible in certain instances. Specifically, it held that the State of Idaho had no obligation to subsidize the union’s speech; thus, the State could, constitutionally, prohibit payroll deductions for its own State employees. The analysis was different, however, for local
government employees. The court held that the State was not actually subsidizing the union’s speech through the payroll deduction of local government officials. *Id.*

The Ninth Circuit ultimately concluded that, because the local government payroll system was not a "nonpublic fora" of the State of Idaho, strict scrutiny applied. Because Idaho lacked sufficient justification for the statute, the Ninth Circuit held that the statute violated the First Amendment.

On December 28, 2007, Ben Ysursa, Idaho Secretary of State, and Lawrence G. Wasden, Idaho Attorney General, filed a petition of writ of certiorari with the Supreme Court. On March 31, 2008, the Petition was granted. The opening brief is due on May 30, 2008, and MSLF’s amicus brief is due on June 6, 2008. MSLF will file its amicus brief arguing that the First Amendment freedom of speech does not protect a union’s right to collect its dues in the most expeditious manner possible and that the State may prohibit unions from deducting their dues directly from a government payroll.


On August 8, 2008, the Pocatello Education Association filed its response brief. On September 8, 2008, the State of Idaho filed its reply brief. Oral arguments were held on November 3, 2008.

On February 24, 2009, the Court overturned the decision of the Ninth Circuit, holding that Idaho’s ban on political payroll deductions, as applied to local governmental units, does not infringe on the unions’ First Amendment rights. (Joel Spector) (08-6368)