

## NATURAL RESOURCES POLICY UNDER THE BUSH ADMINISTRATION: NOT WHAT IT SAYS, BUT WHAT IT HAS DONE IN COURT

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September 18, 1996 was not a good day for Western Americans in general or for Utahans in particular. Standing at the edge of the Grand Canyon in Arizona, President Clinton announced the creation of a 1.7 million acre national monument in neighboring Utah.<sup>1</sup> He did so, he and others admitted, to kill an underground mine that would have employed 1,000 highly paid workers and generated more than \$16 million in annual revenue in economically hard-pressed Garfield and Kane Counties.<sup>2</sup> Incredibly, as Governor Leavitt revealed later in congressional testimony, President Clinton called him at two o'clock in the morning on the day of the announcement, averring that no decision had been made and encouraging Governor Leavitt to provide Clinton with his thoughts on the possible designation of a national monument in Utah.<sup>3</sup> President Clinton did give Robert Redford advance notice of the photographic opportunity.<sup>4</sup> On the day of the announcement, which garnered headlines across the country, environmental groups lauded Clinton; westerners reviled him.

Therefore, it was not surprising that Dick Cheney's announcement, during the presidential campaign of 2000, that he would revoke all of Clinton's national monuments was greeted with enthusiasm

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1. *Establishment of the Grand Staircase-Escalante National Monument*, White House Press Release, September 18, 1996, at <http://www.ugs.state.ut.us/online/c/c-93/gseprocl.htm> (last visited Mar. 23, 2004).

2. James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 523 (1999) (stating that President Clinton singled out the federal coal leases of Andalex Resources, Inc. as reason for establishing the monument).

3. Testimony of Governor Mike Leavitt, *Hearing on the Grand Staircase-Escalante National Monument*, at [http://www.utah.gov/governor/newsrels/1997updates/updates\\_042697testimony.html](http://www.utah.gov/governor/newsrels/1997updates/updates_042697testimony.html) (last visited Mar. 23, 2004).

4. 143 Cong. Rec. H8411 (1997).

throughout the west.<sup>5</sup> Of course, by this time, Clinton had abused the power that Congress had delegated to him through the Antiquities Act several more times in other Western states.<sup>6</sup> In the wake of Clinton's announcements, lawsuits had been filed challenging Clinton's authority to unilaterally create vast wilderness-style land designations by means of a statute adopted to protect items of antiquity. Observers concluded that the first evidence of Governor Bush's intention to do as Secretary Cheney suggested would come in the federal government's response to that litigation.<sup>7</sup>

Mountain States Legal Foundation (MSLF) filed two of those lawsuits. On Halloween, 1996, MSLF challenged President Clinton's creation of the Grand Staircase-Escalante National Monument, a lawsuit in which it was joined subsequently by both Governor Leavitt and the Utah Association of Counties.<sup>8</sup> Then, in August 2000, MSLF and the Blue Ribbon Coalition filed suit in Washington, D.C., contesting President Clinton's authority to designate six national monuments in four western states: Washington, Oregon, Colorado, and Arizona.<sup>9</sup> Naturally, the Clinton Administration vigorously defended Clinton's action, by stonewalling as to discovery and by asserting, in an unsuccessful attempt, that Congress had ratified Clinton's designation of the Utah monument through action and inaction.<sup>10</sup>

However, although there was a change in the occupant of the Oval Office on January 20, 2001, there was no change in the approach of the U.S. Department of Justice to assertions that Clinton had violated the Constitution and federal law by his designation of national

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5. Joseph B. Frazier, *Cheney: Monuments May Be Rescinded*, ASSOCIATED PRESS, Aug. 24, 2000, at [http://www.evot.com/news\\_section/2000-08/08242000Cheney2.asp](http://www.evot.com/news_section/2000-08/08242000Cheney2.asp) (last visited Mar. 23, 2004).

6. Press Release, Senator Don Nickles, Congressional Record: The Antiquities Act (Jan 22, 2001), at [http://nickles.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=42&Month=1&Year=2001](http://nickles.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=42&Month=1&Year=2001) (stating that Clinton used the Antiquities Act to declare 2 million acres after the 2000 election and 1 million acres in his last week.) Overall, Clinton claimed 5.7 million acres as national monuments, as was his plan. *Id.*; Paul Larmer, *A Bold Stroke: Clinton takes 1.7 Million-Acre Stand in Utah*, High Country News, Sept. 30, 1996, at [http://www.hcn.org/servlets/hcn.Article?article\\_id=2795](http://www.hcn.org/servlets/hcn.Article?article_id=2795).

7. Petition for Writ of Certiorari, Mountain States Legal Found. v. Bush, Supreme Court No. 02-1590.

8. Governor Leavitt later withdrew from that litigation. See Press Release, Governor and Interior Secretary Bruce Babbitt join to sign a historic agreement on exchanging School and Institutional Trust Lands (May 8, 1998), at [http://www.utah.gov/governor/newsrels/1998/newsrel\\_050898.html](http://www.utah.gov/governor/newsrels/1998/newsrel_050898.html) (last visited Mar. 23, 2004).

9. Mountain States Legal Found. v. Clinton, Civil No. 00-2072 (D.D.C.).

10. See, Memorandum Opinion and Order, Mountain States Legal Found. v. Clinton, Civil No. 97-479 (D. Utah, August 12, 1999).

monuments across the west. Indeed, in time, the Bush Administration leaked news that President Bush would not repeal the Clinton decrees.<sup>11</sup> Instead, Bush lawyers vigorously defended all of Clinton's actions, including those in the designation of the Utah monument that involved the illegal backdating of a presidential letter in order to escape the requirements of the National Environmental Policy Act (NEPA).<sup>12</sup> In fact, Bush lawyers even went so far as to suggest that no citizen had the right to challenge what MSLF and the Blue Ribbon Coalition asserted were the *ultra vires* actions of President Clinton in designating six vast monuments in four western states.<sup>13</sup>

The response of the Bush Administration is disappointing for two reasons. First, Governor Bush and Secretary Cheney campaigned throughout the American West by making common cause with westerners who were angry at the unilateral fashion in which President Clinton had designated national monuments. For not only were the wishes of the residents of the states and counties and their political leaders not considered—in fact, these individuals were not even consulted—but also, the creation of these monuments jeopardized the ability of these mostly rural counties to engage in economic and recreational activities. Both Bush and Cheney seemed, during the 2000 campaign, to agree on all counts. However, after the election, when they sent their lawyers into court, they defended the very actions they had derided a few weeks before.

Second, Governor Bush and Secretary Cheney, and those with whom they had surrounded themselves during the presidential campaign, had objected to the manner in which the Clinton Administration, in “its legal briefs, and its executive actions, . . . [had] ignored both constitutional limits on government power and constitutional guarantees of individual liberty.”<sup>14</sup> Westerners were not the only ones who expected that a Bush Department of Justice would take a principled approach that recognized the constitutional and statutory provi-

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11. Eric Pianini, *White House Won't Fight Monument Designations; Norton Says Boundaries, Land Use Rules May Be Amended*, WASH POST, Feb. 21, 2001, at A7 (quoting Secretary Norton as saying she hasn't heard any call to repeal the decisions on the monuments).

12. Memorandum in Support of Plaintiff's Motion for Summary Judgment, *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004) (No. 97-479).

13. Brief for the Federal Respondent in Opposition at 5-9, *Mountain States Legal Found. v. Bush*, 124 S.Ct. 61 (2003) (No. 02-1590).

14. Roger Pilon, *Introduction*, in *THE RULE OF LAW IN THE WAKE OF CLINTON* (Roger Pilon, ed., Cato Institute, 2000). One of Governor Bush's campaign lawyers and President Bush's current Solicitor General is Theodore B. Olson, a contributor to the Cato publication. See, Theodore B. Olson, *Politicizing the Justice Department*, in *THE RULE OF LAW IN THE WAKE OF CLINTON*, *supra*.

sions limiting the ability of the president to do what he wants to do, especially in defending the actions of previous presidents but also in defending President Bush's actions.<sup>15</sup> However, the Bush Administration eschewed such a principled approach in defending Clinton's monument decrees. Instead, it embraced a litigation strategy of winning on any basis whatsoever. Thus, for example, Bush Administration lawyers argued, in MSLF's appeal to the D.C. Circuit of its "Six Monuments case," that a federal district court has no authority to determine whether a president's actions comport with the statutory limits imposed by Congress, notwithstanding clear and binding precedent from the D.C. Circuit to the contrary.<sup>16</sup>

Even more federal lands were involved in the second major issue on which the Bush Administration's pre-election rhetoric failed to give rise to changed policy or litigation strategy, that is, President Clinton's 60 million acre forest land lockup. In the case of Clinton's creation of wilderness area in scores of multiple-use forests, MSLF was not alone in challenging Clinton's authority to do what Congress had reserved for itself in the Wilderness Act of 1964<sup>17</sup> and the Federal Land Policy and Management Act of 1976.<sup>18</sup> Lawsuits were filed in Idaho, Alaska, Utah, and Wyoming.<sup>19</sup> MSLF was the first, however, to file a lawsuit on the subject when it sued on behalf of a small, grass-roots group in Lincoln County, Montana, Communities for a Great Northwest, and other northwestern Montana entities.<sup>20</sup>

Lincoln County, of which seventy-eight percent is federally owned, had, for decades, relied upon forestry and mining activities for

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15. Although he was writing of criminal prosecution, U.S. Supreme Court Justice George Sutherland's description of the U.S. Attorney's role is instructive: "[w]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

16. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); Brief for President George W. Bush, *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (No. 01-5421).

17. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-1136).

18. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (43 U.S.C. §§ 1701-1785).

19. *Idaho v. U.S. Forest Serv.*, 2000 WL 33417326 (D. Idaho 2000); *Alaska v. U.S. Dep't of Agric.*, Civ. No. 01-039 (D. Alaska); *Utah v. U. S. Forest Serv.*, Civ. No. 01-0277B (D. Utah); *Wyoming v. U.S. Dep't of Agric.*, 239 F. Supp. 2d 1219 (D. Wyo. 2002); *Wyoming v. U.S. Dep't of Agric.*, 201 F. Supp. 2d 1151 (D. Wyo. 2002).

20. *Communities for a Great Northwest v. Veneman*, Civ. No. 00-1394 (filed June 12, 2000).

jobs.<sup>21</sup> Lawsuits by environmental groups and policy changes by the Clinton Administration had killed hundreds of those jobs.<sup>22</sup> As a result, the community sought to develop a ski hill on federal lands within the county, expending hundreds of man-hours and thousands of dollars in the process.<sup>23</sup> Shortly after President Clinton's October 1999 announcement of his plans for so-called "roadless areas," Lincoln County officials were told by the local U.S. Forest Service officials that the ski hill was dead.<sup>24</sup> The community sought the assistance of MSLF, which filed a lawsuit on its behalf. Subsequently, after terrible forest fires swept through Montana in the summer of 2000, the Montana Coalition of Forest Counties, believing that Clinton's decree made it more difficult to manage for forest health, prevent catastrophic fires, and fight those fires once they began, asked to join the lawsuit.<sup>25</sup>

In light of the fact that Clinton's forest lands lockup took place along with other desperate abuses of power by the Clinton White House, such as Clinton's infamous pardons, it was believed by many who voted for Bush, and not just Westerners, that his administration would revoke Clinton's order.<sup>26</sup> Unfortunately, that was not to be. Within months of taking office, Secretary Veneman announced that Clinton's roadless rule would stand.<sup>27</sup> As a result, the Bush Administration defended the Clinton rule in litigation throughout the country, including in Wyoming where the State of Wyoming had challenged Clinton's decree. Notwithstanding a vigorous defense by lawyers for the Bush Administration, the Wyoming federal district

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21. See Tom Gorman, *A Town Puts Its Faith in Hope*, L.A. TIMES, Jan. 26, 2003, at A13, available at 2003 WL 2380922.

22. *Id.*; see also *Couple Dozen Loggers, Others Visit Environmentalists*, AP NEWSWIRE, Jan. 9, 2003.

23. Notices, Treasure Mountain Winter Sports Area Conceptual Development Plan; Kootenai National Forest, Lincoln County, Montana, 62 Fed. Reg. 42,740 (Aug. 8, 1997).

24. William Perry Pendley, *Fiddling While Montana Burns*, at [http://www.mountainstateslegal.org/summary\\_judgment.cfm?articleid=68](http://www.mountainstateslegal.org/summary_judgment.cfm?articleid=68) (last visited March 21, 2004); Beth Quinn, *Ski Resort Violates Forest Plan, U.S. Says*, THE OREGONIAN, February 29, 2000, at E2.

25. Mountain States Legal Found., *Legal Cases: Communities for a Great Northwest, et al. v. Bush, et al.*, at [http://www.mountainstateslegal.com/legal\\_cases.cfm?legalcaseid=61](http://www.mountainstateslegal.com/legal_cases.cfm?legalcaseid=61) (last visited Aug. 24, 2004).

26. BARBARA OLSEN, *THE FINAL DAYS: THE LAST, DESPERATE ABUSES OF POWER BY THE CLINTON WHITE HOUSE* 81-84 (2001).

27. "We're here today to announce the department's decision to uphold the Roadless Area Conservation Rule. Through this action, we are reaffirming the Department of Agriculture's commitment to the important challenge of protecting roadless values." Press Release, U.S. Dep't of Agric. USDA Uphold Roadless Protections Rule (May 4, 2001), at <http://www.allears.org/litigation/usdanewsrelease.pdf>.

court ruled, on July 14, 2003, that Clinton's actions were a "thinly veiled attempt to designate 'wilderness areas' in violation of the clear and unambiguous process established by the Wilderness Act."<sup>28</sup> The court imposed a nationwide injunction on implementation of the rule<sup>29</sup>. Perhaps persuaded by the court's carefully reasoned and lengthy opinion, the Bush Administration recently announced that it would not appeal the district court's ruling.<sup>30</sup> However, environmental groups, which had intervened in the district court proceedings, have appealed that ruling to the U.S. Court of Appeals for the Tenth Circuit.<sup>31</sup> MSLF has filed a friend of the court brief in support of a motion by the State of Wyoming to dismiss the appeal for want of Article III standing.<sup>32</sup>

Regrettably, the Bush Administration's failure to ensure that its pre-election pronouncements or even its post-inauguration policies are given effect in the manner in which it litigates is an evident example of the gap between announced policy and litigation strategy, not only in broad national issues, such as those involving millions of acres of national monuments and national forest lands, but also in local issues.

For decades, experts have known of the vast oil and gas potential of the Overthrust Belt, which runs along the Rocky Mountains from New Mexico to Montana.<sup>33</sup> Further, the experts have known that one of most highly prospective sources of natural gas is beneath the Lewis and Clark National Forest in Montana. For years, the U.S. Forest Service had been doing the NEPA documentation necessary to engage in the oil and gas leasing that all anticipated would take place.<sup>34</sup> However, in an effort to protect the environment, no drilling was to be permitted within the forest itself; all drilling would be from off-

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28. Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003).

29. *Id.*

30. Steve Raabe, *Federal "Roadless" Policy Officially Ends*, DENV. POST, Sept. 16, 2003, at B4.

31. Wyoming Outdoor Council v. Wyoming, No. 03-8058 (the notice of appeal was filed July 15, 2003).

32. Press Release, Mountain States Legal Found., Environmental Groups May Not Appeal Forest Ruling (Nov. 10, 2003), at [http://www.mountainstateslegal.org/press\\_releases.cfm?pressreleaseid=307](http://www.mountainstateslegal.org/press_releases.cfm?pressreleaseid=307).

33. James B. Martin, *The Interrelationships of the Mineral Lands Leasing, The Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENVTL. L. 363, 397 (1982).

34. U.S. Forest Serv., *Lewis and Clark National Forest: Projects and Plans*, at <http://www.fs.fed.us/r1/lewisclark/projects/index.shtml> (last updated Mar. 1, 2004).

site.<sup>35</sup> Nonetheless, and contrary to representation made in the draft and Final Environmental Impact Statements (DEIS and FEIS), the Forest Supervisor closed the nearly one million acres of national forest that was to be made available to leasing.<sup>36</sup> Her ostensible reason for doing so was that those who opposed oil and gas leasing had not read the NEPA documents and did not understand that the forest itself would not be harmed; therefore, they would suffer psychological harm from that activity even though there were no on-the-ground consequences of the activity that they feared.<sup>37</sup> Moreover, she concluded, the land was sacred to some American Indians and therefore could not be used.<sup>38</sup>

The Independent Petroleum Association of America (IPAA), which had participated in the NEPA process and whose members work, live, and recreate in Montana, challenged the decision. However, a federal district court ruled that because NEPA is an environmental protection statute and because IPAA is concerned only with economic issues, the IPAA could not challenge the action.<sup>39</sup> The court also held that the Forest Service had the legal authority to close land as sacred or because people living far distant from the forest would suffer psychological harm from activity that had no on-the-ground consequences.<sup>40</sup> Not surprisingly for observers of the U.S. Court of Appeals for the Ninth Circuit, the decision was upheld on appeal.<sup>41</sup>

Most of this litigation took place before the Bush Administration took office, and one cannot fault the Administration for, very early in 2001, allowing career lawyers to argue before the Ninth Circuit that the Montana federal district court was right. However, by late summer, when IPAA filed its petition for *writ of certiorari*, the Bush Administration was well aware of the Nation's need and campaign commitment to a sensible energy policy that would permit

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35. See Mark Matthews, *Forest Service Acts to Preserve 'the Front'*, HIGH COUNTRY NEWS, Oct. 13, 1997, at [http://www.hcn.org/servlets/hcn.Article?article\\_id=3711](http://www.hcn.org/servlets/hcn.Article?article_id=3711) (stating that "land disturbance would be less than one half of 1 percent of the forest's 1.2 million acres.")

36. Record of Decision, *Lewis and Clark National Forest Oil and Gas Leasing: Final Environmental Impact Statement* (September 23, 1997); See *Forest Service acts to preserve 'the Front'*, at [http://www.hcn.org/servlets/hcn.Article?article\\_id=3711](http://www.hcn.org/servlets/hcn.Article?article_id=3711), (Oct. 13, 1997).

37. *Id.*

38. *Id.*

39. *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.*, 157 F. Supp. 2d 1142, 1145 (D. Mont. 2000).

40. See *id.* at 1144 (holding that it is within the Forest Service's power to deny a lease based on public opinion even when the lease is scientifically approved).

41. *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.*, 12 Fed.Appx. 498 (9th Cir. 2001).

environmentally sensitive development of the Nation's rich oil and gas resources.<sup>42</sup> Nonetheless, Bush's Solicitor General filed a brief in opposition and the petition was denied.<sup>43</sup>

By its actions, the Bush Administration left standing a Ninth Circuit decision that held that the Forest Service had the statutory authority to close lands to multiple use because those lands are considered "sacred" or because their use would cause psychological harm to people far removed from the land in question, including land that would not have been affected in any manner, let alone adversely, by the barred activity.<sup>44</sup> Even though there is absolutely no basis for either holding, the Bush Administration asked that both be allowed to stand. One would think that a government desire to ensure that an agency is limited to its statutory authority would have compelled the Bush Administration to join in the IPAA's call for the granting of *certiorari*. But, in this case, there was more.

With its ruling in the IPAA case, the Ninth Circuit had joined the Tenth Circuit in limiting the ability of entities like the IPAA and their members to challenge NEPA violations by federal agencies. Even though the IPAA and its members had participated in the NEPA process that led to the challenged closure order, the Montana federal district court, followed by the Ninth Circuit, held that the IPAA lacked the standing to challenge the Forest Supervisor's decision.<sup>45</sup> The Tenth Circuit has been similarly restrictive as to the ability of those who seek to use federal land for economic activity to challenge illegal closures.<sup>46</sup> The result is that, as to the vast area that constitutes the Ninth and Tenth Circuits, which includes the overwhelming majority of all federal lands, alleged violations of NEPA may be challenged only by those who favor non-use over use. Again, adherence to federal law would suggest that the Bush Administration should have supported the IPAA's petition, especially since the Supreme Court has made it clear that NEPA is a procedural statute, not an en-

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42. National Energy Policy Development Group, White House, *National Energy Policy*, 5-8 to 5-10, at <http://whitehouse.gov/energy/Chapter5.pdf> (May 2001).

43. *Indep. Petroleum Ass'n v. U.S. Forest Serv.*, 534 U.S. 1018 (2001).

44. *Rocky Mountain Oil & Gas Ass'n*, 12 Fed.Appx. at 500-501.

45. *Id.* at 500.

46. *Marathon Oil Co. v. Babbitt*, 166 F.3d 1221 (10th Cir. 1999) (unpublished), *cert. denied*, 528 U.S. 819 (1999); *see also* *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868 (10th Cir. 1992); *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992); *Mount Evans Co. v. Madigan*, 14 F.3d 1444 (10th Cir. 1994); *Baca v. King*, 92 F.3d 1031 (10th Cir. 1996).



vironmental protection statute.<sup>47</sup> There is an even more prosaic reason for the Bush Administration to have taken that position: recognition that, because it could not ensure that all federal land decisions would be consistent with the views of the Administration, somebody out there, probably somebody who had an interest in developing energy resources, should have the standing necessary to sue to ensure that consistency. At the very least, the Bush Administration's failure to support the IPAA's position demonstrates that it is hardly solicitous of the needs of the energy industry.

The closing of a million acres of the Lewis and Clark National Forest to oil and gas leasing because of claims by some American Indians that it is "sacred" suggests yet another broad issue area on which the Bush Administration's commitment to energy development, science-based forestry practices, and multiple use has not been heard in the positions Bush lawyers have taken in federal court.

That federal land may not be closed to the public or to the recreational and economic activities permitted by federal law because it is "sacred" to any person or group, including American Indians, is well established, both by the U.S. Supreme Court and the Tenth Circuit.<sup>48</sup> Nonetheless, but not surprisingly, federal land managers in the Clinton Administration did just that: they closed land to multiple use-activity in response to the demands of American Indians.<sup>49</sup> For example, at Devils Tower National Monument in Wyoming, the National Park Service ("NPS") denied permits to climbing guides during June in response to the demands of American Indians who claim Devils Tower is sacred. The NPS's action was enjoined as a result of a lawsuit filed by MSLF.<sup>50</sup>

More recently, the U.S. Forest Service closed nearly 50,000 acres of the Bighorn National Forest in Wyoming to timber harvesting, again because some American Indians regard the federal land that

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47. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 550-52 (1978).

48. *Lyng v. N.W. Indian Cemetery Prot. Ass'n*, 485 U.S. 439 (1988); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

49. Sometimes they do not wait until the Indians make their demands; instead they go to the Indians and tell the Indians how "important" the land is to the Indians. See Contestee's Post-Hearing Brief, *United States v. Burton*, Office of Hearings and Appeals, U.S. Department of the Interior, CAMC 269556 (on file with author).

50. *Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction*, *Bear Lodge Multiple Use Ass'n v. Babbitt*, Civ. No. 96-063-6 (D. Wyo. 1996). A challenge to the NPS's "voluntary" closure of Devils Tower to June climbing was dismissed on standing grounds. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999).

surrounds but is not a part of the Medicine Wheel National Monument as sacred. In fact, the Forest Service announced that it would manage all of what is referred to as Medicine Mountain “as a sacred site.”<sup>51</sup> On behalf of Wyoming Sawmills, the largest private employer in Sheridan County, MSLF challenged the action of the Forest Service as a violation of the Constitution’s Establishment Clause.<sup>52</sup> Despite the clear precedents of the Supreme Court and Tenth Circuit barring such action and notwithstanding its announced concerns regarding forest health in the west and the annual danger of catastrophic and deadly fires in unmanaged forests, the Bush Administration continues to defend the unconstitutional actions of the Forest Service.<sup>53</sup>

Oil shale, unlike oil or natural gas, represents a potential future and not a viable present energy source; thus, in the ranking of matters of chief concerns to the Bush Administration, it is no doubt far down the priority list. However, those holding oil shale claims possess a valuable property right, the type of right about which Governor Bush and Secretary Cheney, and those who campaigned for them, often spoke.<sup>54</sup> Not surprisingly, the view of President Bush and Vice President Cheney, regarding property rights, was not shared by President Clinton and Vice President Gore. Hence, one is not shocked to learn that the Clinton Administration sought to deprive oil shale claimants of their valuable property by seeking to overturn a 1930 ruling of the U.S. Supreme Court, which had been recognized by nine different presidents.<sup>55</sup> What is surprising, however, is that the Bush Administration, when the case reached the Tenth Circuit, defended the view of the antiquated decision and the Clinton Administration.<sup>56</sup> This does not bespeak an administration that ostensibly cares about the development of energy resources or about the constitutionally protected right to own and use property.

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51. U.S. Forest Serv., *Historic Preservation Plan for Medicine Wheel National Historic Landmark and Vicinity* (Sept. 1996).

52. *Wyoming Sawmills, Inc. v. U. S. Forest Serv.*, 179 F. Supp. 2d 1279 (D. Wyo. 2001), *appeal pending*, No. 02-8009 (10th Cir. filed July 22, 2002).

53. Similarly, the Bush Administration defends the policy of the NPS that Rainbow Bridge National Monument is to be managed in accordance with the view of some American Indians that Rainbow Bridge is god incarnate and is not to be approached by visitors. *Natural Arch & Bridge Soc’y v. Alston*, 209 F. Supp. 2d 1207 (D. Utah 2002), *appeal pending*, No. 02-4099 (10th Cir. filed Nov. 15, 2002).

54. *See supra* note 14.

55. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930).

56. *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250 (10th Cir. 2002), *cert. denied*, 537 U.S. 1108 (2003).

All of these actions by the Bush Administration, contrary to what many regard as the promises and commitments made during the presidential campaign of 2000, are disappointing. But they are, after all, policy calls about which the Bush Administration may have had a change of heart or of mind, though some of them seem contrary even to what we are told is the current view of the Bush Administration, for example, with regard to the need to develop domestic sources of energy.

What is not a policy call or even a judgment call, however, is whether the U.S. Department of Justice under President Bush will defend clearly illegal or unethical conduct or in doing so will use arguments that are clearly without foundation. After eight years of an ethically challenged administration during which, for example, President Clinton quibbled famously over the definition of “is,” “alone,” and “false,” one would have expected that, when presented the opportunity to decline to defend those who sought to emulate Clinton, President Bush’s Justice Department would decline to do so. Sadly, that has not been the case.

One example, although there are others, will suffice. A small mining company sought to develop a valuable mineral deposit it had located in the Sweet Grass Hills area of north-central Montana.<sup>57</sup> This area has been mined for decades and is mostly private surface with underlying federal minerals. Unfortunately, under pressure from a single Member of Congress, the Clinton Administration decided to do everything within its power to prevent the small company, Mount Royal Joint Venture, from developing its property. One high-ranking official wrote to the Director, Bureau of Land Management (BLM), and stated that “[w]ith careful handling, the approval [of the plan of operations] could be delayed many months or even years.” With the go-ahead from the BLM director, that is exactly what the Clinton Administration sought to do. By and by, the entire matter ended up in federal court.<sup>58</sup>

It would be nice to report that Justice Department lawyers took one look at the fact of this case and announced, “This is indefensible!” They did not. It would be nice to report that Justice Department lawyers, citing the cost and time of litigation, sought to settle the mat-

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57. *Mount Royal Joint Venture v. Norton*, Civ. No. 99-2728 (D.D.C. filed Oct. 15, 1999); Mountain States Legal Found., *Legal Cases: Mount Royal Joint Venture et al. v. Norton et al.*, at [http://www.mountainstateslegal.org/legal\\_cases\\_category\\_home.cfm?casecategoryid=6](http://www.mountainstateslegal.org/legal_cases_category_home.cfm?casecategoryid=6) (last visited Mar. 1, 2004).

58. *Mount Royal Joint Venture*, Civ. No. 99-2728.

ter under mutually agreeable terms. They did not. It would be nice to report that Justice Department lawyers mounted a *pro forma* defense asking the court to defer to the agency's expertise and leaving it at that. They did not.

Instead, contrary to what every natural resources lawyer knows to be true, *i.e.*, that the deference of Congress to the Executive's exercise of authority over federal land ended with enactment of the Federal Land Policy and Management Act (which sets forth the precise and only manner in which federal land can be withdrawn and thus overruled the Supreme Court's 1910 *Midwest Oil* decision),<sup>59</sup> the Bush Administration cited *Midwest Oil* for the proposition that the President's withdrawal authority remains unlimited.<sup>60</sup>

There may be reasons why it appears, at least to this litigator, that there is disjoint between the Bush Administration's Department of Justice and the views the public hears expressed by the White House. One reason may be related to Vice President Gore's contest of the 2000 presidential election. Another reason may be that Senator Jeffords switched parties, which changed which party controlled the Senate and, thus, delayed the confirmation of various high level officials. Yet another reason may be that the attack on America on September 11, 2001 changed, and properly so, the priorities of so many senior officials; for instance, Assistant Attorney General Thomas L. Sansonetti did not reach his office until November 30, 2001. However, we are near the end of President Bush's first term and, on a host of very important legal issues, the litigating posture of this Administration is no different than the last.

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59. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1910) (indicating that the Executive Branch had implied authority to withdrawal federal lands from operation of the mining laws). *But see* Section 704(a) of FLPMA, wherein Congress expressly overruled *Midwest Oil*. Pub. L. No. 94-579, § 704 (a), 90 Stat. 2743, 2792 (1976).

60. Memorandum in Support of Defendants' Motion for Summary Judgment, *Mount Royal Joint Venture*, Civ. No. 99-2728.