

THE LITIGATOR

MOUNTAIN STATES LEGAL FOUNDATION

VOL. 2, 2022



A FOUNDATION IN PRIVATE PROPERTY-2
SAVE THE WEST FOR LAST-4
CELEBRATING 45 YEARS-6
UN-MUDDYING THE CLEAN WATER ACT-8

45 YEARS OF PROTECTING YOUR CONSTITUTIONAL RIGHT TO PROPERTY...

A Foundation in Private Property

Cristen Wohlgemuth

Sometimes a trip down memory lane can be inspiring. This month I took such a trip and flew down to Arizona to sit down with Jim Watt. Jim served as Mountain States' first president. This impressive gentleman committed his life to public service, and in 1977, Jim took up the challenge issued by our first chairman, Joe Coors, to create a free-market, public interest law firm that was (and remains) "dedicated to individual liberty, the right to own and use property, limited and ethical government and economic freedom." Jim eventually left Mountain States to serve as the Secretary of the Interior under President Reagan, but his leadership set our Foundation on firm footing.

Our first Board of Directors believed that it was our responsibility to safeguard our natural resources, but also believed that "environmental goals [could] not be allowed to take precedence over a commitment to insure economic and employment opportunities, adequate food production and public safety... The health and welfare of the American public depends as much on an adequate energy supply as on protection of the environment, and these factors must be balanced and considered together." In that respect, not much has changed. Our current Board remains similarly committed to an appropriate balance between conservation, and efficient and effective use of our natural resources.

Jim and his team kicked off our first natural resource direct representation action in 1978 challenging the authority of the Secretaries of

Agriculture and Interior to add approximately 62 million acres to the Wilderness System. Over the years we've won significant victories on these issues as you'll read soon, but the fight consistently comes back around to issues that ring familiar.

For example, our case defending the ranchers of Wyoming's Upper Green River Drift against environmentalist groups trying to shut down America's most historic remaining cattle drive. They demand the government remove these public lands from multiple use because, they argue, grazing on the pastures these ranchers have used for over 100 years—since before they had to ask the government's permission—is necessary to preserve the area for grizzly bear habitat.

We also weigh in against the government's outlandish definition of Waters of the United States, claims that endangered species habitat includes land wholly unsuitable for the species' in question, denial of oil and gas leasing and drilling permits, and so many other cases where Jim's directive to balance conservation, and efficient and effective use of public and private lands continues to be a battleground. We've made good progress in the cases you'll read soon but holding and advancing that line continues to be incredibly important. Thank you for being a part of that fight!

Cristen Wohlgemuth is the President and CEO of Mountain States Legal Foundation.



FROM SEA TO SHINING SEA

Natural Resource Issues on the Horizon

Joseph Bingham

As the Biden Administration advances through its second year, MSLF expects the Administration's almost uniformly-bad natural resources rulemaking agenda to accelerate. Currently pending before the Supreme Court is *Sackett v. EPA*, in which MSLF filed an *amicus* brief, and the outcome of that case will lead to perhaps the most significant rulemaking of the administration, as it will propose a new definition of Waters of the United States for purposes of defining the jurisdiction of the EPA and Army Corps of Engineers under the Clean Water Act. The administration will inevitably seek to exceed whatever boundaries the Supreme Court establishes, and MSLF expects to challenge its proposal.

Many other environmental regulations are in development, including restrictions on methane emissions and more regulations in furtherance of the Biden Administration's goals of restricting oil and gas development and livestock grazing on public lands. To deal with these efforts, MSLF will be seeking opportunities to compel issuance of oil and gas leases and to defend the Forest Service's multiple-use mandate, which requires the Forest Service to pursue not only conservation but also recreational and productive uses of federal land. MSLF's natural resources and equal protection practice areas may also increasingly overlap this year, as every federal agency has been instructed by the White House to develop and implement "equity plans," which is wokespeak for "plans to reject scientific data and to discriminate on the

basis of race." And the Administration's "30x30" initiative, which has heretofore been largely aspirational, will begin to take concrete shape in the form of regulatory proposals that will be ripe for challenge.

Of course, many of the most important natural resources issues, like the decades-long fight over the reach of the Clean Water Act, are longstanding battles.

MSLF WILL CONTINUE SEEKING OPPORTUNITIES TO CHALLENGE LISTING DECISIONS UNDER THE ENDANGERED SPECIES ACT AND, EVEN MORE IMPORTANTLY, TO CHALLENGE THE STATUTE ITSELF AS EXCEEDING CONGRESS'S POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

The battle over the reach of the Clean Air Act and the EPA's authority to regulate pursuant to it will also reach a new stage after the Supreme Court issues its decision in *West Virginia v. EPA*. And both *West Virginia v. EPA* and *Sackett v. EPA* offer the Supreme Court an opportunity to reshape administrative law in general, opening up new opportunities to challenge a vast number of longstanding federal regulations.

Joseph Bingham is a senior attorney at Mountain States Legal Foundation



Save the West for Last: Defending Ranching in the Era of Environmental Extremists

Kaitlyn Schiraldi



Ranchers face a barrage of attacks by deep-pocketed environmental groups and need advocates. Without ranchers, there are no ranches. Without ranches, America will become weak and beholden to other countries over commodities it could and has sourced itself. MSLF takes on a unique set of cases to protect American traditions—rooted in self-sufficiency and back-breaking work—from being destroyed by well-funded leftists.

The ranchers' plight is not localized. Ignorant leftists of Colorado voted to re-introduce wolves in the state—a pie in the sky attitude about wolves despite gruesome attacks on cattle in northern Colorado. Wildfires in California prevented grazing on certain allotments. And in Wyoming, well, MSLF is still fighting the good fight against environmentalists trying to shut down grazing on the Upper Green River Drift.

The Upper Green River Drift is a rare cultural diamond of the West—it's on the National Register of Historic Places and is the oldest cattle drive in Wyoming. Any imagined romanticism of the West, cowboys, solitude, and the magnificence

of the outdoors most likely resembles its idyllic landscape. This land is very well-maintained and not depleted through the work of the true conservationists—ranchers. Not to mention the cooperative relationship between the Forest Service and the ranchers to ensure the land isn't over-grazed. The world, and especially small communities, greatly depend on ranching and other agri-business, and grazing is also used in some states as fire management. Ranchers are incentivized to protect the land—their economic viability is dependent on productive land. The Upper Green River is also grazed rotationally, giving the soil a break and chance for forage to grow.

When the environmentalists are taking a break from teaming up with the agencies to drive ranching into oblivion, they're suing the agencies under nonsensical, made-up rules. This time the environmentalists claimed grazing causes degradation of the grizzly bear and its habitat, and that grazing should come second to there being enough grass for amphibians and birds to hide in. The grizzly argument has been re-packaged but remains the same; however, the "adequate forage" argument was novel.

The environmentalists challenged the percentage of “adequate forage,” i.e., grass, that can be grazed, stating the grazing amounts on the Upper Green River do not align with the Bridger-Teton National Forest’s forest plan. Under the National Forest Management Act (“NFMA”), each National Forest is governed by a forest plan. Part of the Upper Green River drift is on the Bridger-Teton National Forest; therefore, grazing must comply with the rules of the forest plan. It’s simple—the forest plan explicitly lays out the exact amount of forage that can be grazed on each allotment, and the grazing permits issued on the Bridger-Teton National Forest comply with those numbers.

Consider this analogy. Think of the Bridger-Teton National Forest like a library—it has a vast number of resources that can be taken and replenished, just like checking out books, but there must be a limit on what can be taken at one time. Now imagine going to a public library (a relic in this day in age). The library’s rule is that a limit of five books can be checked out at one time despite the vast selection of books. Then, the library patron only checks out four books, a self-imposed limit even though they are well within their rights to check out five.

Here, the Bridger-Teton National Forest is the library. It allows 60% of the upland range forage to be grazed. The Upper Green River grazing permits are the library patron—the permits on the Upper Green River allow 50% of the forage to be grazed, a self-imposed limit. The environmentalists cannot claim the forage amounts on the Upper Green River do not follow the rules of the Bridger-Teton National Forest’s forest plan because the library patron abided by the rules and checked out even fewer books than what was allowed. MSLF explained this absurdity in response to the environmentalists’ arguments, noting the grazing permits set permissible limits on grazing.

MSLF WILL CONTINUE TO STAND UP FOR AND STAND BEHIND THE RANCHERS ON THE UPPER GREEN RIVER DRIFT NO MATTER WHAT ILLOGICAL ARGUMENT THE LEFT THROWS AT THEM NEXT.

Ranching is deeply rooted in our nation’s history and will not be undermined and bullied into extinction so long as MSLF is still standing.

Kaitlyn Schiraldi is an associate attorney with Mountain States Legal Foundation.



REASONS FOR RAYCO: WHY WE FIGHT

David McDonald

In *Rayco v. Haaland*, we are currently waiting for the go-ahead from the judge to begin merits briefing. In December of last year, we moved to supplement the administrative record in the case, believing that the government is withholding a document containing key information regarding the government’s malfeasance, which the court is still reviewing. As decision is hopefully coming soon, and then the real fight begins.

----- Q + A -----

Why is this case so important?

The United States Federal Government is currently engaged in total war against mining, oil and gas, ranching, and other industries that generate value from the land. They and their environmentalist allies will not stop until all natural resources development in America is destroyed—or until we make them stop. The Ray family was forced off the land they had been mining for three generations. If the federal government is allowed to get away with this, it will only embolden bureaucrats to further weaponize their slow-moving incompetence, and Americans who work the land will be slowly ground down until there’s nothing left.

Who does this case impact?

While it may seem that this case only impacts a small little mine in the middle of the Mojave Desert, the methods the government used to hurt the Ray family can easily be adapted to hurt anyone forced to interact with the Administrative State—in other words, everyone.

Why did we take this case?

Emerson Ray, a frontiersman and entrepreneur of the sort they only make in America, fresh off his service as one of the last true calvarymen fighting in World War II, staked his claims on unsurveyed land in the desert outside Baker in 1948. And how did the federal government reward their efforts? Old, unfeeling indifference. MSLF intends to make the BLM feel something soon, and it unquestionably won’t be indifference.

CELEBRATING 45 YEARS

45 years of protecting and restoring liberty through pro-bono litigation

Mountain States Legal Foundation celebrated 45 years of defending freedom last month! MSLF has always believed in the importance of property rights and natural resources. Here are our top 4 property rights cases we litigated in our first 45 years of success.

Laguna Gatuna, Inc. v. United States (1993-2003)

Laguna Gatuna was an oil and gas service company, regulated out of business in 1992, after the EPA declared a sink hole to be Waters of the United States subject to regulation under Clean Water Act. If Laguna Gatuna continued its operations after the EPA's threat, the company risked daily fines of \$25,000.00 and jail time for its principals. Laguna Gatuna owned some of the land it had used for its operations and leased additional lands. The EPA's actions made the land and leases worthless, so, after years of litigation in the Tenth Circuit and administrative appeals, MSLF represented Laguna Gatuna in a takings case in the Court of Federal Claims. After a trial in 2001, the Court of Federal Claims found that that EPA's actions rendered the leaseholds without economic value, thwarting Laguna Gatuna's investment-backed expectations, and resulting in a taking. After being beaten by MSLF and its client at trial, the United States finally paid Laguna Gatuna and settled the case.

Glossmeyer v. United States (1993-2004)

The Glossmeyers owned a family farm in Missouri that was transected by an easement for the now defunct Missouri-Kansas-Texas Railroad. Under state law, the easement had been abandoned when the railway was abandoned, but under improper use of a "rails to trails" program, the Glossmeyers were still prohibited from using the easement, which the government now planned to convert to a public trail. MSLF filed a takings claim on behalf of the Glossmeyer family farm in 1993. That case was stayed, however, as similar cases were pending before the Supreme Court and Court of Appeals for the Federal Circuit. MSLF pressed the Glossmeyers' interests by acting as *amicus* in the parallel cases. The Glossmeyers' case resumed in 1997 and with MSLF's representation, in 2000, the judge ruled that the Glossmeyers' land had been taken. The matter was partially resolved around the end of 2002 and the Glossmeyers were paid for what was taken. After further proceedings, the United States paid the attorney fees MSLF expended in pursuing

the case.

Mann v. United States (1998-2014)

In 1981, the BLM Issued a geothermal lease eventually held by Stanley Mann. After successful wells were drilled and capped on the lease, Mann and a co-investor sought ways to develop the resources and converted the lease to a long-term lease in 1989-1990. The BLM then transferred management of the lease to another agency. In 1993, the BLM, ignoring the long-term lease conversion, sent notice that it planned to cancel the lease for lack of development. Because the BLM no longer managed the lease, however, the notice was not sent to a valid address. The lease was cancelled and MSLF represented Mann, first by filing due process and other claims in federal district court, then by filing a breach of contract action in the Court of Federal Claims in 1998. The trial court ruled against Mann, but MSLF appealed and the Court of Appeals for the Federal Circuit reversed, holding in 2003, that the BLM had breached its lease. A trial was held to determine the amount of damages and in 2009, a damages judgment was issued to Mr. Mann. Five years later, the court also ruled on the attorneys' fees and costs the United States owed for its illegal conduct and the matter was closed.

Marvin M. Brandt Revokable Trust v. United States (2006-2017)

Marvin Brandt of Fox Park, WY, owned 83 acres of land, a portion of which was burdened by a right-of-way for Railroad Companies. In 1996, the railroad companies moved to abandon the rail line; by 2004 they had done so. According to federal and state law, the right-of-way was extinguished, and Mr. Brandt's property became unencumbered and available for his use. However, in 2005, the U.S Forest Service announced plans to convert a non-existent right-of-way into a public recreational trail. In 2006, the U.S sued Mr. Brandt, and MSLF jumped in where we eventually argued in front of the Supreme Court of the United States that a right-of-way under the 1875 Act granted an easement only and, upon abandonment by the railroad, any interest in the right-of-way was extinguished and passed to Mr. Brandt. In 2014, the court ruled in favor of Mr. Brandt in an 8-1 ruling, in which Chief Justice Roberts said "Moreover, nothing in the text of the law supports the federal government improbable and self-serving reading."

DID YOU KNOW THAT THERE ARE MULTIPLE WAYS TO GIVE? HEAD ON OVER TO THE NEXT PAGE TO CHECK IT OUT! ----->



MOUNTAIN STATES LEGAL
FOUNDATION
FREE COUNTRY. FREE PEOPLE.

DOUBLE YOUR GIFT!

Right now, we are locked in a legal war to save our natural, American rights, including property rights, equal protection under the law, and the right to keep and bear arms.

To meet the unprecedented attacks on the Constitution by the Biden Administration, our Board of Directors has issued a special matching gift challenge. They will match every gift received by June 1, 2022—up to \$105,000. ACT NOW!



THERE ARE MANY WAYS TO GIVE



Amazon will donate 0.5% of the price of your eligible purchases to MSLF. Scan the QR code to sign up!
AMAZON SMILE



Log in or create an account then search for MSLF (AP806). By linking your loyalty card MSLF will receive a portion of your purchase. Scan the QR code!
KROGER REWARDS



BECOME A MEMBER OF THE 5 STONES SOCIETY

By joining the 5 Stones Society, and making a monthly commitment to Mountain States Legal Foundation, you are taking a stand in the fight to preserve our individual liberties and the Constitution that safeguards them.

**JOIN NOW TO GET
A FREE PRINT.
LIMITED
QUANTITY!**

Donate a monthly gift of \$50.00 or more, and you'll receive an exclusive commissioned print, valued at \$450, that embodies the American Spirit from a professional photographer and longtime supporter of MSLF. Sign up NOW!



MOUNTAIN STATES LEGAL FOUNDATION

FREE COUNTRY. FREE PEOPLE.

Non-profit Organization
U.S. Postage PAID

Denver, Co
Permit No. 847

2596 South Lewis Way
Lakewood, Colorado 80227
303-292-2021 / mslegal.org
Twitter: @MSLF
Facebook.com/mountainstateslegalfoundation
Address Service Requested

PRESIDENT AND CEO
Cristen Wohlgemuth

GENERAL COUNSEL
William E. Trachman

EXECUTIVE COMMITTEE
Roger Cymbaluk, ND; Chair
Rick Fletcher, TX; Vice-Chair
John E. Rockwell, P.E., NM; Secretary
Peter Wold, WY; Treasurer
Roy G. Cohee, WY; Immediate Past Chair

LITIGATION ADVISORY
COUNCIL CHAIR
Emily Jones, Esq., MT

It's Time to Un-Muddy the Clean Water Act

Kaitlyn Schiraldi

In February, MSLF commented on the Biden Administration's proposed regulation attempting to re-define what Waters of the United States means under the Clean Water Act. We emphasized the lack of constitutional authority that the Environmental Protection Agency has to regulate every puddle, stock pond, or ditch.

Congress relied on its Commerce Clause authority when it enacted the Clean Water Act and gave the Environmental Protection Agency power to regulate navigable waters. The term "navigable waters" is defined as "Waters of the United States, including the territorial seas[,] but the definition of Waters of the United States is ambiguous.

The Supreme Court noted that "navigable waters" is defined more broadly than that term's traditional understanding, however, the court "ha[s] also emphasized [] that the qualifier 'navigable' is not devoid of significance[.]"

We demanded a different regulation that would be within the bounds of the Constitution, with clarity, and would protect individual liberty.

Farmers and ranchers cannot read the current proposed regulation and easily ascertain whether occasional or intermittent streams or temporary



puddles created by rain will be federally regulated. The proposed regulation also lacks any exemptions for agricultural uses like stock ponds. Of particular concern is that the rule fails to disclaim authority over anything that is not water.

MSLF submitted its comment to stand up for our clients that need to understand what water on their property is regulated as Waters of the United States without having to hire an expert.

To support MSLF's fight to defend your constitutional rights, visit mslegal.org.