



## COVER STORY

# Unsettling Development

*During the Bush administration, the Justice Department has abandoned its established role of defending federal laws and regulations from court challenges in some key environmental cases. Often in secret, the department has settled at least a dozen lawsuits to the great benefit of developers. Not surprisingly, the traditional role of public interest intervenors in these cases has been drastically curtailed*

TOM TURNER

In the middle of March, rumors surfaced that there was something going on in the bowels of the Utah state government concerning wild areas in the state managed by the federal Bureau of Land Management and coveted by miners, off-road-vehicle enthusiasts, and developers of one stripe or another.

Jim Angell, an attorney with Earthjustice in Denver, heard from a friend at the Southern Utah Wilderness Alliance that something was afoot. His colleague Ted Zukoski heard something similar from a friend in county government in northwest Colorado. Just what was up was unclear, but it was unlikely to be something they and their client organizations would be too happy about.

They soon found out. On March 31, the state of Utah—along with the Utah School and Institutional Trust Lands Administration and the Utah Association of Counties—filed a motion in federal district court in Salt Lake City to resurrect a suit mostly dismissed by the Tenth Circuit Court of Appeals in 1998. The case was still technically alive but had lain essentially dormant for five years. The judge in the original district court case was Dee Vance Benson, a former chief of staff to Utah Senator Orrin Hatch, and it was in his court that the motion landed. The suit argued, among other things, that BLM's authority to suggest lands for possible protection as wilderness had expired in 1993 and that millions of acres where the agency was holding off some damaging activities until it could decide whether to manage the lands to protect their wilderness character must be released for exploitation.

Angell and Zukoski, working with SUWA's staff attorney, Steve Bloch, raced to prepare intervention papers, which they filed on Monday, April 7, exactly a week after the Utah papers were lodged with the court.

Their clients were SUWA, The Wilderness Society, New Mexico Wilderness Alliance, Arizona Wilderness Coalition, Friends of Nevada Wilderness, and Colorado Environmental Coalition. Shortly thereafter they submitted another motion seeking intervention on behalf of the Natural Resources Defense Council, Biodiversity Conservation Alliance, California Wilderness Coalition, and Idaho Conservation League.

So far, so good. But then things turned bizarre. Unknown to the putative intervenors, late on Friday afternoon, April 11, lawyers for the state of Utah, the U.S. Department of the Interior, and the U.S. Department of Justice submitted a settlement agreement to Judge Benson. This would appear to be hard to explain, had it been made public at the time, since the motion to resurrect the case—filed less than two weeks earlier—had said that such a move was necessary because settlement negotiations had failed. The following Monday, without acting on the intervention motions, the judge approved the settlement, and more than 150 million acres of public lands throughout the West and Alaska were stripped of the chance to be protected by BLM for their wild, natural character, perhaps forever.

Two strange things happened in this case that have been happening in a disturbing number of environmental court cases around the country since the Bush administration took office. These cases have been primarily in the natural resources area, but not exclusively, as we shall see. First is the exclusion of groups representing the public interest.

Organizations are forever butting into each others' lawsuits. Industry groups intervene in litigation filed by environmental groups that might hamper their ability to turn a profit chopping down trees or pump-

**Editor's note:** We offered Assistant Attorney General Thomas L. Sansonetti, head of the Justice Department's Environment and Natural Resources Division, an opportunity to contribute an "Another View" sidebar to this cover package, but he declined the offer. The editor's Profile of General Sansonetti, "Master of the Court," appeared in the November/December 2002 issue.

ing crude oil. Environmental groups jump into suits filed by the same industry groups when they can add something to the defense's arguments or when they fear the defense mounted, generally by the Department of Justice, won't be vigorous.

There are two kinds of intervention, one as of right, the other at the discretion of the courts. Most courts are fairly generous in letting interested parties participate in the latter kind of litigation, and once granted intervention, the intervenor groups are full parties (subject to limits imposed by the judge, which are rare), with the right to present oral arguments, submit briefs, examine witnesses, conduct discovery (assuming any party is granted such a right), and to file appeals.

Second is that the Justice Department is not defending the United States in court according to its charge. Its officers have sworn to preserve, protect, and defend the Constitution and the laws of the United States, but the Bush Justice Department is rushing to settlement all too frequently. The Justice Department has always settled cases, but on terms that were protective of the interests of the United States and the public. What's different these days is not only the large number of cases but also that the Bush administration is excluding intervenors who might aid in the defense of the law, or at least provide a measure of public scrutiny. More important, however, is that the administration is quietly settling them on terms highly favorable to the plaintiffs — generally industry groups or states that want to help them. So what you have is secret deals that favor development interests, not what natural resource and environmental protection is all about.

**T**he Federal Land Policy and Management Act was enacted in 1976. It is the statute that governs activities of the Bureau of Land Management, an agency within the Department of the Interior that oversees 261 million acres of federal lands in the West

and Alaska, 150 million of which are undeveloped. By comparison, the national forests comprise 191 million acres and the national park system 84 million acres. BLM — derided by many environmentalists as the Bureau of Livestock and Mining — was the government's forgotten land agency until FLPMA provided it with an organic act.

One key provision of FLPMA requires the agency to maintain a more or less continuous review of its lands, including the possibility of protecting more acreage as wilderness. FLPMA also requires the agency to put together management plans for its lands — to figure out which of the multiple uses permitted on its lands (including wilderness) can occur where. The law also specifically ordered BLM to take an initial inventory of all its lands to see which might qualify for protection under the Wilderness Act of 1964.

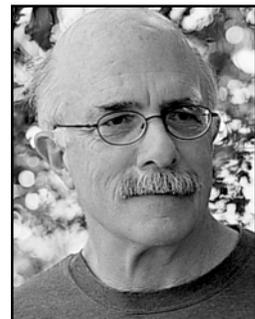
To qualify for wilderness status — the final decision must be made by Congress — a piece of land must be at least 5,000 acres in size and have no permanent artificial structures on it, "a place where man is a visitor and does not remain." FLPMA gave BLM 15 years — until 1991 — to do the job and the president a further two years to review the agency's recommendations and forward them to Congress.

The lands BLM identified in its initial wilderness surveys would be classified "Wilderness Study Areas" and managed as if they were protected wilderness until Congress could decide yea or nay. BLM came out with its wilderness inventory for Utah in 1980. It found that there were only 2.6 million eligible acres out of the 22.9 million acres the agency manages in the state. After a number of appeals, the number was increased to 3.2 million acres in 1984.

Environmental groups, under the umbrella of the Utah Wilderness Coalition, were still far from satisfied, and set out to do their own surveys. Volunteers combed the state, exploring, photographing, and verbally describing dozens of wild and beautiful places that seemed to qualify. Their first list totaled about 5.7 million acres,

*A technique that provides political cover — the administration can argue that "the courts made us do it"*

**Tom Turner is Senior Editor at Earthjustice and author of *Justice on Earth, Earthjustice and the people it has served* (Chelsea Green, 2002), *Sierra Club, 100 Years of Protecting Nature* (Harry Abrams, 1991), and *Wild by Law, the Sierra Club Legal Defense Fund and the Places It Has Saved* (Sierra Club, 1990).**



Mary Jorgensen

A N O T H E R V I E W

## When Citizens Sue, DOJ Now Argues Against The Law

The Department of Justice is essentially the litigation law firm for the executive branch. In addition to enforcing federal law, when disputes arise that land federal agencies in court, it is DOJ that defends them.

Since George W. Bush took office as president, executive agencies dealing with the environment have been frequently sued over violations of various federal environmental statutes. The plaintiffs in these suits have overwhelmingly been environmental groups or citizen coalitions concerned with environmental degradation.

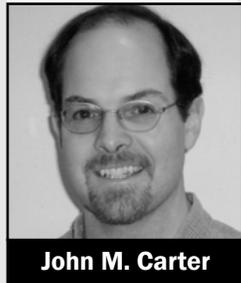
The Judicial Accountability Project at Defenders of Wildlife, with the assistance of the Vermont Law School Clinic, examined the Bush DOJ arguments in federal court litigation involving three environmental statutes during the administration's first two years. Our analysis reveals that, contrary to long-established practice, the administration is taking positions that tend to undermine or contradict these laws 60 percent of the time, averaged over the three statutes.

Starting with the National Environmental Policy Act, executive agencies were sued over issues implicating NEPA at least 172 times. In 94 of those cases, DOJ advanced arguments that tended to undermine the statute, making arguments contrary to established judicial and regulatory interpretations. Despite the high level of deference usually afforded agencies in federal court, the courts rejected 73 of these arguments, giving the administration an astonishingly low 21-percent win rate. By contrast, when the administration argued consistent with NEPA, it prevailed in 75 out of 78 cases.

Likewise, the administration was sued at least 46 times over its forest management policies under the National Forest Management Act. In 31 of these cases, DOJ presented arguments contrary to accepted interpretations of NFMA. The administration

won only 3 — a 90-percent loss rate. In the 15 cases in which DOJ argued consistent with NFMA it won all 15.

Finally, the administration was sued for failure to comply with the Endangered Species Act at least 120 times. In 76 of these cases, DOJ advanced arguments contrary to established interpretations of the ESA. It lost 68, an 89-percent loss rate. In the 44 cases in which the administration argued consistent with the ESA, it won 40.



John M. Carter

Substantive review of the arguments made in these cases indicates that the Bush administration is actively working through DOJ to undermine these environmental laws.

In *Neighbors of Cuddy Mountain v. Alexander*, DOJ argued that citizens

have no right to sue to ensure that timber sales comply with forest plans. The court rejected this argument, stating, "To hold otherwise would permit the Forest Service to don blinders to the overall condition of a national forest each time it approved a sale, quite literally losing sight of the forest for the trees."

In *Defenders v. Norton*, DOJ argued that the lynx did not qualify as an endangered species because it no longer existed in enough of its historic range to be considered "significant." The court said this reasoning "would allow the most fragile and at risk species to receive the least protection under the law. Such a consequence flies in the face of the plain language of the ESA and its purpose."

In *Kootenai Tribe v. Venemann*, wise use groups claimed that the government had failed to fully consider the environmental impacts of the Roadless Rule under NEPA. Plaintiffs claimed that wilderness areas could be harmed because agencies (and extractive industries) would not be able to use roads to access those lands for "management." In contrast to its diligence in defending against environmental petitioners, the DOJ conceded this case, stating "it shares plaintiffs' concerns about the potential for ir-

reparable harm." On appeal, the Ninth Circuit rejected this position, stating that NEPA may not be used "to force federal agencies, in contravention of their own policy objectives, to develop and degrade scarce environmental resources."

Our report reveals that the Bush administration has largely abandoned its constitutional charge to implement the law where the environment is concerned. However, an even more disturbing trend is that DOJ has openly defied federal court orders in many environmental cases. For example:

In *Save the Manatee Club v. Ballard*, DOJ argued it could not be made to comply with a federal court order because being forced to comply with federal law would infringe on the discretion of an executive agency. The court called this argument "ludicrous and preposterous," and ordered the Bush administration to show cause why it should not be held in contempt stating "the federal government is not above the law."

In *Center for Biological Diversity v. Norton*, DOJ argued that Interior could not be compelled to comply with a court order to designate critical habitat because Interior did not have sufficient funds. The court rejected this argument stating, "defendant's argument cannot be characterized as anything but an impermissible, unconstitutional intrusion on the judicial power to enforce existing law," concluding, "the United States may not evade the law by simply failing to appropriate enough money to comply with it."

In contrast to the president's oath to "uphold and defend" the Constitution, the Bush administration's use of DOJ to avoid compliance with these environmental laws, and defy the authority of federal courts, implicates the constitutional fabric of our federal government.

John Carter is the Judicial Accountability Fellow at Defenders of Wildlife. Defenders Vice President William Snape contributed to this article. A series of articles based on their work is appearing in *The Environmental Law Reporter*.

and they began gathering support for a "Redrock Wilderness Act" that would override BLM's failure to do a thorough job. That bill slowly picked up supporters but not yet enough to make it law. (As of 2003, the Redrock Wilderness bill has 168 sponsors in the House of Representatives and 15 in the Senate and encompasses some 9 million acres.)

The coalition's inventory caught the interest of Bruce Babbitt, the former Arizona governor who was then secretary of the interior in the Clinton administration. At a hearing before a committee of the House of Representatives in 1996 Babbitt said he was considering having BLM reinventory its Utah lands to see if it had missed any. Representative Jim Hansen, a Utah Republican and a staunch opponent of wilderness, urged Babbitt to go out and look for more wilderness. "You won't find any," he said.

Babbitt ordered his BLM to do just that.

Hold on, said the state of Utah, Utah School and Institutional Trust Lands Administration, and Utah Association of Counties. They filed an eight-count complaint in federal district court in Salt Lake City alleging, among other things, that it was illegal to do another inventory of these lands because the authority to do so had expired in 1991. Judge Benson received the complaint, told the attorneys for the federal government that they were about to lose the case even before reading their response, and enjoined the inventory.

The Justice Department appealed to the Tenth Circuit, and the environmental groups filed an amicus curiae brief. Seven of the eight counts were dismissed on the grounds that the plaintiffs had no standing to bring them. One count — a claim that BLM could not manage wildlands not identified in the survey as wilderness because only Congress can declare a place to be wilderness — was sent back to Judge Benson for more hearings. Nothing much happened and the issue lay dormant. That was the part that was still technically alive in March 2003.

The Babbitt inventory got underway in 1998, and eventually found that yes, by gum, the agency had missed about 2.6 million acres of wilderness-quality BLM lands in Utah. Upon concluding that it had important new information about the character of these lands, BLM did the sensible, balanced thing. It decided not to approve new, wilderness-destroying actions until it had a chance to consider whether, through

its land management planning authority under FLPMA, it would protect all, some, or none of these wildlands. Now, it may never have the chance to make that decision

**T**he settlement signed by Judge Benson last April was a curious piece of work. In it, the federal government capitulated on several of the claims that had been dismissed seven years earlier by the Tenth Circuit on standing grounds. In other words, the federal government — which had effectively switched sides by this time — gave Utah a victory on claims the appeals court had said the state could not bring, let alone win. The Interior Department seemingly forever surrendered its authority to protect wildlands through management plans — an authority even James Watt said the agency clearly had. Congress, of course, could intervene and rewrite the law, but the settlement as written and approved seeks to tie the hands of all future administrations in this matter, which may be unconstitutional, according to the environmental intervenors. BLM is now able to plan for mining, logging, drilling, bulldozing, and every other damaging use under the sun on its land, but not wilderness. Hardly the approach called for in FLPMA: "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations."

Weeks went by and still no answer from the judge on the intervention motions. Fearing that their options might be closing, Angell, Zukoski, and Bloch filed papers with the Tenth Circuit announcing that they would challenge the settlement, and they amended their answer in the district court with cross-claims explaining why the settlement was illegal and unconstitutional. The state and the feds opposed the request that the Tenth Circuit take up the case on the grounds that there were still cross-claims pending in the district court. The lawyers pointed out that the cross

*In the Utah settlement, the federal government capitulated on several of the claims that had been dismissed by the appeals court on standing grounds ...*

## A N O T H E R V I E W

**Here DOJ's A Good Guy — But Interior Runs It Over In An SUV**

**O**n Christmas Eve 2002, the Bush administration announced changes to an obscure regulation that, together with other administration actions, places at risk parcels of potential wilderness and other treasured lands throughout the West — opening them to development. The announcement was followed quickly by a secretly negotiated agreement between the U.S. Department of the Interior and the state of Utah. The rule change and back-room agreement are prime examples of the Bush administration's use of exclusionary procedures to implement dramatic and destructive environmental policy.

The revised regulation relates to "disclaimers of interest" under Section 315 of the Federal Land Policy and Management Act, the organic act for the 260 million acres of Bureau of Land Management lands. The changes allow states, their subdivisions, and others to apply for disclaimers regardless of whether they are the property owner of record, as previously required. A disclaimer is a recordable document in which the United States disavows any property interest in a parcel of land.

This secret deal was part of a plan by the Bush administration and its allies to limit wilderness expansion and increase access for, among other things, energy development, by expanding the scope and number of so-called R.S. 2477 rights-of-way across public lands. R.S. 2477 dates from the Mining Law of 1866 and was meant to protect investments in highway construction. It states simply: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." In 1976, with FLPMA's passage, Congress repealed it but grandfathered established claims.

As some states sought to prevent new wilderness designations and expand development, R.S. 2477 emerged as the perfect foil. Thousands of potential rights-of-way —

totaling tens of thousands of miles — run through undeveloped public land that might qualify for wilderness designation or through federal reserves, such as national parks, forests, or monuments. While some potential claims may be legitimate, most — including, for example, claims on the hundreds of miles of hiking trails in Zion National Park — ignore the law's language and are a pretext for blocking wilderness designations.

Since 1976, courts have begun to define the standards for evaluating R.S. 2477 claims. In 1996, the Utah federal district court rejected attempts by several Utah counties to bulldoze R.S. 2477 roads

through federal wilderness study areas, upholding BLM's administrative determination that the claims were invalid because they did not meet the law's requirements that the "highway" be built while the land was unreserved for some other public purpose; it was actually "constructed," not just established by repeated use; and it connect the public to some identifiable destination. Notably, in briefing to the Tenth Circuit for this and a similar New Mexico case, the Bush Justice Department defended BLM's determination and argued rigorous standards for what constitutes a valid R.S. 2477 highway.

But, unhappy with this result, the state of Utah negotiated with the Bush Interior Department for means to implement less restrictive R.S. 2477 standards. Despite repeated requests for a seat at the table, Interior excluded the public. Which brings us back to Christmas Eve 2002. The underlying goal of the revised disclaimer regulations, it appears, is not to "streamline" the process for issuing disclaimers as claimed — fewer than three recordable disclaimers had been issued per year in the last 18 years, none for R.S. 2477 rights-of-way. It is, rather, to ease the conveyance of proposed R.S. 2477 "highways" without meaningful public input or environmental review and

to eliminate the burden of claimants to push claims through litigation.

Four months after the disclaimer rule revisions, Utah and Interior signed a Memorandum of Understanding entitled "Resolution of R.S. 2477 Right of Way Claims." Under the MOU, Interior will use the revised disclaimer rule to relinquish R.S. 2477 rights-of-way. Conveniently, the agreement frees claimants from many of the previously established validation standards based on the law's plain requirement. Where current law, as Justice recently argued in court, requires actual construction of a highway, the MOU requires only that a route be capable of accommodating off-road vehicles. Many wash bottoms and abandoned or dead-end trails could meet this description. Equally troublesome, the agreement provides for no public involvement until *after* BLM has reached an initial conclusion to validate a claim; dispenses with any investigation of the environmental impact of a disclaimer; and does not require that Utah abandon any of its potential 10,000 R.S. 2477 claims.

The administration touts the MOU as a model and is encouraging similar agreements with other western states. Already, Alaska and Colorado have requested more expansive MOUs. Rather than resolving a long-standing debate on R.S. 2477, the MOU only intensifies the controversy. Far from an example of "cooperating to resolve a conflict," as the MOU suggests, the agreement emerged from closed-door negotiations with no public input — an approach Colorado's Republican governor, among others, has criticized. The resolution of such controversial and important issues in public law needs transparency and clarity. If the administration and the state had truly tried to work out a cooperative agreement that acknowledged only non-controversial, regularly maintained roads, the process and result would have been far different.

*Leslie Jones is Deputy General Counsel at The Wilderness Society in Washington, D.C.*



**Leslie Jones**

claims were filed only after Judge Benson had dismissed the case. Eventually, nearly two months after the first intervention motion was filed, Judge Benson allowed the environmental groups into a case he had long since dismissed. He offered no explanation. At press time, the Tenth Circuit has yet to speak. It can decide to hear challenges to the settlement or send it back to Judge Benson for further consideration.

It is a fascinating case with immense implications for more than a hundred million acres of land owned jointly and equally by all citizens of the United States and now open for exploitation by private interests (BLM has already proposed to offer up one prized Utah canyon for oil and gas development, and has plans to offer more). But what interests us here is what happened before the settlement reached Judge Benson's in-box. Freedom of Information Act requests are still pending and may reveal some of what happened. After Angell, Zukoski, and The Wilderness Society's Leslie Jones filed a lawsuit to get BLM to hand over the public records, BLM served up hundreds of pages with relevant information blacked out. [See Leslie Jones's sidebar on a related issue, on the left — ED.] It is quite clear that there were secret negotiations between the state and the feds wherein the Interior Department representatives offered or agreed to capitulate to demands made by the state seven years before and rejected by the court of appeals. Interested third parties were neither informed about any negotiations nor invited to participate. It is part of a pattern that has cropped up repeatedly since the second Bush administration came to power. Here's another example.

In the mid-1990s things at Yellowstone were getting out of hand. The Park Service was wondering if it made a mistake when it decided to allow snowmobiles to use the park in the winter starting in the 1960s. The machines are infernally noisy and dirty: The Park Service at one point estimated that the 80,000 snowmobiles that visited Yellowstone in a recent winter spewed out more pollution than the three million automobiles that cruised through the park the rest of the year.

Snowmobile use was climbing steadily, to the point where *High Country News* could report in 1995 that one could frequently see 1,000 parked at Old Faithful. Complaints were piling up about noise and stink from

the machines, and by the winter of 2002 rangers at the entry gate at West Yellowstone were issued respirators and ear plugs in order to cope with health problems and hearing loss caused by snowmobile exhaust and noise. Ranger Bob Seibert told *The New York Times* that the ticket booths turn into "a tunnel of fumes. Working here is like sitting in a bar — you're dizzy, nauseous, your throat is burning and your eyes are burning."

The machines were also disturbing the park's wildlife. Visitors to the Park could expect to see snowmobilers routinely herding bison down park roads and into snowbanks — at the time of year when they can least afford to expend energy needed to survive Yellowstone's harsh winters.

Conflicts between off-road vehicle use and conserving sensitive ecological resources on public lands were already apparent in the 1970s, prompting President Nixon to issue an executive order directing the Park Service to prohibit off-road vehicle use, including snowmobiles, where it would "adversely affect . . . natural, aesthetic, or scenic values." President Carter renewed the order a few years later.

Everyone knew that the situation was out of control and that something must be done. The Fund for Animals took the bison by the horns, filing suit specifically to stop the grooming of park roads, which would benefit bison and eliminate snowmobiles. The Park Service responded by agreeing to undertake the environmental analysis necessary to put together a new winter-use policy that would better protect and preserve park resources.

The environmental study that resulted led the agency to recommend a phase-out of snowmobiles to be complete by the end of 2003, using authority the Park Service has in its organic act. The Park Service would replace individual snowmobiles with snow coaches that carry eight or ten people and do not produce the racket or pollution that individual snowmobiles do.

*... With the settlement, the federal government gave Utah a victory on claims the appeals court had said the state could not bring, let alone win*



The Record of Decision was announced by the Park Service in November 1999. The agency had received nearly 50,000 comments according to *The New York Times*, about evenly divided for and against the ban. The International Snowmobile Manufacturers Association (there are just four major companies that make snowmobiles), along with the state of Wyoming and the Wyoming State Snowmobile Association, immediately filed suit. They alleged that the phase-out plan violated a host of federal laws and urged the Park Service to reconsider its decision, complaining that there was a great deal of new information available that might change the decision and that the public had had insufficient opportunity to comment — even though the volume of comments received was the largest the Park Service had ever received on anything.

The Greater Yellowstone Coalition and several other groups immediately intervened in the case to ensure that the strongest arguments in favor of the phase-out were heard.

The final, official, public announcement of the new policy appeared in the Federal Register on January 19, 2001, the day before George W. Bush's inauguration. Within hours, the new White House chief of staff, Andrew Card, ordered that all new Clinton regulations be suspended for 60 days.

Soon thereafter, attorneys for the Justice Department met secretly with representatives from the snowmobile manufacturers association and the state and agreed to settle the case. The environmental organization intervenors were not informed of the settlement negotiations, let alone invited to participate. Even the National Park Service was excluded (see below). It was a strictly Justice-plaintiffs deal. In the settlement, the department agreed that the phase-out would be shelved pending a new study.

This time there was a new wrinkle. The Clinton plan did not require the phase-out to actually begin until 2002, so the administration could — and did — argue that it was up-

holding the phase-out as it wrote a supplemental environmental impact statement to examine the new information. This appears to have been a decision taken high up in the Interior Department without including on-the-ground Park Service personnel, including the park superintendent, Mike Finley. He said, in a speech delivered June 9, 2001, "Had the Park been asked, we would have resisted settlement and sought a vigorous defense. We were not asked. In over six and a half years at Yellowstone, I was involved in every major and minor lawsuit. I was consulted. . . . This is the first time the opinion of the Park was not sought, or solicited, or considered by the administration."

This was the period during which the Environmental Protection Agency was getting pummeled for reversing a regulation reducing arsenic limits, and press reports accusing the administration of abandoning Yellowstone might not play well on the hustings.

A little over a year later, when the first 50-percent reduction in snowmobile use was to take place, the administration abruptly delayed the phase-out plan for another year. Then, in mid-2003, the Park Service released its SEIS and — surprise, surprise — the Park Service announced that it had changed its mind and would continue to allow more than a thousand snowmobiles to enter Yellowstone each day in winter.

The overwhelming majority of public comments by this time (80 percent of a total of some 360,000 comments, according to Public Employees for Environmental Responsibility) favored the originally planned snowmobile ban. Even the Park Service affirmed in its environmental analysis that the best way to protect the park, its wildlife, and its visitors would be to get rid of snowmobiles. Nevertheless, the agency decided to keep snowmobiles in the Park. The Park Service reasoned that capping snowmobile numbers (and even allowing for increased snowmobile use over current levels); requiring snowmobilers to visit the Park on guided tours, and requiring snowmobiles to meet stricter standards for emissions and noise would solve all the problems snowmobiles cause in Yellowstone. At the same time, the Park Service acknowledges that even under its new snowmobile plan, there may be days when rangers still will need to wear respirators, employees and visitors will run significant health risks, and haze from snowmobile exhaust will still hang over Old Faithful. Even worse, the snowmobile industry has just released its data on this year's

*Shortly after the manufacturers' suit against the snowmobile ban in Yellowstone, Justice lawyers met secretly with industry lawyers and agreed to settle the case ...*

snowmobile models and they are even noisier and dirtier than last year's models.

The environmental groups filed a new suit in the autumn of 2003 in federal district court in Washington, D.C., challenging the Park Service's failure to protect Yellowstone as the law requires.

On December 16, at about 8:00 p.m. eastern time, Judge Emmet Sullivan ruled that the administration's rewrite of the snowmobile rule was illegal and that the Park Service must operate under the Clinton rule. The snowmobile season started the next day, and the practical effect was to halve the number of snowmobiles allowed in the park this season and completely ban them starting next season. An appeal has been filed by pro-snowmobile interests.

**T**here's nothing unusual about court squabbles over decisions involving management of the public's land or the control of air and noise pollution. What's different is an emerging pattern where the federal government caves in to industry lawsuits or, as in the Yellowstone case, uses litigation as a smoke screen to disguise its rewrite of a legally adopted, well-thought-out, and popular rule. These, to coin a cliché, are but the tip of the mesa.

- Toward the end of the Clinton administration the Forest Service adopted a rule that would ban road building and commercial logging on nearly 60 million acres of roadless land on the national forest system — the now famous Roadless Rule. The rule had undergone extensive scrutiny, had been the subject of hundreds of public hearings, and garnered an unprecedented 1.6 million public comments. As soon as it went into effect it was challenged in nine separate lawsuits by the timber industry and a few states. One of the suits was filed by the state of Alaska.

Environmental groups intervened in the case. On June 3, 2003, the plaintiffs and the federal government concluded an out-of-court settlement agreement without informing the conservation intervenors of the negotiations. In the settlement, the Forest Service agreed to issue, within 60 days, a proposed temporary regulation that would exempt the Tongass National Forest from the application of the Roadless Rule until completion of the rulemaking process for any permanent amendments to the Roadless

Rule. The agency also agreed to publish an advance notice of proposed rulemaking to exempt both the Tongass and Chugach National Forests from application of the rule.

In practical effect, this settlement will result in both of Alaska's national forests being exempted from the rule, giving the state everything it sought in the case. It will turn loose the bulldozers and chainsaws, and likely result in the clear cutting of entire watersheds — the preferred method of logging on the Tongass — with damaging impacts to wildlife and the fishing and recreation economy of the southeast Alaska.

The state and the federal government filed a motion for voluntary dismissal of the pending case without seeking court approval of the settlement. This procedure allows the Forest Service to begin the process of dismantling the rule in Alaska without any effective opportunity for conservation groups or other interested parties to object to the settlement in the court proceedings.

- The California red-legged frog, star of Mark Twain's "The Celebrated Jumping Frog of Calaveras County," is one of the many creatures that have all but disappeared thanks to habitat destruction and other human-caused assaults. A lawsuit resulted in its being listed as threatened; another suit led to a critical habitat designation of more than four million acres.

The homebuilders association then sued to challenge the critical habitat, arguing, as is the custom these days, that the required economic analysis was flawed. Environmental groups intervened in the case and tried unsuccessfully to have it transferred from federal district court in Washington, D.C., to California. Soon thereafter, the intervenors learned that the government was in intense negotiations with the plaintiffs. They asked to join the negotiations and the government refused (the plaintiffs didn't bother to answer).

A settlement agreement was reached and

*... The settlement shelved the phase-out pending a new environmental study. When the EIS was released, the Park Service announced snowmobile use could continue*

despite the conservationist intervenors' objections, the judge signed the settlement and that was it. The settlement wiped out the critical habitat and ordered the Fish and Wildlife Service to start over with a new economic analysis leading to a new critical habitat designation by late 2005. In the meantime, the agency will not assess the impacts of potentially damaging actions on the four million acres of land it found to be critical to keep the imperiled frog alive.

- Two weeks after the election that put George Bush into the White House, various homebuilders associations filed suit in federal district court in Washington, D.C., challenging the critical habitat established for 19 separate groups of salmon and steelhead on the West Coast. They argued that the economic analysis of the habitat designation was flawed. Environmental groups moved to intervene but were denied by the court, which invited them to submit friend-of-the-court briefs instead. The government then promptly settled the case by withdrawing the critical habitat designations.

Without the critical habitat designation, the Fish and Wildlife Service may not assess the impacts to habitat of federal agency actions that may degrade salmon habitat.

- The National Elk Refuge was set aside early in the 20th century as a winter feeding ground for the thousands of elk that migrate to this area annually. In 1997 and again in 1998, the state of Wyoming demanded that it be allowed to vaccinate the elk on the refuge with an untested cattle vaccine because the state feared that the elk would pass a disease to cattle in the area. The U.S. Fish and Wildlife Service refused, primarily because the efficacy and safety of the vaccine in elk was unproven and because the agency felt it could handle the problem itself.

The state responded by filing suit in Wyoming and arguing that states, rather than the Fish and Wildlife Service, have final management authority over wildlife manage-

ment decisions on National Wildlife Refuges throughout the nation. The district court disagreed and the Tenth Circuit Court of Appeals affirmed the district court's decision. When the case was sent back to the district court, however, the new Bush administration entered into secret settlement talks with the state of Wyoming, the result of which was an agreement by the Bush Fish and Wildlife Service to implement the state's vaccination program. The stated reason for this about-face was new information concerning the state's vaccine. In fact, though, the new information demonstrated that the vaccine was *ineffective*.

- On the day after Christmas 2001, the Douglas Timber Operators quietly filed a complaint in the federal court in Oregon seeking to get rid of rules requiring that the Forest Service conduct surveys of land slated for logging to determine whether there are species present that require special protection. Environmental groups, meanwhile, unaware of this suit, filed their own challenge to other provisions of the 2001 record of decision concerning the Northwest Forest Plan.

When they learned of the industry suit, the plaintiffs in the second suit moved successfully to intervene in the first suit. Before either case could proceed very far, rumors reached the community groups that settlement negotiations were underway. Heather Brinton of the Western Environmental Law Center in Eugene, lawyer for the intervenors, telephoned to ask about the rumored negotiations: were they going on? If so, when was the next session? And could she please participate? The answers: yes, we're negotiating; the next session is none of your business; and no, you may not participate. (The Association of Oregon and California Counties, incidentally, had intervened on behalf of the timber industry; it did participate in the settlement negotiations.) Soon thereafter a settlement was announced whereby the Forest Service is writing a new supplemental environmental impact statement that will explicitly examine the option of eliminating the scientific survey and wildlife protection provisions altogether.

- The northern spotted owl and marbled murrelet are both protected under the Endangered Species Act, which requires that listed species have their "status" reviewed every five years, a reasonable idea. But the owl and the murrelet are also lightning rods

*A secret settlement of a timber suit against the Roadless Rule has opened up logging in Alaska's Tongass and Chugach National Forests*



for controversy and the bane of that small part of the timber industry in the Northwest that still targets ancient forests for logging.

In mid-2002, the timber industry filed two suits to attack the birds, one demanding a status review under the ESA, the other challenging both species' critical habitat. Environmental groups, worried about the Bush Justice Department's propensity to settle, intervened. The government immediately settled the status-review case. The intervenors did not object in principle with this settlement, but are concerned that the government may use the review as an excuse to reduce protections for the birds. The Fish and Wildlife Service did agree to keep critical habitat in place while the review is being conducted.

- Black Canyon of the Gunnison National Park in Colorado is all about the river. It carved the canyon and supports a gold-medal fishery within the park. Natural rivers rise and fall, flooding in the spring, dwindling through the summer and into the fall. The plants and animals that exist in the canyon depend on this fluctuation—called a natural hydrograph—to thrive and prosper.

In January 2001, the federal government filed a claim with the Colorado Water Court, seeking a portion of the water in the Gunnison within the park. The claim included provisions for the natural hydrograph, which had been largely lost when a dam and reservoir were built upstream. Environmental groups support the hydrograph, but had other reservations about the claim and filed to join the proceedings.

For the next two years, the environmental groups repeatedly asked the federal government to sit down with all the parties and work out a settlement. No answer. Then, on April 2, 2003, the state and the feds announced that the federal government had agreed to amend its claim, drastically cutting back the amount of water it was requesting, which would eliminate the possibility of seasonal fluctuations. The settlement between the federal government and the state of Colorado hasn't been implemented yet, but only because conservationists have challenged the deal in federal court.

- Two geothermal energy developments were proposed for the Medicine Lake Highlands (Klamath and Modoc National Forests in California) pursuant to BLM geothermal

leases in the 1990s. The Highlands are a remote, relatively pristine area that has been considered a sacred Indian site for 10,000 years.

In 2000, BLM and the Forest Service approved one project and denied another. As a condition of the approval, the agencies placed a five-year moratorium on further development in the Highlands and agreed, within that five-year period, to undertake a public environmental review process under the National Environmental Policy Act to consider whether to amend management direction in the forest plans for the area to prohibit permanently any further development. Energy companies filed a constitutional takings claim in Federal Court of Claims and the Clinton administration moved to throw out industry's case on variety of grounds.

Before any action in the Claims Court case occurred, the Bush administration came in. The pending motions in the court became sidetracked while the administration unilaterally lifted the development moratorium. The government then settled the takings case with respect to the second project by agreeing to reconsider the project and eventually reversed the decision.

Some people have suggested that the administration may actually have invited some of these suits, so as to produce the favorable-to-development-interests settlements, though no hard evidence has yet appeared to support that claim. It is clear, however, that it welcomes these suits, and is only too eager to settle them, too often behind closed doors. It's a technique that provides political cover in the sense that the administration can argue that "the courts made us do it" when it enters a settlement that, if subjected to a public legislative process, would be highly unpopular with a significant fraction of the citizenry. •

*Another settlement offer made behind intervenors' backs wiped out designated critical habitat for Mark Twain's celebrated jumping frog*