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Whither the West: A Call to Action

By William Perry Pendley

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By William Perry Pendley

It has been a tough four years. We have been learning what George Bush meant, or maybe more precisely, what the bureaucrats thought he meant, when, during the campaign of 1988, Mr. Bush said, "I am an environmentalist." It has not been a pretty picture.

I worried about the President's campaign promise. I worried even more when I heard his first State of the Union address in which he announced two "environmental policies."

First, he placed off limits to oil and gas exploration and development three areas of the Outer Continental Shelf (OCS)—two offshore California and one offshore Florida. Congress quickly followed suit, adding more areas to the moratorium, so that today there is little of the OCS available—a most unfortunate policy since energy experts believe there is enough oil in the OCS to replace all that we get from the Persian Gulf for the next 25 years.

Second, he announced an aggressive federal land acquisition program to buy land from private landowners, to take it off the tax rolls, and to put it into federal hands. That aggressive land acquisition policy continues today. The budget of the Bureau of Land Management, for buying privately owned lands, went up 200 percent, and the budget for the U.S. Forest Service up 38 percent in fiscal year 1992. (Parenthetically, the government's land-acquisition program received a stinging rebuke from the Inspector General of the Department of the Interior who severely attacked the improper, and often illegal, manner in which that program is being conducted.)

After President Bush's first State of the Union address, I wondered what would happen next. The answer was not long in coming. It happened in Denver, Colorado, an area I now call home.

The "Environmental President" and His Legacy

For one hundred years, the people of Denver have planned for a water project—a water project they call Two Forks—at the two forks of the South Platte River. Forty local units of government did something unique. They worked together to plan for future water needs. They spent $47 million to study the project. They agreed to spend $90 million in mitigation measures to make local environmentalists happy with the project, but that was not enough for the national environmental groups. They went to their friend Bill Reilly, Administrator of the Environmental Protection Agency, and said, "Veto this water project." So he did.

In a bit of irony for us Westerners, he sent an EPA official from Atlanta, Georgia—where they get 80 inches of rainfall a year—to Denver—where we get 13 inches of precipitation annually, mostly in snow—to tell us whether or not we need the water. He decided we did not.

Administrator Reilly has used the Clean Water Act, and the provision in that statute which was adopted to protect the water quality of municipal water supplies, to embark upon an aggressive land management, land use planning program. Not surprisingly for someone who has called for "sustainable growth" and has called property rights a "quaint anachronism," he vetoed water projects from South Carolina to San Diego and from Miami to Massachusetts.

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The Northern Spotted Owl. You no doubt have been following in the national media the agony in the Pacific Northwest—in Washington, Oregon and northern California—over the Northern Spotted Owl. Experts from the University of Washington and the University of Oregon predict that 100,000 men and women will lose their jobs; $100 million in timber revenues will be lost to counties and local government; and Americans will begin spending $4.3 billion to purchase timber from Russia and New Zealand because we will not be able to harvest trees in the Pacific Northwest.

Recently the Bush Administration adopted a draconian critical habitat plan under which nearly 6 million acres of land in Washington, Oregon, and California will be placed off limits to timber harvesting. That 6 million acres is equivalent to a three-mile swath stretching from Portland, Oregon, to Portland, Maine, all in two and one-third states.

Incredibly, when given the opportunity to grant relief to the timber communities of Oregon, the Bush Administration blinked. In May 1992, the Endangered Species Committee (the so-called "God Squad") permitted only 13 of 44 Bureau of Land Management timber sales to go forward. This despite the evidence which Mountain States Legal Foundation—representing the Oregon Lands Coalition and its 81,000 members—helped to present that these sales would provide much needed jobs while not posing harm to the Northern Spotted Owl.

As if this weren't enough trauma for the timber communities of the Pacific Northwest, the Bush Administration—in a misguided attempt to defuse the negative publicity of the U.S. bashing going on at the Earth Summit in Rio—announced it was all but abandoning clear cutting as a harvesting technique. You cannot grow Douglas Fir without clear cutting.

"No Net Loss Of 'Wetlands.'" President Bush traveled to my home state of Wyoming, stood at the foot of the Grand Teton Mountains and announced a "no net loss of wetlands" policy. While that sounds fine at the stratospheric level at which the President operates—he and his duck-hunting buddies; and I'm for shooting birds—in the bowels of the bureaucracy, where millions of Americans must operate, the "no net loss of wetlands" policy is a major problem. As the *National Law Journal* once reported, under such a policy, even the deserts are "wet."

I will confess, as a lawyer, that one of the reasons we have such problems with "wetlands" is because of the definitions we lawyers use. We have a joke in the law. Many regard the practice of law as a joke. As a lawyer, I am ethically prohibited from thinking that. Our joke is, "How much water does it take to have a stream in interstate commerce?" If you have a stream in interstate commerce, Congress can pass a law about it and federal bureaucrats can regulate it. Our punch line is, "only so much water as to float the first page of a Supreme Court opinion." With definitions like that you can see why millions of Americans have a problem with "wetlands" policy, and why, in August 1991, the presidents of all 50 state Farm Bureaus sent a letter to President Bush opposing Bush's wetlands policy.

Secretary of the Interior Manuel Lujan refused to issue patents or title to oil shale mining claims in Colorado because oil shale is controversial among some on Capitol Hill. Despite the fact that these mining claims are constitutionally protected property rights, and despite the fact that the statute under which the claims were filed and patents sought is still the law of the land, Secretary Lujan refused. He refused until ordered to comply with federal law by the Tenth Circuit Court of Appeals.

National Parks. Secretary Lujan attacked the free enterprise system in our national parks seeking to abandon, by regulation, the well thought out statutory scheme of a cooperative effort between the National Park Service and the free enterprise system, a scheme under which park goers benefit. Instead of private businesses, Secretary Lujan's new policy will lead to govern-

ment-owned and -operated concessions. If you like the service you get from the IRS, you'll love "McLujans."

Desert Tortoise v. Ravens. In the deserts of California, Nevada, Utah, and Arizona, there are three million Desert Tortoises, 100,000 of them in captivity. Yet the U.S. government, after careful study, decided that the Desert Tortoise is threatened as a result of raven predation. As the government expressed it in its report, raven predation will lead to the extirpation of the tortoise population. I didn't know what extirpation meant. I had to look it up. It means to pull up, as if by the roots. So I think of extinction as going out with a whimper. Extirpation is going out with a bang.

The government, recognizing the threat to the tortoise population posed by the raven, decided to kill 1,500 ravens. I'm for shooting birds, so I supported that program. However, the Humane Society of the United States did not like that program. It filed a lawsuit saying that the program would be inhumane to the raven. In response, the U.S. government, "to save the cost of litigation," quickly settled the lawsuit after the Humane Society generously allowed the government to kill, not 1,500 ravens, but 56.

The government did not take that deal quickly enough because the Humane Society added another condition. The Humane Society said the government could only kill ravens "it could positively identify as habitually preying on tortoises." That deal the government took.

Nevada Wilderness Act. While President Reagan vetoed wilderness legislation for Montana, President Bush signed into law the Nevada Wilderness Act over the objections of Congresswoman Barbara Vucanovich, who represents every county in Nevada except Clark County. There are no wilderness areas in Clark County, unless you count the Las Vegas Strip.

Rio Summit. President Bush bowed to the pressure of environmentalists, within and without his Administration, and journeyed to what former Washington State governor Dixy Lee Ray called the "Flat Earth Summit" in Rio de Janeiro. Although Bush was there, no reputable scientists were there given the total absence of scientific data to support the summit's proposals.

Like its predecessor, the Law of the Sea Treaty (LOST), and every other U.S. bashing exercise, the confab in Rio boiled down to the fact that other countries want two things from the U.S.: its technology and its money. To paraphrase a Woody Allen joke, LOST gave the U.S. none of what it wanted at an outrageously high price.

The Earth Summit is a perfect marriage of convenience, between the covetous international bureaucrats who tried to blackmail the U.S. at LOST and the "sky-is-falling" environmental groups. Unsuccessful at extorting money from the U.S. for LOST, international bureaucrats have gone "green," covering their demands for U.S. dollars with a veneer of "Chicken Little" rhetoric from their new allies in the environmental movement.

President Bush obviously forgot Ambassador Jeane Kirkpatrick's testimony that the greatest accomplishment of President Reagan at the United Nations was that the United States finally took off the "Kick Me" sign. Thus President Bush put the "Kick Me" sign back on and went to Rio to be lectured on the evils of capitalism and democracy by that great humanitarian, Fidel Castro.

Killing Birds to Save Them. Finally, we have perhaps the most outrageous action by the government on the environmental front. Before the lawsuit over the Exxon *Valdez* was settled, lawyers for the government decided they did not have the evidence to support the damage award which the government wanted to recover from Exxon—in what *The Wall Street Journal* called the "blood sport trashing of Exxon." So the government, in order to prove the total number of birds killed—not just those which washed up on shore—hired a contractor to go to Alaska, kill

several hundred birds on two Alaska wildlife refuges, dip them in oil and throw them into Prince William Sound.

I know this is true. I read it in the *Los Angeles Times*. It is true. Recently, John Turner, Director of the U.S. Fish and Wildlife Service, confessed that his agency did just that. In fact, the General Accounting Office (GAO) was called in to investigate the government's bird killing activities. Remember, these are the same agencies of the U.S. government which fined a mining company $500,000 for accidently killing 25 birds in Nevada.

So much for the legacy, thus far, of the Environmental President.

This Land is Their Land

One-third of the nation's land is in the hands of the U.S. government. An overwhelming majority of that land is in the West where the federal government is the dominant landowner. Nearly half the land in Wyoming, Oregon, and California is federally owned. In Nevada and Alaska, more than 85 percent of the land is in federal hands.

These lands, sometimes called public lands, have always been controversial. You read the debates in the U.S. Senate and House of Representatives of 100 years ago and the battles were the same then as they are today—between use and nonuse, development and conservation, progress and preservation.

However, there is a new specter in this country, for, after spending the last 20 years using the West as a laboratory for controlling and limiting growth, environmentalists are attempting to extend these controls and limits to any land. Today in America, any use of any land, public or private, fee or federal, is controversial, is challengeable.

Because of the scope and the reach and the depth and the breadth of "wetlands" policy, any use of any land, anywhere in America can be challenged and stopped, at least temporarily. Because of the scope and the reach and the depth and the breadth of the Endangered Species Act, any use of any land can be challenged and stopped—perhaps permanently.

A few months ago, my home state of Wyoming sponsored a conference in Laramie at the University of Wyoming. A couple of professors, named Popper—a husband and wife team—from Rutgers in New Jersey, came to discuss a program they call the "Buffalo Commons." Their thesis is that mankind was never meant to live on the Great Plains. I was in Pierre, South Dakota, a few weeks ago and this came as a great surprise to all the people there.

The professors believe that, sooner or later, all of the people now living on the Great Plains will be gone and it ought to be sooner. So the professors have proposed that the U.S. government embark upon a program to "deprivatize" 110 counties in nine states in which 400,000 people live. They want to move those people out so that the buffalo can once more roam upon the land. I don't know if Kevin Costner would be there on opening day.

Of course, this is laughable. It is ridiculous. It is ludicrous. It is not going to happen. However, I submit to you that in large parts of America this is happening today, as the cattleman, the rancher, the woolgrower, the miner, the timberman, the water developer, the ski resort operator, the oil and gas explorationist, and all of the little towns and communities that depend upon such activities are being pushed off of the land.

We are locked in a battle for economic survival, for the survival of our most precious rights—the right to own and use property, individual liberty and freedom. Yet we have a consensus, compromise, conciliatory, go along, get along, will-o'-the-wisp, wet-finger-in-the-wind Administration that does not understand the nature of the battle. It does not understand the nature of the beast with which we are engaged and have been engaged for more than 20 years.

This lack of understanding reminds me of a few years ago when the government decided to outlaw the poison 1080 that woolgrowers were using to kill the coyotes that were decimating their sheep herds. The government decided that instead of the poison, the woolgrowers should put out a feed that would render the coyotes sterile. One bright young man from EPA traveled out to Wyoming to explain it to us. He ended before a standing-room-only crowd at an elementary school in Gillette, Wyoming. After he explained this new concept to everyone, a gnarly old boy in the back stepped up to the microphone in the center of the aisle and said: "Sonny, I don't think you understand the nature of the problem. You see, the coyotes are killing and eating the sheep. They're not raping them."

Which reminds me too of former President Reagan's definition of Washington, D.C., as a small plot of land on the banks of the Potomac, surrounded on all sides by reality.

Environmental Passion, Constitutional Peril. We are in a new day in America. You can't pick up a newspaper, you can't pick up a magazine, you can't turn on the television, you can't go to the movies, you can't even go into the grocery store, without being besieged by sky-is-falling environmental rhetoric.

It is ironic that it is happening now, because something incredible is happening everywhere else in the world. Not long ago, they tore down the Berlin Wall. The very next year the brave people of the Soviet Union faced down the Red Army, said no to tyranny and totalitarianism, no to dictators and despots. All around the globe, people cry out for freedom. Everywhere, people are embracing freedom and liberty. It is worth noting that, in the former Soviet Union, the number one freedom sought by the people is the right to own and use property.

Meanwhile here in America, in the birthplace of liberty, we seek and embrace more and more governmental restrictions over our ability to use our land, over our most basic and fundamental freedom. Here in America we find ourselves asking, "Oh, EPA, can we farm our land?" "Oh, Corps of Engineers, can we protect our land from floodwaters?" "Oh, Fish and Wildlife Service, can we harvest our own trees?"

The late Warren Brookes—a man whose brilliant mind, ability to see through mendacity, and willingness to take on what others call the "green bigots" will surely be missed—once referred to environmental extremists as "watermelons"—green on the outside and red on the inside. "Environmentalism" is indeed the last refuge of the left, the last safe haven for those who trust, not the people, but big government, those who seek to place the power in the hands of federal bureaucrats. No wonder the environmental message has became the cause of choice for the elitists of Hollywood. It should not surprise us that they have embraced environmentalism with the same self-righteous fervor as they once embraced socialism and communism.

One Bright Light—Federal Judiciary. One of the great accomplishments of President Reagan, whom I was proud to serve, was the appointment of conservative and moderate to conservative judges to the federal bench. Thank God, the one bright spot in the Bush Administration has been the continuation of that vital legacy. You cannot look at this Supreme Court very long and not understand that amazing things are happening today.

Of particular note is a case now before the Supreme Court, *Lucas v. South Carolina Coastal Council.* Mr. Lucas purchased two beach front properties in South Carolina with the incredible notion of building a home on each—one for his family and one for resale. However, the South Carolina Coastal Council decided that Mr. Lucas could not build his homes even though there were other homes along the beach. Mr. Lucas sued, asserting an unconstitutional "taking" of his property for "public purpose" without "just compensation." The trial court agreed and awarded Mr. Lucas $1.23 million. The South Carolina Supreme Court, by a three to two margin, over-

turned the trial court's ruling. Mr. Lucas appealed to the Supreme Court, which agreed to hear the case and did hear the case on March 2, 1992.

Lucas v. South Carolina Coastal Council may be one of the most important cases ever before the Supreme Court because it will help establish what constitutes a "taking." It is vital also because of what it will do to many of the goals of the environmental movement.[1] For years, the environmental movement has been saying the American people are willing to pay any price, bear any burden, to achieve the goals set forth by environmental organizations.

Notwithstanding their confidence that the public is willing to pay the freight, most environmental policies have been achieved "off budget," that is, the cost is borne not by the public, but by individuals. This was brought home to me in a recent debate in which I participated with an official from the National Wildlife Federation. He was asked his position on legislation now being proposed to compensate landowners for the loss of property under the "no net loss of wetlands" policy. His response was the country can't afford to pay for the land, it must achieve wetlands policy by regulation.

Thus, Mr. Lucas of South Carolina is asked to bear the burden of the very public benefit sought by the South Carolina Legislature, that of preserving the beaches in an undeveloped state. Not surprisingly, environmentalists are fearful of the impact of *Lucas* since it may mean that the costs of the environmental agenda will no longer be hidden, but will become part of the national debate on environmental policy. In all likelihood, most Americans will begin to assert that much that environmental organizations want is too expensive.

We got a glimmer of that reality during round one of the confirmation hearings of Justice Thomas when that great legal scholar, U.S. Senator Joseph Biden, questioned Judge Thomas on his position on the Fifth Amendment "takings" clause. Senator Biden commented, "Judge Thomas, if your position on the Fifth Amendment prevails, the government will not be able to regulate as it has in the past." From my perspective, that is the one thing that Senator Biden got right during the entire confirmation process.

Advantages of Public Interest Litigation. However, it does no good to have capable justices on the Court, conservative, property-rights oriented, balanced justices, unless we take to them good cases, effectively argued to bring the pendulum back to the middle; to restore balance to the consideration of environmental goals and economic growth; to put people back into the environmental equation. That's where an organization like Mountain States Legal Foundation comes in.

Mountain States Legal Foundation is a nonprofit, public interest legal center dedicated to individual liberty, the right to own and use property, limited government, and the free enterprise system. Created in 1977—and this year celebrating its fifteenth year—Mountain States Legal Foundation is committed to ensuring that the courts realize that "public interest" is not the exclusive province of environmental organizations and other left-leaning entities.

There are a number of advantages to public interest litigation as practiced by Mountain States Legal Foundation.

First, Mountain States Legal Foundation litigates for the public interest, not the profit motive. Not that there is anything wrong with the profit motive, but if you want to attract public support, litigating in the public interest is vital.

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1 On June 29,1992, the U.S. Supreme Court decided in favor of Mr. Lucas.

Second, attractive clients build public support. For while everyone uses energy, there is no constituency for the oil industry. While everyone uses wood products, there is no constituency for the timber industry. While everyone uses metals, there is no constituency for the mining industry. There is instead a huge and growing constituency in support of multiple use of public lands, in support of private property rights, and in support of growth and jobs.

Because the litigation in which Mountain States Legal Foundation becomes involved are cases and controversies, that litigation attracts public attention, not just once—as in the release of a report by a think tank—but throughout the duration of the lawsuit and at each stage in its movement through the courts.

By the careful selection, not only of cases but of clients, Mountain States Legal Foundation causes people to say—with regard to wetlands or endangered species or affirmative action or federal land management—"I support those goals, but what is happening in that case isn't right."

Third, Mountain States Legal Foundation litigates issues that might not otherwise go to court.

Fourth, Mountain States Legal Foundation enjoys a national reputation. As a result, the Foundation garners media attention regarding its cases; builds public support for its litigation; elicits a deferential response from the federal bureaucracy; and has an excellent reputation with the judiciary.

Types of Public Interest Litigation. Mountain States Legal Foundation can become a party in litigation—acting on behalf of its members throughout the country—as it did in the U.S. Supreme Court case of *Mountain States Legal Foundation v. National Wildlife Federation.* Mountain States Legal Foundation can serve as legal counsel for parties in litigation, as it did when it represented school teacher Wendy Wygant before the U.S. Supreme Court in *Wygant v. Jackson Board of Education.* Obviously, Mountain States Legal Foundation can intervene in ongoing litigation in the same manner.

Mountain States Legal Foundation often files briefs *amicus curiae,* thereby serving as a "friend of the court." There are circumstances in which an *amicus* brief serves an important, if not vital, function.

First, an *amicus* brief permits an entity which is not involved in the litigation to be heard on important issues affecting that entity—although the issues may not rise to the level to justify intervention as a party. For example, in an important case before the Colorado Supreme Court interpreting the powers of county government vis-à-vis the Colorado Oil and Gas Commission, Mountain States Legal Foundation represented, not the oil and gas industry which was well represented by others, but a ranching family which feared that an adverse ruling would affect its ability to develop energy resources on the family's property.

Second, an *amicus* brief allows the raising of public policy issues or legal arguments which are not being addressed by the other parties. Thus, Mountain States Legal Foundation filed briefs *amicus curiae* before the Ninth Circuit Court of Appeals and the U.S. Supreme Court in *Masson v. The New Yorker Magazine, et al. Masson* was the defamation case in which the Ninth Circuit held that a reporter could make up a quote and attribute it to a public figure if it were "a rational interpretation of an ambiguous remark," or if it "maintained the substantive content of unambiguous remarks." If that decision had been permitted to become the law of the land, it would have posed grave dangers to public debate on such emotionally charged matters as environmental issues.

Third, a brief *amicus curiae* permits the court to be made aware of the interests of a substantial body of the public and how a decision might affect the membership of various entities. Thus in the Lucas case, Mountain States Legal Foundation filed a friend of the court brief on behalf of the National Cattlemen's Association, and 300,000 cattlemen nationwide. Since landowners who

are the nation's stockgrowers are the ones most affected by environmental policies like "no net loss of wetlands" and environmental statutes like the Endangered Species Act, their views need to be before the Court.

Cases and Controversies. I want to share with you some of the cases in which Mountain States Legal Foundation is involved, not just to brag up on ourselves a little bit, although I love to do that; but also to let you know that millions of Americans are locked in this battle for freedom and liberty, fighting and winning, fighting and losing, fighting and not giving up.

A Color Blind Constitution. For years, Mountain States Legal Foundation has been a leader in the area of reverse discrimination. It was the Foundation, for example, that took the seminal case on the subject to the U.S. Supreme Court on behalf of school teacher Wendy Wygant. Our victory in *Wygant v. Jackson Board of Education* has permitted further advances toward our forefathers' goal of a "color-blind Constitution." We are now representing a highway subcontractor from Utah who has been denied contracts on which he submitted the low bid, solely because he is white.

Supreme Court Victory. In 1976, when Congress adopted the Federal Land Policy and Management Act, it mandated that the major land management agency, the Bureau of Land Management (BLM), release federal lands which were off limits as a result of outdated classifications or withdrawals. However, when the BLM completed its study—concluding that 180 million acres of land, an area the size of the states of Texas, Vermont, and New Hampshire combined—should be reclassified, the National Wildlife Federation sued to stop the release of these outdated or illegal land classifications. For five years, all of this land was locked up in federal court and with it some 1,000 oil and gas leases, 7,000 mining claims and hundreds of other applications by land-locked Western communities.

Mountain States Legal Foundation, fearing that the government would settle the case under disadvantageous circumstances, fearing the same type of terrible settlement as the government agreed to in the Desert Tortoise case, intervened in the lawsuit. In 1990, the Supreme Court ruled that the environmental group had no legal right to bring the lawsuit, what we lawyers call "standing," and threw the case out.

The environmental group called the decision a "disaster," and for environmental organizations it was. It was the greatest victory in more than 20 years in attempting to stop environmental groups from going into court.

Wilderness Water Rights. When the late Senator Hubert Humphrey introduced the wilderness bill in 1956, Westerners objected out of fear of what the wilderness act, if adopted, would do to Western water law. As a result of that concern, Senator Humphrey amended his bill to provide that it would have no affect on Western water law. It was that compromise which permitted enactment of the Wilderness Act of 1964.

However, some 20 years later, an environmental organization filed a lawsuit in Colorado asserting that the Wilderness Act required the Forest Service to claim water rights for wilderness areas. Incredibly, the federal district court agreed. Shortly after winning that case, the environmental organization attempted to shut down a water project for Colorado Springs, Colorado, which passed through a wilderness area. We appealed that case to the Tenth Circuit Court of Appeals, where the court ruled that the district judge was wrong.

Grizzlies and "Takings." Dick Christy, a woolgrower in Montana, lost some 20 sheep to Grizzly Bears in Montana. He told the Fish and Wildlife Service employees about it, but they did nothing. Then one day, he looked up and saw a couple of them coming across the field. He took out his rifle and shot one—a Grizzly Bear, not a Fish and Wildlife Service employee.

The government fined him for killing the Grizzly Bear, charged him with "taking" an endangered species in violation of the Endangered Species Act. We joined with him on his appeal to the U.S. Supreme Court, asserting an unconstitutional taking of Mr. Christy's property, his sheep. Although the Court declined to take the case, one Justice, Byron White of Colorado, wanted to hear the case. He believed that when the U.S. government permits a endangered species to dine upon a man's property—his sheep—there is an unconstitutional "taking." We believe that, in time, Justice White's views on this subject will prevail. In fact, we are currently representing a woolgrower fined $7,500 for killing a Grizzly Bear to protect his sheep and his own life.

Superfund. We have joined in a challenge to the constitutionality of "Superfund" asserting that the statute, on a retroactive and ex post facto basis, punishes conduct that was legal when it was performed. Superfund has numerous other procedural and constitutional deficiencies. Yet, as important is the fact that Superfund is not working. While Superfund threatens the financial solvency of companies, counties, and cities, while it turns business against business, it is making lawyers and experts rich. According to one report, of some $1.3 billion spent on several Superfund sites, 90 percent went for lawyers and administrative costs.

"Wetlands." The machinations of President Bush's "no net loss of wetlands" policy are best seen in our representation of two western Colorado ranchers, Dennis and Nile Gerbaz. For their 70 years, these ranchers—whose father came here from Italy in the early 1900s, working first in the mines of the West—have lived in harmony with the land.

A few years ago, the U.S. government gave a permit to a neighbor to do some work on the Roaring Fork River which flows past the ranch of Dennis and Nile Gerbaz. That was fine with Dennis and Nile since they're good neighbors. However, as a result of the work permitted by the government, the river slowly became filled with debris, such that the land of Dennis and Nile Gerbaz was flooded—some five acres.

That troubled them some, so Dennis and Nile Gerbaz asked for a permit from the government to repair their side of the river. The government not only denied that permit, government agents didn't even come out to the Gerbaz ranch to investigate the site. The following spring, the worst fears of Dennis and Nile Gerbaz were realized. The river filled with so much rock and tree and debris that the river was no longer able to proceed down its historic path. Instead, the entire force of the river was upon the land of Dennis and Nile Gerbaz. The river flooded 15 acres of their land, washing away five feet of top soil over a two acre area.

That was too much, even for them. They went to a lawyer who told them they had the right to remove the obstruction from the river, to remove the debris from their neighbor's irrigation headgate, and to restore their preexisting levee. So they did.

They returned the river to its condition before the flood. Today it looks as it has for more than 50 years.

Everything was fine until one day the government came, knocked on their door, and gave them a summons to come to court and pay a fine of $45 million, each! It is the government's position that when the river flooded their land it created a wetland which they could not dewater without a permit.

People, Trees, and Grizzly Bears. We are representing two counties, five tiny towns, a family-owned timber mill, and a grass roots organization in a lawsuit against the U.S. Forest Service. In northwestern Montana and northern Idaho, in the Kootenai National Forest, the Forest Service decided to cut back allowable timber harvest by 43 percent so as to achieve a 1 percent increase in Grizzly Bear habitat. In these timber-dependent communities, in communities where in ex-

cess of 60 percent of the county is federally owned, such a cutback will have devastating economic consequences.

It will also have catastrophic environmental consequences since the Forest Service has decided to leave standing millions of board feet of timber devastated by the Mountain Pine Beetle. It is these trees which will serve as the tinder for the next cataclysmic fire to sweep through the region. When it does—not if, but when—it will destroy not just the dead trees, but healthy forest and homes—not just the homes of people—but the habitat of the Grizzly Bear.

This lawsuit is unique for the plaintiffs are not timber companies, but the people of a community banding together to fight for the survival, not just of economic viability of their communities, but of the health of the forest which surrounds them and which they love.

Of Snails and Men. We have agreed to represent Brandt Child of Kanab, Utah, in Kane County. Kane County, although huge—it is slightly smaller than Connecticut—is sparsely populated. Less than 5,000 people live there. In the midst of some very beautiful country, it lacks two things: economic activity and water. Brandt Child sought to utilize the latter to create the former.

Retired with a partial disability from the construction industry, Mr. Child moved to Kanab, bought 400 acres of land near a highway, purchased $75,000 worth of heavy equipment and began to build a recreational park and tourist stop. Shortly after he began work, the Fish and Wildlife Service informed him that the three aquifer-fed ponds upon his land—around which he planned to build his resort—were the home of the Kanab Ambersnail—which is "endangered." When Mr. Child objected to this intrusion upon his land by saying, "This is my land. I own it and I pay taxes upon it," one government agent responded, "You may own it and you may pay taxes upon it but we control it."

Government Neglect of Wildlife. In Wyoming, we joined a lawsuit against the U.S. government on behalf of the Wyoming Stock Growers Association. In that case, a Wyoming rancher lost his entire cattle herd to the disease of brucellosis. Believing that the disease had come from infected elk and bison managed by the U.S. government, he sued.

The government—although it permits 50 percent of the elk and 40 percent of the bison to carry this deadly disease—asserted that it has no legal duty to Wyoming ranchers to prevent the spread of brucellosis and thus could not be held liable. The district court rejected the notion that the government was above the law even if it engaged in negligent land or wildlife management practices.

Although the court concluded that the rancher had failed to prove that the disease came from the elk or bison, the court did conclude that the U.S. government "acted negligently in managing the wildlife." The court also ruled against the government on its attempt to evade responsibility as a matter of law: "The federal government does not have the discretion to do nothing in the fight against a disease which it is perpetuating by its wildlife management practices . . . ."

Wolf "Recovery." Mountain States Legal Foundation intervened in a lawsuit filed against the U.S. government by Defenders of Wildlife in which the environmental group asked the federal court to require the Secretary of the Interior to introduce the wolf into Yellowstone National Park. Representing the farming and ranching communities of Wyoming, Montana, and Idaho, we argued that the U.S. Fish and Wildlife Service so-called "recovery plan," drafted by bureaucrats in 1987—in which introduction into Yellowstone National Park was proposed—was not a document which a court could order to be implemented. The court agreed with us and dismissed the lawsuit.

We also questioned how far such "recovery" could be taken, since the wolf is neither threatened nor endangered in Alaska, is being recovered in Minnesota and elsewhere, and once

roamed over the entire country. Could Defenders of Wildlife seek to have the wolf reintroduced into Rock Creek Park in Washington, D.C? On that note, we from the West find it very ironic that the Washington, D.C., City Council seeks to prohibit the ownership of wolves and wolf hybrids in the District of Columbia at the same time that some in Congress think the wolf belongs in our backyards.

There is more, of course, but that is enough to give you a flavor of the types and kinds of fights in which we are and have been engaged.

Potomac Fever. I spent thirteen years in Washington, D.C. I still have many friends in Washington, D.C., primarily because they have never heard this speech. Yet despite my friendships, I would not hesitate to sue any one of them in a New York minute.

A strange thing happens to people who come to Washington, D.C., even when they come from the states and communities which are having such problems today. I think it is in the water. They arrive in Washington, D.C., and all of a sudden they lose their perspective and start looking over their shoulders to the left, never to the right.

Ask yourself two questions: Why did the government settle that lawsuit with the Humane Society over the Desert Tortoise? What happened as a result of that settlement?

The U.S. government, deprived of the only program that would have improved the lot of the Desert Tortoise—diminishing raven predation—felt compelled to take other action. The government limited the grazing rights of cattlemen and woolgrowers, it canceled off highway vehicle events, it denied permits to mining companies, and it shut down the building boom in the fastest growing city in the country, Las Vegas, Nevada.

With a gun to its head, this is the deal made by the City of Las Vegas. In exchange for the right to build on 22,000 acres in downtown Las Vegas, the city agreed to place 400,000 acres in surrounding Clark County in a Desert Tortoise Management Zone in which there will be no grazing, no mining, no off road vehicle events, no hunting, and no hiking. To build in the rest of downtown Las Vegas, a total of 1.4 million acres of Clark County and nearby Lincoln County will be placed in the Desert Tortoise Management Zone. Worst of all, in the document announcing this new program, the Fish and Wildlife Service asserted: there are 50 other threatened or endangered species for which provisions must be made.

All of this because the government did not have the courage to fight the Humane Society. All of this because the government was more concerned about battling the Humane Society than doing the right thing. The government certainly wasn't worried about the rights of ranchers, or miners, or recreationalists.

It is imperative, therefore, that we get the government's attention, to let the bureaucrats and decisionmakers know that we are serious about protecting our rights and that we will go to court to do it. Perhaps an example is in order.

A few months ago, I became aware of the fact that the U.S. Forest Service had placed a member of the radical environmental group—Earth First!—on a fifteen-member working group to decide the future of the George Washington Forest in Virginia. Now, I have very strong feelings about Earth First!. First of all, I believe, as does Robert F. Kennedy, Jr., an attorney with Natural Resources Defense Council, that it is a terrorist organization. Or, as an Oakland police officer testified, it is a group that engages in the making and planting of explosive devices.

Second, I believe it has no place at any bargaining table presided over by the U.S. government. When a group believes it has the moral right, or even duty, to engage in certain illegal and even deadly activity to achieve its ends, then the presence of that group at the bargaining table skews the results of any negotiations.

When I learned that the Forest Service was negotiating with a member of Earth First! I wrote to the Forest Supervisor, providing him with information which Mountain States Legal Foundation had gathered on Earth First! since we established a clearinghouse on environmental terrorism. I asked that the Earth First! member be removed from the working group. The Forest Supervisor denied my request, asserting that the man represented the "deep ecology" movement.

I appealed to the Chief of the Forest Service, providing him with the State Department's official policy on counter terrorism. "If the United States won't negotiate with international terrorists, why is it negotiating with domestic terrorists?" I asked.

At a meeting of the National Cattlemen's Association, I met the Chief of the Forest Service. I asked about his response to my letter. He told me that his letter was ready to be signed. He also told me that he was denying my request. Said he, "We don't want to rock the boat." When I told him I knew people who had been threatened by such terrorists, he pleaded, "We haven't had any trouble with Earth First! in Virginia and we sure don't want to start."

At that I gave him my card after writing my Federal Express number on it. "As soon as you return to Washington," I asked, "please sign that letter and send it to me by overnight delivery, because as soon as I get it I plan to go into federal court. I want you to explain to the American people why you are negotiating with a terrorist group."

Six weeks later I got his letter. An amazing thing had taken place, wrote he. The Forest Service had discovered that it could work with the entire community and no longer needed the 15-member working group. Although they threw the baby out with the bath water, at least they were no longer negotiating with a member of a terrorist group.

Weird or Political Science. However, it is not enough to defend. We must go on the offensive. One of the biggest battles we face in America today is what I call weird or political science. It is not the science that we all learned in school but agenda science. Former Washington State governor Dixy Lee Ray, in her book, *Trashing The Planet*, asks the question: Who speaks for science? Her answer is, not the scientists. Part of the reason for weird science is weird scientists.

Today, the scientific community is really two communities. On the one hand we have reputable scientists, on top of their subject, seeking peer approval, publishing in scholarly journals and declining every opportunity to speak to the media. On the other hand are the weird scientists, unfamiliar with the issues with which they pretend to deal, declining to seek peer approval, and publishing in *People* magazine. As one of them said:

> We have to offer up scary scenarios, make simplified, dramatic statements, and make little mention of any doubts we may have. Each of us must decide what the right balance is between being effective and being honest.

No wonder the American public has been so bamboozled by the sky-is-falling crowd.

Thus, despite the total absence of credible scientific evidence, the media is convinced—and is attempting to convince us—that we have global warming, an ozone hole and acid rain and that it is all man's fault.

The Northern Spotted Owl—what the *Washington Post* calls the flying snail darter—is weird science. The testimony we received at the God Squad hearings in January 1992, in Oregon, reveals that every time scientists go out to count the owl, they find more of them. That should not surprise us since environmental groups admit that the Spotted Owl is just a surrogate to stop tim-

ber harvesting. It is weird science to assert, as do the environmental groups, that Spotted Owls live exclusively in old growth. They thrive very well, thank you, in second and third growth.

The debate surrounding old growth involves elements of weird science. We have already saved millions of acres of old growth in parks and wilderness areas. However, if environmental groups are truly concerned about global warming, they should know what every forester knows: acre for acre the best photosynthesis factory of any land-based vegetation is new growth.

The Red Squirrel which stopped a $240 million international observatory in economically hard-pressed southeastern Arizona is endangered, according to the Fish and Wildlife Service, essentially because the squirrels, upon seeing an intruder—a human—will become fixated, will forget to collect cones and will starve to death in the winter. People ask me if I make this up. No, but I think the Fish and Wildlife Service does.

In Colorado, the Squaw Fish threatens the construction of an important water project agreed, by treaty, to be built for the Ute Indian peoples. Yet in Washington and Oregon, there is a bounty on the Squaw Fish since there it allegedly interferes with the salmon.

The weirdest science of all is "Dr." Meryl Streep on apples. While I have the greatest respect for Meryl Streep's ability as an actress, she's no scientist. Yet, she felt no compunction about pronouncing that there are 5,500 to 6,500 cases of cancer each year from Alar alone, and helping to drive the price of apples from $14 a box to $9 a box, when they could be sold. When that happened orchardmen and women across America lost millions, and some of them lost everything they had.

During the course of the French Revolution, Marie Antoinette snorted "Let them eat cake." Two hundred years later, Meryl Streep essentially whined, "I don't mind paying $3 for an organic apple, do you?"

Which reminds me of a sign I saw at a timber rally in Forks, Washington. Inside the auditorium everyone in town had gathered in an attempt to find out what they could do about the economic disaster that was befalling them due to the Northern Spotted Owl. Outside a little boy stood in the rain with a sign held high: "It's Not The Owls. It's The Loons."

They want science. I'll give them science.

In the deserts of California and Nevada, modern day alchemy is being performed in the name of heap-leach gold mining. This new technology allows the recovery of microscopic gold and it is meaning millions of dollars of economic activity for previously economically hard-pressed Western counties. It means jobs, and opportunities, and revenue.

Unfortunately, in the past, heap leaching mining had an unfortunate side effect in that the weak cyanide solution used in the process was allowed to collect in ponds. Birds flying over mistook the ponds for the Caribbean and landed in them. As many as 10,000 birds may have died. Obviously mining companies and the Bureau of Land Management don't want that to happen and they have done something about it.

Yet that is not enough for some environmentalists. They want to shut down those gold mines because if they can shut down the mines they can render the desert uneconomical and they can have it locked up as a wilderness.

For those people, I want to put those accidental bird kills into perspective. Isn't that what it is all about, putting things into perspective? Two British scientists have helped me to do just that.

According to their study, the 5 million household cats in England kill 20 million birds every year. I called my friends at the Humane Society. "How many household cats in the United States?" "57.5 million," said they, "not counting the Tom's."

So I figured it out. I had the old math. The 57.5 million cats in America are killing 230 million birds every year. Then I saw a footnote, estimates are off by half, they said, because cats only bring home half of their kills. One of my lawyers asked, "What half?" That's kind of a lawyer question.

Thus, our 57.5 million household cats are killing 460 million birds every year. So I say: Before we get rid of the gold mines which are contributing so much to the economy of California and Nevada, we get rid of the cats. Better yet, suggests my son Perry, let's parachute the cats into the California desert to kill the ravens which are eating the tortoises!

I mentioned that to a lawyer friend in Denver and he said, "Perry, a cat would never take on a raven." "Hey," said I, "it's a joke!" Who said lawyers have no sense of humor?

Winning Hearts and Minds

Mountain States Legal Foundation is fortunate. It wins 75 percent of its cases—partially the result of case selection, partially the result of aggressive lawyering. However, we must do more than win cases. We must win the hearts and minds of the American people. We must change public attitudes.

After all, why did George Bush say, "I am an environmentalist." The reason is simple. His pollsters went to him and said, "Mr. Bush, a majority of the American people say they're environmentalists. You've got to be one too." So he is. So are we!

We all want clean air, and clean water, and safe lands. However, we know that being an environmentalist does not mean, as some apparently mean it, that we stop cutting timber, grazing stock, mining ore, developing energy, or growing. Some however, mean just that when they say they are environmentalists. As Meg Greenfield, Editor of the Editorial Page of the *Washington Post* says, the word "environmentalist" is not big enough to include all of us who use that term. It means too many different things to too many different people.

To us it means mankind and nature working together in productive harmony for the benefit of mankind. While for some others it means man is a cancer on the planet; it means more and more governmental regulation and control and less and less personal freedom.

I have waited in vain for George Bush to use the bully pulpit of the presidency to explain to the American people what it means to be an "environmentalist," to demonstrate the balance between environmental goals and economic growth, to put people into the environmental equation.

In the absence of such leadership, we must lead from the grass roots. I saw a bumper sticker on a beat-up old pickup truck in Roswell, New Mexico, that said it best, "If the people will lead, the leaders will follow." We must provide that leadership.

For it is not the Spotted Owl, nor the Desert Tortoise, nor the Red Squirrel that is endangered, but us, and our jobs, our economic strength, our lives, our dignity, our rights, our freedom.

Yet it doesn't have to be. I am optimistic about the future for several reasons.

First, is the defeat of "Big Green" in California. When that proposition was placed on the ballot, 60 percent of Californians polled favored its adoption. However, in November, 60 percent voted against it. There is a difference between Earth Day and Election Day.

Second, according to the respected Roper Organization, only 22 percent of the American people are, what one might call hard core environmentalists. The largest single group is that composed of those against government regulation on environment issues. We are the majority.