

Western Environmental Law Center



Defending the West • Fall 2008

Eugene, Oregon Taos, New Mexico Durango, Colorado Helena, Montana



WELC at the Supreme Court

On the morning of October 8th, WELC attorney Matt Kenna appeared before the Supreme Court to defend citizens' right to challenge rules enacted by federal agencies. Kenna was just 30 seconds into his argument before Justice Scalia interrupted him with a question. What followed was rapid questioning from the Justices in his half-hour before the Court.

The case began in 2003, when we successfully challenged a Bush administration rule that eliminated the public's right to comment on and appeal proposed major Forest Service projects, such as commercial logging, in our national forests. On appeal, the 9th Circuit court upheld the lower court's decision to set-aside the rule nationwide.

Then, the Supreme Court granted the government's request to review the case. This time the government did not argue that the Bush rule was permissible, but asserted that citizens do not have the right to challenge a federal regulation before it is applied to a specific project (e.g. a timber sale), and therefore, it was wrong to set-aside the rule nationwide.

Justices Souter, Ginsburg, and Breyer expressed skepticism. How, they inquired of the government's attorney, are citizens to be assured their legal right to have a voice in national forest management when

they cannot contest the rule denying that right until after the trees are cut?

"If we do not find sufficient elasticity and standing to allow a challenge to the regulation, there will, in fact, be a preclusion of any challenge to a lot of specific actions," Souter said.

Ginsburg concurred, noting that the law provides citizens with the right to notice, comment and appeal before a specific action is taken. "These are people who said, 'We are concerned about saving our forests,'" Ginsburg explained. "It doesn't do us any good after the project has been authorized. We want to be there when the decision is made to take action."

Chief Justice Roberts and Justice Scalia appeared sympathetic to the Bush administration's position and repeatedly challenged Kenna. Not to be deterred, Kenna cited multiple legal opinions supporting citizens' access to the courts to challenge federal regulations.

A moment of levity came when Kenna mentioned that he cut down his own Christmas tree every year, as an example of an action that would not require notice and comment. "You cut down a tree in the national forest without approval?" Roberts asked, feigning shock. "I did get the permit, Your Honor," Kenna assured him as the courtroom erupted in laughter.

We anticipate a decision early next year, and will keep you informed.



Matt Kenna, center, and WELC staff on the steps of the Supreme Court.



Photo: James Johnston

WELC defends your right to have a voice in the management of our national forests.

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Looking Across the West

This fall our attention turns eastward toward Washington, and not only for the reason you think. Yes, of course there is the election, which offers a glimmer of hope for our nation and our environment. But let's not kid ourselves, regardless of the outcome, our environmental challenges will be with us for a very long time. We are drawn to Washington for another reason: staff attorney Matt Kenna vs. Justices Roberts & Scalia, in the Western Environmental Law Center's first appearance before the United States Supreme Court on October 8th.

The stakes are high. Our citizens' ability to challenge in court the decisions of our Executive Branch, typically executed by its administrative agencies, helps maintain the balance of power between the Executive and Congress. This is critical to ensure the proper execution of and compliance with our environmental laws. Recognizing the tremendous power that 'We the People' yield through citizen enforcement, the Bush administration seeks to severely hamstring our ability to protect the interests of the many when they conflict with the interests of the few – the political supporters upon which this administration relies.

The details of this landmark case are addressed in our cover story, but think about the other implication of this case and its juxtaposition with the election. Justice Stevens is 88. Justice Ginsburg is 75. Justice Kennedy is 72. The next president will undoubtedly appoint at least one, maybe more Supreme Court Justices. How will such appointments change the composition of a court that came within a whisper of dismantling the Clean Water Act?



WELC enforces the law to protect western wildlands, such as the Grand Tetons in Wyoming. Photo: Willie Gibson
Cover Banner Photo: Brett Cole, Wild Northwest Photography

For the past eight years we have witnessed a steadfast campaign to consolidate and expand the power of the executive branch, while at the same time cloaking its decisions in secrecy. We have witnessed time and again the ineffectiveness of a legislative branch that on both sides of the aisle is beholden to corporate money. Our only check on an overreaching executive and ineffective legislature is a vigorous and impartial judiciary. And we have seen the Supreme Court take a decided turn to the right with the appointments of Justices Alito and Roberts.



Greg Costello, Executive Director

The fact that the Supreme Court accepted review of this case, in which we prevailed every step of the way, is an omen of what could come from a court that is antagonistic towards traditional concepts of jurisprudence.

As it sits, a precarious balance has been maintained, as witnessed by the recent non-restrictive view of the standing doctrine (which dictates who can go to court to enforce environmental laws) in the Court's landmark decision, *Massachusetts v. EPA*, in which the Court ruled that a state has standing to sue the EPA to regulate greenhouse gases. However, Chief Justice Roberts lashed out in a strongly worded fifteen-page dissent, articulating his narrow view of standing that he would apply in environmental matters. Justice Roberts, 53, is the youngest member of the Court. Justices Scalia, Alito, and Thomas typically join with him on decisions. It would only take one more like-minded appointee to tip the scales at the Court in favor of unchecked executive power.

This fall, Americans are focused on the candidates' views on the economy, the price of oil, health care, taxes and the war in Iraq and Afghanistan. I hope that in the next few weeks we will add to that list the candidates' views on the role of the judiciary. Few issues have as great a potential to impact the course of everyday life in America as this one.

Greg Costello
Executive Director

Spotlight

Striving to Protect National Forests From Off-Road Vehicle Abuse

WELC steps in to compel the Forest Service to uphold its conservation duty in the Sawtooth National Forest.

Idaho's beautiful Sawtooth National Forest has undergone a massive re-designation project opening nearly 1,200 miles of roads and trails to motorized vehicles. The re-designation process was supposed to be part of a national effort to remedy massive harm caused by unmanaged motorized recreation use on our national forests. Unfortunately, using sleight-of-hand tricks, the Forest Service is testing the integrity of this process by disregarding its conservation duties.

Over the course of the several-year planning process, the Forest Service worked exclusively with motorized-user groups and did not properly solicit or consider input from conservation groups.

"It is regrettable the district chose to develop a proposed action alternative based primarily on several years of exclusive input from motorized-user groups," wrote David Parrish, Regional Supervisor, Idaho Department of Fish and Game, opposing the plan. "We believe a more balanced proposed action could have been developed



Off-road vehicles compact and erode soil, spread noxious weeds, pollute the air and water, disrupt wildlife and directly damage trees, shrubs and other plants. *Photo: Courtesy of Wildlands CPR*

by inclusion of other interest groups, at the same level as the motorized groups, during the process," continued Parrish.

Both the Ketchum and Fairfield districts of the Sawtooth National Forest incorporated baseline wildlife protections recommended by Idaho's Fish and Wildlife department, but the Minidoka disregarded them. The area is home to many sensitive fish and wildlife species, such as the Yellowstone cutthroat trout, and bighorn sheep.

As a result, the Minidoka Ranger District has failed to remedy the massive harm to wildlife and water quality caused by unmanaged motorized recreation. In most areas of the Minidoka, motorized route densities are 2 to 4 times the science-based recommended maximum of 1 mile per square mile. The consequence to wildlife (habitat fragmentation, noise, and other impacts), and to water quality (stream crossings, sedimentation, and degradation of riparian habitats) has been devastating. For example, all of the subwatersheds on the Minidoka Ranger District are "Functioning at Unacceptable Risk" or "Functioning at Risk" for one or more water quality indicators.

Much of the harm to the forest's wildlife and water quality is linked to the documented existence of at least 734 miles of unauthorized, user-created routes. These routes are created when an ATV or other motorized vehicle



WELC is working to protect the Sawtooth National Forest from off-road vehicle abuse. *Sawtooth Mountains with Salmon River, Idaho.*

Photo: James Henderson, Sawtooth National Forest.

carves tracks into the landscape, without regard to wildlife and water quality, which, in turn, encourages other ATV and motorized vehicle intrusions. Over time, the unplanned routes become permanent. The Forest Service stood to the side, unable or unwilling to protect the forest from this unacceptable behavior.

To ensure that conservationists have an equal voice and that fish and wildlife are protected, we have filed a federal lawsuit with our Idaho partners, The Wilderness Society and the Prairie Falcon Audubon.

Responsible ORV Use

National forests across the country are engaging in the so-called travel planning process to satisfy a 2005 federal rule that required all national forests in the country to minimize the damage caused by cross-country, off-trail motorized vehicles. Working with forest conservation groups across the West, WELC is striving to ensure that this process is fair, and results in healthier forests and the responsible management of our public lands.

Regional Highlights

WELC is currently representing and collaborating with more than 120 organizations on approximately 100 matters to defend the West. Here are a few recent highlights:

1 Northern Rocky Mountains

VICTORY! Historic agreement to save Kootenai River White sturgeon



Kootenai River, where the Libby Dam has prevented sturgeon from spawning since 1974. Photo: MT Dept. Nat. Res.

White sturgeon have inhabited the Kootenai River since the last ice age nearly 10,000 years ago, but unless more young fish live to spawning age the species will likely be extinct in as few as 20 years. The aging population has not spawned since 1974, when the Libby Dam in northern Idaho was completed.

The Kootenai River sturgeon's habitat is currently restricted to 168 river miles from Kootenai Falls, Montana, located below the Libby Dam, downstream to Cora Linn Dam at the outflow from Kootenay Lake, British Columbia. The sturgeon population was listed as endangered in 1994, after declining in number due to operations of the dam, water quality degradation and loss of habitat.

Now, after nearly six years of litigation, WELC attorney Geoff Hickox has reached an historic settlement agreement that will give the sturgeon a chance of survival. Under the agreement, the Army Corps of Engineers will operate the Libby Dam flows to mimic ideal conditions for sturgeon spawning. In the longer term, the parties agreed to a project intended to restore habitat conducive to sturgeon recovery.

2 California

WELC Presses for Deep GHG Emission Reductions

In 2006, California Gov. Schwarzenegger signed into law arguably the boldest plan ever taken in the U.S. to fight global warming. The California Global Warming Solution Act (AB 32) aims to cap the state's greenhouse-gas emissions at 1990 levels by 2020. The State's own economic modeling shows that doing so would boost California's economy and save its residents money over the long-term. WELC attorney and climate change expert, Dan Galpern, will be representing the public interest as the California Air Resources Board develops the nitty-gritty details of how this is actually going to be achieved. Our goal is to ensure that the law is implemented in such a way as to realize the maximum economic gains and achieve the greatest feasible GHG emission reductions. Stay tuned!

3 Pacific Northwest

Ending Grass Seed Field Burning in Oregon

The evidence is conclusive -- field burning is an outdated and unnecessary practice that especially harms children, the elderly, and persons with respiratory or vascular diseases. Alternatives to burning are readily available and currently employed by the majority of grass seed growers in Oregon, Washington, Idaho and California.

We are in our second year of work to end field burning, and our efforts are paying off. Responding to community pressure, Oregon Governor Kulongoski has modified his position and is now calling for an end to field burning in three years. While the Governor's change of heart is welcome, several more years of field burning will cause additional needless suffering for downwind residents throughout the Willamette Valley. We are now gearing up for a fight in the legislature, where powerful industry lobbyists will seek to defeat any limitation on burning.



Field burning pollutes the air, harming children and the elderly, August 2008, Corvallis, Oregon. Photo: Brizz Meddings.

4 VICTORY! Elk Creek Dam Notched for Salmon

In a series of 16 blasts over the course of this summer, the Army Corps of Engineers “notched” the concrete dam blocking Elk Creek in southern Oregon, allowing its clear blue waters to flow to the Rogue River, and wild steelhead and coho salmon to swim back above it to spawn. The notching ends a 22-year saga involving WELC, the University of Oregon law school environmental clinic, and the U.S. Supreme Court.

Congress authorized the Elk Creek Dam as one of three to control floods in the Rogue basin in 1955. The Corps began construction in 1986, but due to concern for spawning fish, Neil Kagan, a recent graduate of the law clinic (then run by WELC founders Mike Axline and John Bonine), won an injunction stopping the dam from being completed. The case ultimately went to the Supreme Court (*Marsh v. ONRC*), which ruled for the Corps, but the injunction remained in place stopping the dam at 83 feet, one-third of its intended height.

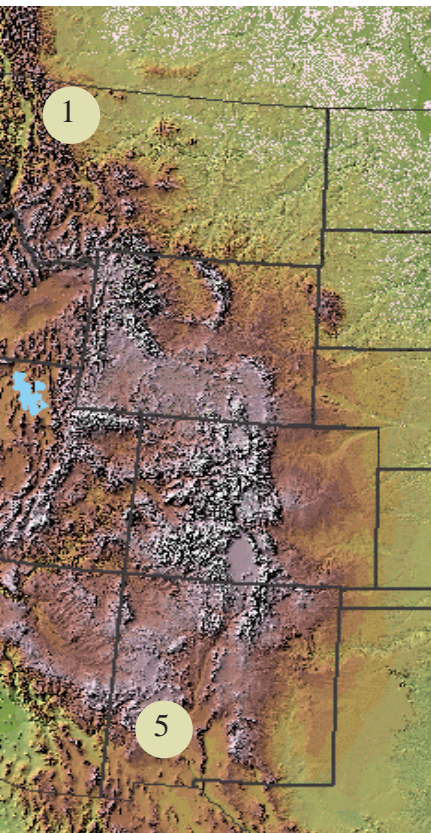
Soon thereafter, migrating salmon and steelhead were bumping up against the base of the uncompleted dam, unable to swim up through an internal tunnel. So the Corps began trapping and hauling them in trucks above the dam. That didn’t work well either. By the late 1990s, the coho’s inability to spawn landed them on the threatened species list.

In 2000, WELC attorney Pete Frost sued the Corps to cease the trap and haul operation and to notch the dam. He lost the case on technical grounds, but sued again later, only to have Rep. Greg Walden (R-Ore) stick a “rider” in an appropriations bill temporarily prohibiting the Corps from notching the dam.

The Corps realized that the trap and haul operation would never work well enough, and, in 2006, directed funds to notch the dam. And so this fall, for the first time in 22 years, salmon and steelhead will freely migrate back to their historic habitat to spawn in Elk Creek’s headwaters.



Elk Creek Dam undergoing a blast to provide salmon passage for the first time in 22 years. Photo: WaterWatch of Oregon.



5 Southwest VICTORY! Protecting Last Remaining Native Grasslands

Our 5 ½ year battle with the U.S. Bureau of Land Management (BLM) over the fate of wilderness-quality lands on some of the last remaining native Chihuahuan desert grasslands in Luna County, New Mexico is nearing a happy conclusion. Over the course of our litigation, BLM has terminated all 25,000 acres of oil and gas leases on the grasslands. While the threat of oil and gas development hasn’t been entirely eliminated, we’ve given some breathing room to our allies, the New Mexico Wilderness Alliance and Sky Island Alliance, to obtain long-term conservation protection for these important lands, which provide habitat for the many grassland species that are in decline. Part of a broader battle raging across the West, this victory is a testament to our persistence and vigilance in protecting our most special places from irresponsible and unwise oil and gas development.



Protecting desert grassland in the Otero Mesa, New Mexico, from oil and gas drilling. Photo: Stephen Capra

National News

WELC Protects Wildlife, Birds, and Habitat on Farms

Judge grants our request to preserve nearly 24 million acres of farmland enrolled in the federal Conservation Reserve Program.

We are thrilled to report that, in one of the quickest legal resolutions we've witnessed, WELC has won a significant victory protecting habitat for wildlife on farmlands across the nation.

This spring, the USDA abruptly announced plans to allow haying and grazing on 24 million acres of farmland enrolled in the highly successful Conservation Reserve Program (CRP). Under the CRP, farmers are paid to not farm their lands, and instead establish and maintain perennial cover for wildlife. However, the USDA, without environmental analysis or seeking input from state wildlife agencies, decided to allow the destruction of this critical habitat, while still planning to pay farmers for habitat conservation!

Since the CRP was established in the 1985 Farm Bill, it has been very popular with farmers, state wildlife agencies, conservationists and hunting groups. CRP acres are in most states, ranging across the country from Maine to Washington and Florida to California. The program has had a profound and positive impact on many species of wildlife, including waterfowl, upland game birds, and migratory songbirds, which depend on extensive

"Our problem was not with the individual farmers and ranchers by any means, but with the government's failure to analyze the environmental impacts of taking such a broad, sweeping action as opening 24 million acres of protected wildlife habitat to haying and grazing."
~ Sarah McMillan, WELC attorney



Photo: Brett Cole, Wild Northwest Photography.

CRP lands provide critical wildlife habitat, such as for this American Avocet.

grassland to reproduce successfully. In just the three states of Montana, North Dakota, and South Dakota the CRP has been credited with adding at least 12.4 million ducks to the waterfowl population that mi-

grates south in the fall. By encouraging farmers to convert highly erodible cropland to vegetative cover, the program reduces soil erosion and sedimentation in streams and lakes, improves water quality and enhances forest and wetland resources.

Working with the National Wildlife Federation, WELC attorney Sarah McMillan requested review of the USDA's decision to allow haying and grazing on CRP lands, which would destroy protected wildlife habitat.

At the hearing, the judge noted that the USDA's actions were "breathtaking," that the agency could not draft regulations that allowed it to circumvent statutes enacted by Congress, and that its short checklist could "charitably be described as a joke" in terms of environmental analysis.

The judge agreed to stop the destruction of important wildlife habitat on CRP lands, except for the lands for which farmers had requested to hay/graze prior to the temporary restraining order, equaling about 2.5 million acres.



Great Blue Heron lands in farmer's field. Photo: Brett Cole, Wild Northwest Photography.

WELC News



WELC is a proud member of **1% for the Planet**. We thank businesses **Tactics** and **Bambu** for their **generous contributions** to WELC through the 1%

for the Planet program. To learn more, visit www.onepercentfortheplanet.org, or if your business would like to donate to us through the program, please contact Russa Kittredge at kittredge@westernlaw.org, or call 541-485-2471.



Ronni Flannery, Attorney, Northern Rockies Office

We extend our warmest welcome to our new staff members, **Ronni Flannery** and **Jackie Marlette**. Ronni has extensive legal experience working to protect the ecological integrity of private lands through conservation easements and other land conservation tools. Jackie is our new development coordinator, and has worked with non-profit organizations focused on community collaboration, forest restoration, river conservation, outdoor education, and regional planning. **WELCOME!**



Jackie Marlette, Development Coordinator, Northwest Office

Double Your Donation – WELC’s Northern Rockies office has been awarded a matching grant from the **Cinnabar Foundation**. The foundation will match your donation dollar for dollar, up to \$5,000. Please consider a gift today that will provide twice the support to defend the unique Northern Rockies region. To participate in the match, please call Russa Kittredge at 541-485-2471.

Honors and Presentations

Megan Anderson (attorney, Southwest office) represented the environmental community at the **ABA Energy and Environment** conference on a panel entitled “Transmission Corridors and the Modern Electric System.” She also recently attended the **Western Mining Action Network, No Dirty Energy Summit** where she presented information about the Energy Policy Act of 2005 and how the environmental community can work to ensure that energy efficiency is a top priority.

Charlie Tebbutt (attorney, Northwest office) presented at the **University of Oregon Law School’s Public Interest Public Service** symposium on public interest law practice and at **Lewis & Clark Law School’s Animal Law Conference** on Concentrated Animal Feeding Operations (CAFO) law.

WELC Leads Wildlife Corridor Strategy Sessions

One of the most promising prospects for the permanent protection of a functioning, connected network of ecosystems where wildlife have the resilience to adapt to global warming is the recently adopted Western Governors’ Association (WGA) Wildlife Corridors Initiative. As such, WELC is mobilizing the conservation community to capitalize on the recent political will of the Western governors.

In that vein, Monique DiGiorgio, WELC Conservation Strategist, led a 2-day wildlife corridor strategy session this September with conservation organizations from ten states. The group drafted a plan to implement the WGA’s Wildlife Corridors Initiative emphasizing the conservation community’s goals. Next steps include statewide workshops to develop specific campaign plans that will promote priority policies and achieve on-the-ground conservation successes. For more information, visit our wildlife corridors center at www.westernlaw.org.



Wind turbines in Pronghorn antelope habitat.



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WHY I DO WHAT I DO . . .

By Pete Frost, WELC attorney since 1999

A few months ago an Oregon NPR affiliate interviewed me about what it's like to litigate against the Bush administration. I'm not good with the media (I was quoted in newspapers as saying that the administration's bad new regulations for our national forests are "The same clown in different shoes," even though I don't really know what that means). But after I had carefully answered the interviewer's questions, she caught me off guard by asking: "Do you have a personal environmental connection to cases you work on?" It gave me real pause, and I said: "Absolutely, and I grew up here. I was a boy scout. I have four kids. My grandma was born here. I want this place to be as good as I remember it when I was a kid."

I do want that, even recognizing the romance of my hindsight. As a kid, I camped out with friends under really big trees, and I loved the quiet. I learned how other-worldly tidepools are, and how big a Sitka spruce looks from its base.



Pete, on burro. Three Sisters Wilderness, Ore., 1960's

In summers, I ran the Clackamas River in an inner tube, got sprayed by cold waves, and sat on warm round rocks under willows. In high school, I helped hang our food in Glacier National Park, and listened at night to whether grizzlies might come. I was so very lucky.

Like me, this past summer my 4 year old boy caught (and released) a wild coastal cutthroat trout in the Drift Creek Wilderness in Oregon's Coast Range.

No one knows what the future holds. But I am again lucky to do what I can to protect and restore the West, so we may experience what is so good about this place.