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Feature Article

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Tipping the scales

by Ray Ring

For four decades, the federal courts have stood up for environmental laws. If George W. Bush has his way, that will soon be ancient history.

BILLINGS, Montana — The federal court here operates in a pale stone building, five stories tall, whose bulk and plainness make it appear a monument to impartial justice.

Inside, the neutral style continues in U.S. Magistrate Richard Anderson's courtroom: beige walls with no windows, dark wood furniture. The judge wears the ceremonial black robe. The courtroom feels like a sanctuary, as if any judge's ruling here is pristine, shielded from all the pressures of the outside world.

On this December day, the courtroom hums with an important environmental case over a slew of coalbed methane wells planned for the Powder River Basin, an arid rangeland that stretches from Montana deep into Wyoming. Four environmental groups, the federal Bureau of Land Management, oil and gas companies, ranchers, and the state of Wyoming are represented by 14 lawyers. The environmentalists are concerned about salty wastewater from the wells, a grid of new roads and pipelines, and the impacts on already-hammered species, such as prairie dogs and sage grouse.

But before they address those concerns, the lawyers argue over where the case should be argued. The environmentalists have chosen to file the lawsuit here in Billings, while the federal defendants, as well as Wyoming's state government and the industry, want to move it to the federal court in Wyoming.

Earthjustice lawyer Susan Daggett attempts to explain why the environmentalists didn't file in Wyoming, the state where most of the drilling will come down. "Most of the plaintiffs live here," she says. "Even those who live in Wyoming, live closer to Billings than to Cheyenne." She adds a compliment: "This court has the experience in these matters."

The BLM's attorney, Lori Caramanian, argues to move the entire case — or at least the

Wyoming portion of it. The judge challenges her: "Is there any difference (in how the BLM runs) coalbed methane in Montana and Wyoming?" And when she says yes, he pushes skeptically, "The same resource, with the same impact, from the same industry?"

The lawyers talk politely in terms of which court would be most convenient and appropriate. No one brings up what they're really arguing over, because it's too explosive: If the lawsuit stays here, the inevitable appeals will rise to the 9th Circuit Court of Appeals in San Francisco, where the judges have a reputation for being liberal and sympathetic to environmentalists. If the lawsuit is moved to Wyoming, any appeals go to the 10th Circuit Court of Appeals in Denver, where the judges are considered more conservative.

The attorneys on both sides are "venue shopping," or "jurisdiction shopping," in legal parlance — looking for a court, or even a specific judge, whose leanings may improve their odds of winning. It's common practice by both environmentalists and industry. Around the West, lawyers know which of the federal judges are likely to be sympathetic, and which are not.

And that information is becoming more valuable, because, despite all efforts to make them look neutral, federal courts are becoming increasingly political. Since the 1960s, the courts have been the backstop for environmentalists. When corporations or agencies have flouted federal laws protecting wilderness areas or rivers or forests or endangered species, environmentalists have gone to the courts, asking judges to be the laws' enforcers. But that backstop has been eroding over the past 20 years, and now, the Bush administration is on an uncompromising quest to recast the judicial system by appointing judges who are unlikely to agree with environmentalists, to put it mildly.

As the Bush administration stacks the courts, it becomes harder for environmentalists, like the ones in this courtroom today, to find sympathetic judges. While the trend has received little attention, it is emerging as the nation's core environmental issue. The future of the movement — and of the West's land, air, water and wildlife — depends very much on who gets to wear the robe.

A process fraught with politics

Currently, there are only about 870 federal judges nationwide on active status, holding coveted lifetime jobs, when all vacancies are filled. They work the front lines in local district courts, and work in 13 regional appeals courts and the Supreme Court. Several hundred more judges are on "senior status," working reduced hours, or performing special duties.

Most federal judges are named in an utterly political process, which is embedded in the United States Constitution. Most of the power is held by the nation's president. To fill a vacancy, the president identifies a pool of candidates, and there are almost no job requirements. These days, all judges begin as lawyers, but the president could nominate a hardware store clerk, and there would be no law against it.

In what's supposed to be a system of checks and balances, the president presents nominations to the Senate, and the Senate votes yes or no. While the Senate can prevent the president from appointing biased or unqualified judges, it almost always votes yes, even when the other political party is in charge. Most nominees have adequate credentials, and the parties don't want the government machine to break down over something the general public pays little attention to.

The exercise of political power goes back to President George Washington, who made sure to appoint judges who would uphold the fledgling U.S. Constitution. President Abraham Lincoln appointed judges who didn't allow states to secede from the Union. Franklin Delano Roosevelt appointed judges who supported his radical New Deal programs in the 1930s. John F. Kennedy and Lyndon Johnson saw judges in the South ruling against the civil rights movement in the 1960s, and appointed new judges who weren't racists.

The composition of the courts today has its roots in the 1960s and '70s, when a series of liberal Supreme Court rulings outlawed prayer in public schools and established the rights of the accused, such as the right to an attorney, and the right to privacy, including the right to abortion. The era also saw landmark environmental rulings — based on the flurry of new laws that protected clean air and water, endangered species, and public lands. In one famous case, the Supreme Court upheld the Endangered Species Act and temporarily stopped a huge hydropower dam in Tennessee to protect an obscure fish, the snail darter. Courts also established the "hard-look" doctrine, which holds that any federal action that may harm the environment must be scrutinized.

The right wing of the Republican Party reacted strongly against these rulings, and Ronald Reagan swept into the presidency in 1980, running against so-called "activist judges." During Reagan's two terms, he appointed 358 judges to lifetime jobs — more than any other president up to then, according to the Federal Judicial Center, an agency of the court system. We're still feeling Reagan's push for judges who want less government and fewer laws and regulations, because more than a hundred Reagan judges are still handling cases.

Even more, we're feeling the impact of Reagan's successor, George H.W. Bush, who continued the ideological push in the 187 lifetime judges he named — almost all still handling cases today.

When Democrat Bill Clinton took over the White House, he appointed 367 lifetime judges in his eight years in power. But Clinton was a moderate, who had to deal with an extremely hostile Senate run by right-wing Republicans for six of those years. Weakened by sex scandals, the Whitewater investigation, and his own impeachment trial in the Senate in 1999, Clinton appointed many qualified judges, but had no political capital to spend on confrontations over ideology — and he wasn't an ideologue, anyway.

Much of the power during the Clinton years was held by Republican Sen. Orrin Hatch of Utah, chair of the Judiciary Committee when his party ran the Senate. Hatch led efforts to stonewall dozens of Clinton nominees, and allowed any Republican senator to kill any nomination with a single "no" vote. Hatch also promoted his own candidates for judgeships,

epitomized by one politically connected friend, Ted Stewart, who had no courtroom experience, and was fiercely opposed by environmental groups.

Stewart, who ran Utah's Department of Natural Resources during the 1990s, presided over the layoffs of dozens of state biologists — an apparent purge to discourage anyone from speaking for frogs and other species in trouble (HCN, 5/27/96: Utah ushers its frogs toward oblivion). In 1999, Clinton refused to nominate Stewart for a district judgeship in Utah, but Hatch held 42 Clinton nominees hostage until the president caved in.

At least two Clinton appointees to Western courts often rule in favor of environmentalists these days. But all in all, the Clinton years were "a lost opportunity," says Judge Stephen Reinhardt, one of the few judges appointed by President Jimmy Carter who is still hearing cases. "Clinton was not willing to have any fights over (the courts)," says Reinhardt, who sits on the 9th Circuit Court of Appeals, "so he just bowed to the Republicans, and he was careful not to nominate anyone who might be considered liberal."

As a result, the courts lean to the right. "There has been a substantial return to 'originalism' in the courts in the last 15 years," says Stephen Calabresi, a law professor who co-founded the Federalist Society, one of numerous court advocacy groups that have sprung up in Washington, D.C., since 1979. The Federalists claim to be fundamentalists, believing that judges should stick absolutely to the original wording of the Constitution, even if it means overruling more recent case law. "I think (the trend in the courts) is good; it reflects treating the Constitution as law and being bound by it," says Calabresi.

Talking to a judicial right-winger, you get the feeling that if the Founding Fathers didn't mention endangered species in the Constitution, then the federal government has no authority over snail darters, spotted owls and other species in danger of extinction. Environmental lawyers see it differently.

"The mantra that the right wing is promoting a return to first principles is just a smokescreen, designed to mislead what they believe is an uneducated public," says John Echeverria, director of the Environmental Law and Policy Institute at Georgetown University.

"There has emerged since 1980 a new phenomenon — anti-environmental judicial activism," says Doug Kendall, founder of Community Rights Counsel, a Washington, D.C.-based group that helps local governments defend their regulations against right-wing lawsuits. "It's a product of a very distinct effort by a series of Republican presidents to appoint judges who show a hostility to environmental safeguards."

Bush II in charge

Despite the right-wing campaign, environmentalists have continued to have noticeable success in the courts. That could change, however, if George W. Bush has his way.

Bush probably understands the importance of judges better than any president ever has —

after all, he was named president by judges in both Florida and Washington, D.C. He has surpassed both his father and Reagan with his tactics on judges, pushing some nominees who are blatant ideologues, reducing the role of the American Bar Association in rating candidates — even reducing the role of Senate Republicans in screening candidates, all part of his pattern of concentrating power in the White House.

It keeps the Republican Party's dedicated right-wing voters — and its industry campaign donors — energized. "Our current president pushes the envelope. He's a risk-taker, a high-stakes gambler," says Sheldon Goldman, a judicial politics professor at the University of Massachusetts. "He and his administration are willing to go to the mat on judges, and for them it's a no-lose proposition. If they get their ideological folks confirmed, then they turn to their (political) base and say, 'Look, we delivered.' And if they can't, they can say, 'We tried. And now you gotta work harder to get (more Republicans elected to the Senate).'"

Of course, not all Bush nominees are ideologues, but some of them are so in-your-face, they set a definite tone. Like Victor Wolski: When Wolski was with the libertarian Pacific Legal Foundation, from 1992 to 1997, he roamed the West filing lawsuits against land-use planning and other environmental measures. In 1999, he told the National Journal, "Every single job I've taken since college has been ideologically orientated, trying to further my principles ... limited government, individual liberty, and property rights."

Last year, Bush appointed Wolski to the United States Court of Federal Claims in D.C., a key property-rights venue. The court handles "takings" cases, in which plaintiffs claim damages for government regulations that reduce the value of their property. It's comparable to a hard-hitting Earthjustice lawyer being appointed to a court that specializes in environmental cases.

Other questionable Bush appointees include Lawrence Block, a former Hatch aide who was also a "takings" champion (HCN, 2/18/02: Greens join 'Let's derail a judge's game'), confirmed to the Court of Federal Claims; Timothy Tymkovich, a protege of Interior Secretary Gale Norton, sworn in on the 10th Circuit Court of Appeals; and Paul Cassell, a University of Utah law professor, sworn in as a district judge in Utah, despite the revelation that he'd been paid \$12,830 as a consultant to nuclear-waste giant Envirocare, in the company's successful campaign to defeat Utah's Radioactive Waste Control initiative (HCN, 10/14/02: Utahns kill a radioactive dump).

Most of George W. Bush's judges haven't been on the bench long enough to have a track record yet. But the one with the longest record in the West, Sam Haddon — who was appointed in 2001 to the district court in Great Falls, Mont. — has already made two rulings severely limiting the scope of major environmental laws.

"We're steering our cases away from Judge Haddon," says one environmental lawyer in Montana, who asked not to be named. Environmentalists have allied with groups fighting for civil rights and abortion rights to encourage Democratic senators to at least temporarily block a handful of Bush nominees. Though their party is now the minority in the Senate, Democrats have battled over the most crucial seats — those on the appeals courts — by

threatening to filibuster. (A filibuster is a nonstop debate, often continuing through the night, that can only be broken by the votes of 60 senators, which the Republicans don't currently have.) Western Democratic senators in the fray include Max Baucus of Montana, Dianne Feinstein of California, Patty Murray of Washington, and Tom Daschle of South Dakota.

But Bush is persistent. Again and again, he revives nominations that are stalled or killed. And despite a few defeats, his nominees have sailed through the Senate in greater numbers and more quickly than the nominees in Clinton's last term. Already, Bush has named about 170 new lifetime judges.

"There's no effort on the part of Bush to pretend he is looking for moderate appointees," says Judge Reinhardt. "When he ran for election, he said he'd look for judges like Clarence Thomas and Antonin Scalia" — the leading right-wingers on the Supreme Court, named by Bush's father and by Reagan, respectively — "and that's what he's doing."

Pending nominees include Janice Rogers Brown, another property-rights champion. Brown seeks a seat on the D.C. Circuit Court of Appeals, which handles many cases related to federal regulations and federal land, because federal agencies are headquartered in D.C.; she's opposed by 48 environmental and planning organizations.

William Myers, a longtime lawyer for cattlemen and mining companies, who has often challenged regulations on public lands, seeks a seat on the 9th Circuit Court of Appeals, which has jurisdiction over half the West. While serving a brief stint as the top lawyer in Bush's Interior Department, he was targeted by conflict-of-interest investigations. His nomination to be a judge seems like the ultimate conflict of interest, and is opposed by more than 60 environmental and tribal groups, including the National Congress of American Indians, which represents more than 250 tribal governments.

"Myers is not a scholar. He doesn't have extensive litigation experience. He's an industry lobbyist," says Glenn Sugameli, who leads the Earthjustice effort to watchdog the nominees. "He has very extreme views on the environment, and endangered species, and wetlands — the same views as a number of the other nominees, but he's coming at it directly from the perspective of industry."

The scales are tilted

In raw numbers, Republicans have named 57 percent of the lifetime judges on the bench now, according to Alliance for Justice, another watchdog group, including majorities on most of the appeals courts, the Supreme Court and the Court of Federal Claims. What does that mean for environmentalists?

Folklore has it that once a person dons the robe, the politics drop away. Cases are supposed to be decided on their merits, the facts, and the persuasiveness of the lawyers' arguments. Even if Bush appointed every federal judge in the system, it shouldn't mean that

environmentalists never win another case.

"All the institutional incentives, once they're on the bench, drive them in the direction of being responsible and even-handed judges," says Georgetown's Echeverria. "A judge's highest ambition is to be known as an intelligent, scholarly, fair-minded, efficient decision-maker" who is rarely reversed on appeal.

But the law is a labyrinth, complex and convoluted, and there is some room for judges to express themselves, consciously or subconsciously. Even Echeverria sees politics and ideology operating at the "margins of high-profile cases, including environmental disputes." Others see more direct effects.

The notion that personal leanings disappear is "a mythological tale," says William Rodgers, who teaches environmental law at the University of Washington. "For every story like that, there are 10 of the other stripe, where the president who appointed the judge gets just what he hoped for."

In an exhaustive number-crunching exercise, Richard Revesz, dean of New York University Law School, reviewed about 250 environmental cases in the D.C. Circuit Court of Appeals from 1970 to 1994. He found that judges appointed by Democrats are more likely to agree with environmentalists, while judges appointed by Republicans tend to favor industry.

There are Republicans who break the pattern. District Judge James A. Parker, for example, a Republican appointed by Reagan, has come down on the side of endangered fish in the Southwest numerous times.

But since this prolonged round of court-stocking began, environmental lawyers point to three primary trends in court rulings that threaten the foundations of many environmental cases. "These are critical and hotly contested constitutional disputes that will decide the fate of modern environmental law," Kendall says.

First, judges are ruling for "takings" claims in new ways, which could make it much more expensive, or impossible, to enforce many environmental regulations. A recent example came in January, when Court of Claims Judge John Paul Wiese decided the federal government must pay at least \$14 million to California farmers who surrendered some water for endangered fish in the Tulare Lake region. Wiese, a Democrat appointed by Reagan, has written that under the Endangered Species Act, "the federal government is certainly free to preserve the fish; it must simply pay for the water."

Second, courts are more open to arguments limiting the scope of the crucial "Commerce Clause" — a few words in the Constitution that allow the federal government to regulate matters that cross state lines. Since the 1930s, the Commerce Clause has been broadly interpreted to be the basis of federal laws governing many issues, including air and water pollution. But since 1995, in cases involving wetlands, wolves and Superfund cleanups, some judges have indicated that the Commerce Clause doesn't allow the government that

much authority.

Third, some judges show increased skepticism over whether environmental groups and individuals have the "standing" to file lawsuits against government actions that may harm the environment. One famous Supreme Court justice in the past, William O. Douglas, wrote in a 1972 opinion that "trees should have standing" in lawsuits, and that since trees couldn't file the paperwork, environmentalists could. But these days, that judicial openness to environmental values is itself an endangered species.

"Many judges are simply unwilling to issue (favorable) rulings in environmental cases, even when there are very important environmental issues at stake, and clear violations of the law," says Laird Lucas, who has practiced environmental law for a decade and is now director of Advocates for the West, based in Boise.

Venue shopping gets harder

All this makes it more difficult for environmental attorneys to go "venue shopping," the legal maneuvering that has occurred in many cases, including the coalbed methane case in Billings. Litigation has become more of a crapshoot.

When environmental groups challenged the Bush plan for continued snowmobile tourism in Yellowstone National Park, they went to court in D.C., where they drew Judge Emmet Sullivan, one of the nation's greenest judges. Sullivan is the judge who has ordered Vice President Dick Cheney to cough up the records of his Energy Task Force meetings with industry executives, a case now on appeal to the Supreme Court. He ruled in favor of the Yellowstone snowmobile ban in December (HCN, 1/19/04: Yellowstone snowmobilers suffer whiplash).

But on the same issue, when snowmobile interests fought the ban on snowmobiles in Yellowstone, they went to court in Wyoming, where the case was picked up by Judge Clarence Brimmer, who often rules against environmental concerns. Brimmer has indicated he's sympathetic to the snowmobilers; in a hearing in January, he said he might "ignore" the D.C. ruling. When an Earthjustice lawyer complained that the snowmobilers were venue shopping, according to The Associated Press, Brimmer shot back, "Kind of like you folks did. You did an end run to Washington."

If a case lands in the wrong hands, there is little that can be done about it. When lawyers suspect that a judge is biased, they can dig for evidence and try to get the judge removed from a case. But it's almost impossible to prove bias, and they risk offending the judge in question.

Judge Brimmer had at least \$400,000 invested in oil and gas companies and in company royalties when he accepted a case in which Wyoming's government challenged the Clinton roadless initiative, which protected 58 million acres of forest from development. Brimmer ruled the roadless initiative was illegal in 2003 and tossed it out.

Public-interest groups in D.C. filed a complaint against Brimmer with the Judicial Council of the 10th Circuit Court, charging that he had a conflict of interest in the roadless case. But the council — composed of judges — decided those groups didn't have the right to complain, because they weren't directly involved in the case. Brimmer said none of his investments were helped by his ruling, and the Wyoming State Bar passed a resolution saying that Brimmer had "the absolute highest standards of ethics and professionalism."

But Brimmer's decision is still in the center of controversy. Edward Lodge, another Republican-appointed district judge in Idaho, also tossed out the roadless initiative. The appeals court in San Francisco overruled Lodge. Brimmer's decision is being challenged in the appeals court in Denver, which may or may not agree with the San Francisco judges.

And if Brimmer does issue a ruling on snowmobiles that conflicts with the D.C. ruling, "it would create tremendous chaos," says Michael Scott, director of the Greater Yellowstone Coalition, one of the groups involved in the snowmobile cases. "The National Park Service could be in position of having two courts telling it to do opposite things."

The Park Service wouldn't be alone. Different judges have recently ordered the Army Corps of Engineers to reduce flows in the Missouri River for endangered species, for example, and also to keep flows up for barges.

Forecast is for increasing chaos

The coalbed methane case argued in Billings seems to be heading into similar chaos. Since the December hearing, Judge Anderson has ruled that a portion of the case can be moved to Wyoming; some issues, however, will be kept in his court. The judge acknowledged that his court and the Wyoming court "may reach different conclusions."

It's evidence of the collisions that occur when politics shape the federal bench toward ideological ends. Nonetheless, President Bush seems bent on continuing his crusade. When he delivered his State of the Union speech on Jan. 20, Bush kept up the pressure, railing against "activist judges ... who insist on forcing their will on the American people," while at the same time revealing his own activism by criticizing "needless federal regulation."

It's particularly significant, because at the top of the court system, the Supreme Court is about to change. There hasn't been a new appointment to the high court since Clinton named Stephen Breyer in 1994. Two or more elderly justices are ripe for retirement, so Bush may get an opportunity there, as well.

If Bush gets re-elected, and Republicans hold the Senate, it could shape up as an all-time run of ideological appointments to the courts. The prospect raises the stakes in this November's elections.

Environmental and civil rights groups combat the Bush effort as best they can — trying to rally the public to express concern to senators, and raising the issue's profile for the November elections. They're digging into the backgrounds of the most questionable

nominees, producing up-to-the-minute Web sites on their status, and tracking changes in the political balance of the different courts.

"The administration is sending deliberate signals on the hot-button issues," Earthjustice's Sugameli says. "They think they're winning votes, think they're energizing their political base — the corporations that are the most extreme polluters, the ones who are the most opposed to civil rights, opposed to women's rights, to workers' rights.

"But the public wants moderate nominees," he says. "The public doesn't want to go back to the 1930s or the 1890s in terms of environmental protection and protection of all sorts of other basic rights. Most people don't want to repeal decades of progress," he says, "so (the Bush administration) is really energizing people on our side."