Centennial Institute

POLICY BRIEF

Weapons of Mass Obstruction

HOW THE ENVIRONMENTAL LOBBY STYMIES ENERGY PRODUCTION AND HURTS AMERICA

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INTRODUCTION: THE COLORADO MODEL GOES NATIONAL

The militant environmental lobby has developed a remarkably successful playbook for using legal strategies to deny, delay, and deter energy production on public lands in Colorado. This approach has become widely known as "the Colorado Model."

The model is now being applied throughout the American West and across the country in settings from the Marcellus Shale of the Northeast to the Monterey Shale in California.

The snowballing success of the Colorado Model ought to concern all Americans. Its impact is to curtail domestic energy production, to slow the onset of American energy independence, to block job creation and economic growth, and to drive up costs for both consumers and taxpayers.

This policy brief looks three case studies of the model at work in western Colorado. We illustrate how the environmental lobby accomplishes its ends through a sophisticated, multi-level organizational structure and aggressive manipulation of potent but little-understood federal statutes.

We conclude with a menu of recommended policy solutions to counter this attack by the environmentalist community on domestic energy development using litigation and legislation as "weapons of mass obstruction."

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ALLIANCE ON THE LEFT

Energy is central to the life of any community, nation, or civilization. It is in many ways the provenance of a nation's wealth, and a key determinant of that nation's standard of living. Virtually no segment of the economy is unaffected, to one extent or another, by energy and ease of access to it. We rely on energy to produce food, manufacture goods, transport people and cargoes, provide our means of communication, light our cities, and heat our homes.

It is unsurprising then that energy development, and the policies concerning it, has become a key point of contention in the political arena. In Colorado, as in other Western states, the focus of much of this debate has centered on energy development on public lands, since these not only comprise the bulk of acreage in the intermountain West, but also contain vast quantities of mineral and petroleum wealth.

The environmentalist movement has long been opposed to the development of traditional energy –fossil fuels such as oil and natural gas, mining, and nuclear production – in favor of so-called "renewable" technology, principally solar and wind. They have found a natural ally in the political left, who see the opportunity to oppose corporate interests, and who harbor a philosophical distrust of energy production in largely private hands.

These progressive-environmental activist groups have developed and refined legal techniques to stall, or limit, the extent of energy production by using any of several pieces of federal legislation as legal weapons to delay, deny, and deter private energy development projects. The targets range from coal mines, to oil and gas drilling, to processing and power plants.

Specifically, the technique has proven so effective in several high-visibility Colorado battles that some within the environmentalist movement have dubbed it "the Colorado Model." This paper will show how the model works, by way of three case studies that serve as examples of its application in this state and as prototypes of its growing national impact.

CONTEXT OF THE COLORADO MODEL

1. ORGANIZATIONAL LANDSCAPE

The modern environmentalist lobby is well organized and multi-leveled. It consists of various organizations from grass-roots advocacy non-profits, to specific issue-oriented coalitions, to state-level umbrella organizations and national non-governmental-organizations (NGO's) and legal foundations. All of these coordinate with one another to provide research, manpower, legal resources, and political expertise and lobbying services, as required.

Full-time paid operatives often organize local groups in response to a particular issue or project to create the perception of widespread public support for their cause. In this way, they mobilize a volunteer base, which then has access to the professional resources of the larger organizations. These resources, which include policy analysts and lawyers specializing in land use and environmental law, are directed to the end of using the legal system and federal laws, as what might be called "weapons of mass obstruction."

These weapons derive their potency from the left's discovery of how to supercharge the obstructive machinery of the National Environmental Policy Act (NEPA) with ever-flowing subsidies from the Equal Access to Justice Act (EAJA). To reveal how the environmental movement harnesses these statutes to its advantage, let's start by looking at each one's basic workings.

2. MACHINERY OF THE NATIONAL ENVIRONMENTAL PROTECTION ACT

NEPA was signed into law by President Richard Nixon on January 1, 1970, becoming the first comprehensive federal environmental law in the United States. It remains the principal piece of environmental legislation at the federal level. NEPA essentially requires agencies of the federal government to conduct an environmental analysis of any project that they oversee or undertake, and describes the process for doing so, commonly referred to as the "NEPA Process".

The process is initiated whenever there is a federal government concern or action involved. It can include everything from a Corps of Engineers construction project to the Bureau of Land Management issuing a permit to a private entity operating on, or potentially impacting, public lands. In evaluating potential environmental impacts, the process may often serve as a basis for other statutory environmental reviews as may be required by other laws, such as the Endangered Species Act or the National Historic Preservation Act.

The basic process follows a standard formulation: upon an agency's decision to embark on a proposed action (e.g. issuance of a permit) a determination is made as to whether the action will entail any "significant environmental effects". If a proposed activity is not classified as a "Categorical Exclusion" by the agency (usually a list of routine activities, or those that have previously been determined to not pose any significant effects – cleaning a hiking trail, or installing energy efficient windows, for instance,) or if the effects are unknown, then an Environmental Assessment (EA) is to be done; this is the most common route for energy-related projects in Colorado. An EA is a relatively brief study that determines the significance of environmental effects, and examines alternative means to achieving the aims of the proposed

action. The level of public input at this stage is at the discretion of the agency involved, but often imitates the scoping and comment periods prescribed for an EIS, which will be discussed below. The end product of an EA is either a Finding of No Significant Impact (FONSI), or a determination that an Environmental Impact Statement (EIS) is required.

An EIS is a more detailed examination of the potential impacts to each element of the environment (air quality, water quality and quantity, wildlife habitat, vegetation, cultural sites, etc.) as well as an in-depth evaluation of various alternative methods of accomplishing the agency's objectives. An EIS can take several years to complete, depending on the size, scope, and perceived impacts of the project or action undergoing the evaluation. The EIS process starts with a Notice of Intent (NOI) which, as the name implies, provides public notice of the initiation of the EIS process, and also defines the public scoping process. Among the stated goals of the scoping period in the Act are:

A) Identification of people or organizations that may have an interest in the proposed action, and
B) Identification of significant issues concerning the action.

During the scoping period, the lead agency invites public participation, comment, and recommendations through public meetings, hearings, workshops, or other methods as deemed appropriate.

Following the scoping period, the Environmental Protection Agency publishes a Notice of Availability of the Draft EIS in the Federal Register, and the public comment period is initiated. This period initially lasts for 45 days, though it may be extended. During this time, the agency accepts comments from individuals and organizations, generally in writing, though comment can be solicited via public meetings as well.

A crucial part of the DEIS is the "purpose and need statement", describing the reason for the agency to consider the action it is proposing. The core of the NEPA process is to identify and evaluate alternative proposals for accomplishing the "purpose and need". All EIS's include a "No Action Alternative", which describes the impacts of the agency taking no action on the proposed activity (e.g. not issuing the permit), and most times includes the agency's "Preferred Alternative". The lead agency must objectively evaluate all "reasonable" alternatives presented to them -- this is in fact one key to the Colorado Model, as shall be demonstrated below.

The lead agency analyzes all substantive comments it receives, including any new alternatives presented, and prepares a Final EIS. The entire process culminates in the agency releasing a Record of Decision (ROD).

A good summarization of the NEPA process can be found at:
http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf

3. SUBSIDIES FROM THE EQUAL ACCESS TO JUSTICE ACT

The EAJA was enacted in 1980 as a well-intentioned law designed to allow aggrieved individuals and small parties the ability to sue a vastly more powerful federal government. The Act provides for the payment of legal fees (up to $125 per hour) and other expenses to a "prevailing party" in a legal action against the United States Government.

In order to be eligible to receive this payment, the applicant must have prevailed in at least part of their suit, and have a net worth of less than $2,000,000, if an individual, or $7,000,000 (and have a staff of less than 500) if an organization. Under the law as it currently stands, however, these net worth guidelines are not applicable to a 501c(3) non-profit organization – the structure under which many environmental groups, especially local and issue-specific ones, are organized
.
It is important to note that "prevailing" is not synonymous with "winning," as far as triggering EAJA reimbursement. Even if only a lesser portion of a claim is found valid, and the greater part of it is thrown out by the court, the litigating party is still eligible for payment. This is also the case if the government settles the suit, which is often a more attractive option in face of the time, effort, and expense of fully litigating a case. Settlement is an even more preferable option when the government's sympathies lie with the plaintiffs, as not infrequently happens.

Though EAJA was initially intended to protect small businesses, farmers, ranchers, and individuals from the excesses of government, the activist environmental movement has turned that intent around by using the statute as a taxpayer-funded weapon against private economic interests on and near public lands – not just the various elements of the energy industry, but also other users of resources on public land, most notably (and ironically) ranchers. Thus the law has become, in effect, a subsidy pipeline for professional anti-energy, anti-multiple-use litigation.

4. GAMING THE SYSTEM

The organizational landscape of the environmental movement today is, in large part, a reflection of these two far-reaching federal statutes. In a perfectly legal way, but with mounting harm to the public interest, the left has figured out how to game the system.

The numerous, small, local, often specific issue-based non-profit coalitions are designed to create parties to the EIS process (e.g., "Coalition to Protect XYZ River" can reasonably be expected to be an interested party in any action that could conceivably impact the quality or supply of the XYZ river,) as well as provide an organizational base for marshaling public comment.

These smaller, ostensibly separate organizations are also organized in such a manner as to either be exempt from, or fall well short of, the net worth requirements for filing EAJA claims, while still benefitting from access to the "pro bono" legal resources of larger, national umbrella organizations – which may or may not be exempt. (Most litigation firms, for instance are not organized as 501c3's.) This makes them the ideal vehicle for initiating such lawsuits.

OPERATION OF THE COLORADO MODEL

While the specific legal tactics employed by the environmental movement may differ from project to project, dependent on the particular details of the situation, there are common strategies involved. The basis of the model is twofold: 1) to become involved in the NEPA process as an interested party as early and fully as possible; and 2) to identify some basis on which to initiate legal action against the agency or agencies involved (often also the private company seeking the requisite permits to complete the project in question), and then aggressively pursue that legal action.

With so much environmental regulation floating around, augmented by requirements prescribed by related laws such as the Endangered Species Act, (and many others,) some legal standing is not difficult to find. Indeed, much that is contained within the various pieces of legislation is somewhat subjective; one party's notion of what consists of an adequate consideration of potential impacts on, for instance, Sage Grouse habitat, may differ from another party's – and if that party can demonstrate some particular or esoteric knowledge on the subject of Sage Grouse, that gives that party's objections a bit of added weight.

To hedge against the possibility that no reasonable point of legal challenge can be found, these groups may develop their own alternative to the proposed action – invariably an egregiously restrictive one – and base the challenge on the lead agency's failure to fully evaluate this proposed alternative. We shall see how this can be used in an example below.

The defendant in these proceedings is generally the U.S. Government. These lawsuits, for the reasons listed above, are often settled; the litigants are then able to recover their legal costs, at taxpayers' expense. Such payments become a source of funds for continuing legal actions. After one lawsuit is decided or settled, it will either be appealed, or another lawsuit initiated over another part of the project.

The goal of this aggressive legal swarm strategy is threefold: to delay, deny, and deter.

Delay: By keeping a permit, lease sale, or record of decision tied up in court, or bogged down in a protracted EIS, the environmental coalition uses the clock to their advantage. As we shall see, prolonged delays can result in the private company running out of resources to continue fighting, or they can buy time for some external factor to adversely influence matters, such as commodity prices falling sufficiently that beginning a project is no longer profitable.

In other cases, the legal challenge may convince an agency to commit to the generation of a full EIS, where previously an EA, or perhaps even a prior FONSI, would have been sufficient – delaying the entire process by years in many instances. Where delay is the strategic objective, legal victory is often unnecessary; keeping the process tied up until the developer makes a business decision to give up and move on accomplishes the same end – essentially reducing the process to a legal game of "chicken."

Deny: Actual victory is not unwelcome, of course; if the litigation prevails, then so much the better. Victories are defined as denying something – a permit, acreage available for leasing, etc.

In this, timing is also sometimes crucial. As we shall see, waiting to file a lawsuit until the political winds are more favorable can result in key victories.

Deter: The least direct objective is probably the most important from the environmentalist standpoint: deterrence. If the precedent can be established, both in the courts and the minds of executives, that applying for a mine expansion or facility construction permit, or obtaining a federal oil and gas lease, will be a prohibitively costly and time-consuming venture, then chances are elevated that such projects will not be pursued within that jurisdiction in the first place.

VICTORIES OF THE COLORADO MODEL

We'll now examine how variations of this model have been victoriously employed in Colorado.

1. THE ROAN PLATEAU IN LIMBO

The Roan Plateau is a roughly 50,000 acre region in western Colorado, located in Garfield County between the towns of Rifle and Parachute and north of Interstate 70, the majority of which is federally owned. There is an estimated 8.9 trillion cubic feet of recoverable natural gas lying in the rock underneath the plateau.

The area has long been known for its energy potential. In the early 1900's, it was set aside as a Strategic Petroleum Reserve; in the 1970's, ownership was transferred from the Department of Defense to the Department of Energy, and in 1997 transferred again to the Department of the Interior, to be managed by the Bureau of Land Management (BLM). As a part of that transfer, Congress mandated that the land be leased for private oil and gas development.

In complying with this congressional mandate, the BLM launched a NEPA process for the Roan Plateau Resource Management Plan and EIS in November 2000, following the process outlined above. This culminated in a record of decision in June 2007 that opened up the majority of the Roan for oil and gas leasing, contingent on the observance of strict environmental controls on the top of the Roan.

The largest-ever onshore oil and gas lease sale in the contiguous U.S. followed in August 2008, resulting in 54,631 acres being sold, and netting $113.9 million for the U.S. government, of which 49% (roughly $56 million) went to the State of Colorado. In 2009, Bill Barrett Corporation, an oil and gas exploration and production company with existing operations in the surrounding region, acquired virtually all of the leased acreage on the Roan, with plans to develop the gas resources it held.

Almost immediately upon the BLM's adoption of the ROD, a consortium of environmental groups, led by EarthJustice, filed a lawsuit in U.S. District Court. In this case, unable to find fault with the decision's merits under the NEPA, the suit asserted that the BLM had contravened the

Administrative Procedures Act (APA), the 1946 law which governs the manner in which federal government agencies enact rules and regulations.

Specifically, the violations included failure to properly consider "cumulative impacts" on air quality (in that the impacts of existing and potential oil and gas activities on surrounding private lands outside the Roan, were not taken into account), not considering potential impact on the ozone, and failure to adequately consider an alternative (the "Community Alternative," which implausibly proposed that the natural gas resources underneath the 50,000 acres be accessed via "extended reach lateral wells" drilled from a small amount of acreage at the edge of the region), promulgated by the plaintiffs during the scoping period.

In June 2012, federal district judge Marcia Krieger found for the plaintiffs on the majority of the assertions, remanding the EIS back to the BLM for correction. The BLM, under the Obama administration, has not as yet taken any corrective action, and it is widely deemed unlikely that under the prevailing political climate, any action will be taken, keeping the fate of the Roan, and the leaseholders, in limbo.

While the court did not actually vacate the leases, it seems highly probable, given the protracted and costly legal battle, the political atmosphere, and current gas prices, that the leaseholder, Bill Barrett Corporation, will have little choice but to give up the leases, potentially putting the State of Colorado on the hook for paying back its $56 million share of the proceeds from the lease sale. Score another victory for the Colorado Model.

2. REVERSAL ON OIL SHALE

Northwest Colorado is home to the world's largest deposit of oil shale, rock that contains *kerogen,* a solid bituminous material that turns to liquid petroleum when heated. Geologists estimate that at least 800 billion barrels of recoverable oil are located in the Green River formation in western Colorado, northeastern Utah, and southwestern Wyoming. That is more than three times the reserves of the entire Middle East – enough to meet America's petroleum demand, at current growth rates, for well over a hundred years.

This astonishing resource poses, unfortunately, a technological difficulty to extract economically. Several companies are actively engaged in promising research on oil shale production, however – and in fact, several successful projects have been producing oil from shale in places like Estonia and Brazil for many years.

In 2005, the Bush administration enacted the Energy Policy Act, which in part called for the BLM, which manages over 70% of the thickest, most prolific oil shale resources in the United States, to develop a plan for commercial production of oil shale. In response, the BLM began a NEPA process, and released an EIS in 2008 that made roughly 2 million acres of the most geologically prospective oil shale land in the tri-state area available for application for leasing for oil shale production including 360,000 acres in Colorado.

Such leases would each need to undergo their own NEPA process – likely including an EIS – prior to any development taking place. In addition to the EIS, the BLM (again in compliance with the 2005 EPA) also set about writing regulations to govern oil shale leasing.

Again, the environmentalist lobby sprang into action. Upon the inauguration of an administration deemed to be more friendly to their cause in 2009, a coalition of 13 environmentalist organizations (Colorado Environmental Coalition, Western Colorado Congress, Wilderness Workshop, Biodiversity Conservation Alliance, Southern Utah Wilderness Alliance, Red Rock Forests, Western Resource Advocates, National Wildlife Federation, Center for Biological Diversity, The Wilderness Society, Natural Resources Defense Council, Defenders of Wildlife, and Sierra Club) filed two lawsuits with the Department of the Interior over their Final 2008 EIS.

The first suit challenged the decision to open up the acreage for lease application, and was based on similar grounds as the Roan lawsuit, claiming that the Bush-era Interior Department violated the law by A) failing to adequately consider an alternative that would, in the plaintiffs' eyes, protect public lands, sage grouse habitat, and "wilderness quality" lands, and B) failing to adequately consider the impacts of oil shale development on air quality and climate change.

The second lawsuit challenged the royalty rate set in the regulations drawn up by the Interior Department, which set an initial rate of 5% for the first 5 years, to compensate for the high initial costs of oil shale research and subsequent commercialization, to increase annually starting in the 6th year to a maximum of 12.5%, the same as for conventional oil and gas. This lawsuit contended that the administration violated the law by A) failing to provide "fair return" or "fair market value" to the United States for oil shale production, and B) failing to consider the impact on the environment of such low rates.

In this instance, the government settled on February 15 2011; part of the settlement was an agreement to completely revisit the EIS, which it did. This time, though the information was essentially unchanged, the BLM under its Obama-appointed leadership arrived at a dramatically different conclusion. Its preferred alternative this time reduced the acreage available to a few hundred thousand acres in total, reducing Colorado's acreage – where the overwhelming bulk of the recoverable oil shale resource is located – by over 90%. The Final ROD reduced that even further, leaving only 26,000 acres available for *application* for leasing, and that in very small and isolated pockets.

In addition, the final decision prohibits the issuance of commercial leases until an oil shale company can prove the viability of its technology to the government. The end result of this ROD will likely be the indefinite postponement of both substantive R&D and commercialization, as the tracts of land left available are too small, too widely scattered, and too arbitrarily selected (in disregard of geological considerations) to be profitable for the pursuit of such ventures. Without the flexibility of having more land available to apply for leasing, and assurance of the ability to expand research into a commercial enterprise, few if any companies are going to risk capital on oil shale research, regardless of how promising the resource might otherwise be.

The second lawsuit by this same 13-member coalition was settled as well, with the BLM agreeing to revisit the royalty rate, and release new oil shale regulations by May 15, 2012. As of this writing, eight months past the deadline, no new regulations have been released.

While the oil shale matter remains an ongoing issue, it is easy to see how well timed litigation and skillful manipulation of the NEPA process can halt a development – even one with strategic importance to the nation – virtually in its tracks.

3. ENDLESS DELAY AT PINON RIDGE URANIUM MILL

The previous two examples cite energy projects on federal land that have come under attack by the environmentalist lobby with their system of legal assault. This case will examine how that same model can be applied to projects on private land, and whose regulatory structures fall within state jurisdiction.

The Pinon Ridge Mill is a proposed uranium and vanadium mill to be built and operated by Energy Fuels Corporation (EF), and located in western Montrose County, in the heart of Colorado's uranium belt. This would be the first uranium mill built in the United States in over 30 years. The project was subjected to legal actions virtually from the moment it was announced.

In 2007, EF purchased land in Montrose County for the purpose of constructing the Pinon Ridge mill. The company then applied for a Special Use Permit from Montrose County, which issued the permit in September 2009 after hours of public testimony, and a comprehensive review by the county. A Telluride-based organization known as the Sheep Mountain Alliance (SMA) then sued both the county and EF over the issuance of the permit, claiming various procedural failures and oversights. On February 4, 2011, a state judge in Montrose upheld the Special Use Permit. The SMA appealed to the Colorado Court of Appeals, where after another 9 months the district court's decision was upheld on December 8, 2011.

The larger legal contention has centered on the Radioactive Materials License from the Colorado Department of Public Health and Environment (CDPHE). Colorado is an "Agreement State", meaning that the state has entered into an agreement with the federal government to regulate all nuclear and radiation-related facilities at the state level, so all relevant permits for a facility like Pinon Ridge are the responsibility of the CDPHE.

On November 18, 2009, Energy Fuels filed its application for a Radioactive Materials License with the CDPHE. On December 18 of that year, the agency notified the company that the application was determined to be complete, which then moved the process into the technical review phase. This process is similar to the NEPA process, where substantial public input is sought. A total of 7 public hearings were held on the application in various locations, from the towns of Nucla and Naturita, where the mill was to be built, to as far away as Telluride, a ski resort town over 60 miles away, and outside the normal radius for holding such public hearings.

On January 5, 2011, the CDPHE granted EF a conditional approval, which was made final on March 7, 2011. On February 8, 2011, SMA filed a complaint in Denver District Court against both the CDPHE and EF, asking that the license be overturned, claiming procedural violations of

both the Colorado Radiation Control Act and the federal Atomic Energy Act. The CDPHE and EF filed motions to dismiss, which were denied by the court on May 25, 2011, setting in motion the substantive briefings on the case.

In November of 2011, the towns of Telluride and Ophir, along with San Miguel County joined in the lawsuit, represented by the Washington D.C.-based litigation firm Public Justice. Other regional and national environmental and anti-mining organizations, including the Center for Biological Diversity and the Colorado Environmental Coalition, provided services to the plaintiffs as well.

On June 13, 2012, the Court ruled in favor of the CDPHE and EF of most of the claims, but partially for the plaintiffs on one procedural claim. It ordered an administrative hearing, setting the license aside pending the outcome of the hearing. That hearing was conducted in November 2012, and on January 14th, 2013, Judge Richard Dana ruled in favor of EF Fuels, confirming that the hearing fully adhered to the requirements of Colorado law. The CDPHE now has until April 27 to issue a new License decision. It is expected that SMA and their allies will appeal that issuance to the Colorado Court of Appeals.

There are several items of note in this. First is the time and expense absorbed by EF in conducting research, preparing briefings (most over 50 pages in length), and attending hearings, not to mention the filing fees and other legal costs. In the meantime, the price of uranium has dropped to its lowest point in over a decade, making the construction of a mill a lower priority for EF.

Even though the environmentalist opponents of this project (which is overwhelmingly supported by the people of the economically hard-hit towns of Nucla and Naturita) failed to win substantive victories in court, they still achieved their goals by delaying the mill's construction sufficiently to effectively halt it for the indefinite future.

It should also be noted that they are not yet finished; besides the expected appeals, the SMA and their coalition have been continually seeking a federal "hook." Should they be successful in demonstrating that there exists in the Pinon Ridge project a concern that involves a federal agency, then they could conceivably force EF into conducting an EIS, delaying the project another 3-5 years, as well as potentially tying it up in *federal* court for some time.

Score yet another victory for the Colorado Model.

POLICY RECOMMENDATIONS

In response to this demonstrated pattern of green special interests prevailing over the broader public interest in energy development and economic growth, what solutions are called for?

One obvious response is a thoughtful revision of the laws which the environmental lobby is abusing to advance its anti-energy agenda. The challenge is to retain the good intentions of the various acts, while curbing the potential and incentive for abuse.

Reforming the Equal Access to Justice Act is the first priority.

Reasonable steps would include capping the recoverable fees, increasing scrutiny on the applicants, raising the bar for eligibility for payment, and increasing transparency of the payment process.

Two bills attempting this were offered in the last session of Congress. HR 1996, The Government Litigation Savings Act, was sponsored by Rep. Cynthia Lummis (R-WY), and co-sponsored by all four Colorado Republican Representatives (Tipton, Coffman, Gardner, and Lamborn). The bill would have made four key reforms:

(1) restrict awards of fees and other expenses only to prevailing parties with a direct and personal monetary interest in an adjudication, such as personal injury, damage to or loss of use of property, or an unpaid agency disbursement;

(2) require the reduction or denial of awards commensurate with pro bono hours and related fees and expenses to parties who have acted in an obdurate, dilatory, mendacious, or oppressive manner or in bad faith;

(3) limit awards to not more than $200,000 in any single adversary adjudication or for more than three adversary adjudications in the same calendar year (unless the adjudicating officer or judge determines that a higher award is required to avoid severe and unjust harm to the prevailing party); and

(4) expand the reporting requirements of the Chairman of the Administrative Conference of the United States with respect to fees and other expenses awarded to prevailing parties during the preceding fiscal year.

After being weakened in committee, HR 1996 reached the House floor in July 2012, but it never came to a vote. A Senate version, mirroring the strong provisions of the original House version, was introduced by Sen. John Barrasso (R-WY). Similar language was also included in Sen. John McCain's (R-AZ) comprehensive Jobs Through Growth Act in October 2011. But both bills have gone nowhere in the Democrat-controlled Senate.

A similar bill, HR 4402, the National Strategic and Critical Minerals Production Act, introduced by Rep. Mark Amodei (R-NV), did pass the House in July 2012, but it too died in the Senate. Title II of this bill would expedite any legal action taken against an agency pertaining to the production of minerals determined to be in the nation's strategic interest, and would limit the applicability of the EAJA in regard to such minerals by:

(1) Prohibiting the court, in a covered civil action, from granting or approving prospective relief unless it finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of a legal requirement, and is the least intrusive means necessary to correct such violation. (Sec. 204)

(2) Declaring inapplicable to such a civil action specified requirements of the Equal Access to Justice Act relating to award of costs and fees to a prevailing plaintiff. (Sec. 205) and;

(3) Prohibiting payment from the federal government for court costs of a party in such a civil action, including attorneys' fees and expenses.

Although unlikely to pass in the current political alignment of Washington, D.C., the elements of all these bills represent much-needed reforms. They should be proposed again as legislation in 2013 and each year going forward, to keep pressure on the issue. Reintroduction of a limit in the number of EAJA adjudications awarded in a given year, or other set timeframe, should also be pursued.

Legislative reforms will only do so much, however.

Little progress will be made without overall policy guidance from the executive branch in a direction that is more positive towards domestic energy development on public lands. The legal framework already exists; public land use policy in the U.S. has always historically, and properly, been geared towards managing federal lands for the common good of the nation, responsibly producing the resources contained within, and abiding by the principle of "multiple use".

Indeed, as some of the above examples have shown, there has existed legislation *mandating* the development of these resources (e.g., oil shale, natural gas on the Roan Plateau). But absent political will, and facing an administration which presides over the responsible agencies, and largely shares the goals and agenda of the environmentalist movement, it is unrealistic to expect any dilution of the lamentably successful Colorado Model of delay, denial, and deterrence of energy production through litigation. While policy solutions can and should be sought, they will likely only be fully effective through change enacted at the ballot box.

CONCLUSION: TIME FOR A COLORADO COUNTER-MODEL

Advocates of abundant, assured, affordable energy supplies for America in the 21st century should take a page from their opponents' book and create counter-organizations at every level – national, regional, state, and local. Counter-litigation strategies should also be explored. All that is lacking for advocates to begin mounting an offense of their own, in addition to stubborn defense, is the decision and determination to do so.

By mobilizing grassroots support from the silent majority in affected communities, taking their case to the media, testifying at hearings, and filing amicus briefs, pro-energy forces can begin "changing the narrative" about economic/environmental tradeoffs. And they can finally start to exact a price for the other side's manipulative tactics and scare propaganda, which now go virtually unopposed.

Only in this way can advocates set the stage for a better chance of success in future electoral contests and policy battles. If Denver-based organizations such as Centennial Institute, Independence Institute, Mountain States Legal Foundation, and others were to collaborate in launching such an effort, it might even become known as the Colorado Counter-Model. Turnabout, after all, is fair play.

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WEAPONS OF MASS OBSTRUCTION:
HOW THE ENVIRONMENTAL LOBBY
STYMIES ENERGY PRODUCTION
AND HURTS AMERICA

By Kelly Sloan

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