

# LAW WEEK

## COLORADO

### ‘Roadless’ Showdown Brewing Denver Lawyers Play Lead Roles 10th Circuit Case

By Matt Masich  
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DENVER — A decade-long court battle over the federal “Roadless Rule” is coming to a head in Denver’s 10th U.S. Circuit Court of Appeals. Denver lawyers play leading roles on both sides of the case, which will determine the fate of tens of millions of acres of federal land and has a good chance of going to the U.S. Supreme Court.

Put in place by the U.S. Department of Agriculture in the final days of the Clinton administration, the Roadless Rule outlawed road-building and logging on 58.5 million acres of federally owned forests. Most of the affected forests, including Colorado’s North Fork Valley, are in the western United States.

The rule has been the center of litigation since its inception in 2001. Environmental activists love it; mining and timber groups loathe it.

“This is a case of national importance. The Roadless Rule is one of the most progressive conservation initiatives in decades,” said Jim Angell, a lawyer with the Denver office of Earthjustice, which has fought to keep the rule in effect. “Our old system of addressing this issue on a forest-by-forest basis was leading to the loss of millions and millions of acres of wild land because things were being piecemealed away.”

Paul Seby, a partner with Denver firm Moye White, represents the Colorado Mining Association, which has successfully argued that the rule creates “de facto wilderness areas” with-



LAW WEEK PHOTOS BY KATE KLEIN

**Paul Seby of Moye White, left, represented the Colorado Mining Association in its recent “Roadless Rule” victories in Wyoming’s federal court. Jim Angell of Earthjustice, right, represents environmental groups that are challenging those decisions in the 10th Circuit.**

out getting proper congressional approval. The rule also hurts the economy on the Western Slope, Seby said.

“There are valuable minerals that may be located on public lands in the future that could be mined in an environmentally responsible way, and with the Roadless Rule you’re just foreclosing that,” he said.

Lawsuits involving the Roadless Rule have produced mixed results in federal courts. Consequently, it’s not clear whether the Roadless Rule is still enforceable. The latest round

in the ongoing legal fight was *Wyoming v. USDA*. The Colorado Mining Association, or CMA, is an intervenor on behalf of Wyoming; Earthjustice is arguing for a number of environmental groups that are intervenors for the USDA.

Wyoming and the CMA, the appellees in the 10th Circuit case, submitted their briefs this week and oral arguments could be heard as soon as May. It’s been a long road for the Roadless Rule case to get to this point.

#### A Legal Seesaw

In 2001, the State of Wyoming sued the USDA in federal court to get an injunction stopping the rule in the state. Judge Clarence Brimmer of the U.S. District Court for Wyoming did that and then some.

In 2003, Brimmer, father of Colorado federal Judge Phil Brimmer, found the rule illegal and issued an order enjoining the rule not just in Wyoming but across the entire country.

Brimmer found the Roadless Rule violates the National Environmental Protection Act because there hadn’t been enough public input before the rule was enacted, and it violates the Wilderness Act by creating wilderness protection without going through Congress.

The USDA under the Bush administration didn’t appeal the decision, leaving the environmental groups to take up the roadless cause. Though they appealed and the case was accepted by the 10th Circuit, the court never ruled on it because the Bush administration enacted the State Petitions Rule in 2005, replacing the Roadless Rule and rendering the appeal moot.

The State Petitions Rule, which made state governors petition the federal government if they wanted forests to be roadless, was in turn contested. In 2005, Washington, Oregon, California and New Mexico challenged the new rule; the next year, Magistrate Judge Elizabeth Laporte reinstated the Roadless Rule and threw out the State Petitions Rule.

With things back to square

one, Wyoming again sued the USDA to stop enforcement of the Roadless Rule, and in 2008, Judge Brimmer again enjoined the rule nationwide. In response, Magistrate Judge Laporte of the Northern District of California amended her order to only apply to districts in the 9th Circuit and New Mexico; this was affirmed by the 9th U.S. Circuit Court of Appeals.

### **Nearing Resolution**

The USDA and Earthjustice are now appealing Brimmer's injunction in the 10th Circuit. It's up to the court to decide whether to affirm Brimmer or issue a pro-Roadless Rule decision more in line with the 9th Circuit.

The outcome of the case directly affects Seby's clients at the CMA, who have been successful at court so far.

"Forty percent of Colorado's planned development of coal is underground coal in the North Fork Valley," Seby said. If the 10th Circuit reverses Brimmer's order, that land would be protected by the Roadless Rule. Even though the coal mines would be underground, roads would have to be built to install six-foot-tall vents. No roads, no vents. No vents, no mines.

"We're not talking about mining at the surface. We're not talking about building paved roads. We're talking about being able to build a single-lane gravel road

through the forest that can easily be remediated," Seby said.

There are other consequences if the Roadless Rule remains intact, he said. Echoing Brimmer's opinion, Seby said no roads could be built to allow workers into forests to do fire mitigation, including clearing trees killed by beetle infestation.

"That's just flat out wrong," said Angell of Earthjustice. "There's an explicit exception in the rule for instances in which the fire danger is imminent."

Angell also takes exception to Brimmer's ruling that the only legitimate way to protect wild lands is for Congress to do it.

"No court has ever held such a thing, other than him [Brimmer]

in an earlier ruling that was not adopted by the 10th Circuit," Angell said.

If the 10th Circuit ends up affirming Brimmer, Seby said, "there's a classic split in the circuits — that's ideal for a Supreme Court case." Angell said the case has some of the "hallmarks" of a case the high court would take. This means the case could be in its second decade before it's resolved.

"It's certainly one of the biggest litigation investments we've ever made as an organization," said Angell about Earthjustice's efforts, "but it's befitting the importance of such a sweeping measure."