

AFJ NOMINEE REPORT

# JOEL CARSON



*U.S. Court of Appeals for the Tenth Circuit*

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# INTRODUCTION

On December 20, 2017, President Trump nominated Joel M. Carson, III to the United States Court of Appeals for the Tenth Circuit.<sup>1</sup> Carson is nominated to fill the seat previously held by Paul J. Kelly, Jr., who took senior status on December 31, 2017.

Carson has been a career-long advocate for the oil and gas industry, and the bulk of his work has been in advancing corporate interests in contending with environmental regulations. Carson has also been a member of groups that have opposed the protection of endangered species, advocated for fracking, opposed affirmative action, and opposed civil rights.

# BIOGRAPHY

Joel Carson obtained a B.B.A. in Finance from Texas Tech University in 1994.<sup>2</sup> He then attended the University of New Mexico School of Law and received a J.D. in 1997. After law school, Carson clerked for Hon. Bobby R. Baldock on the United States Court of Appeals for the Tenth Circuit. From

1999 to 2008, he worked as an associate and later as a partner at Hinkle Hensley Shanor & Martin, now Hinkle Shanor LLP. The firm describes itself as specializing in “local expertise in oil and gas law, disputes concerning oil and gas matters, tort defense, complex commercial litigation and other areas of practice.”<sup>3</sup> During that time, from 2000 until 2002, he taught paralegal courses in Civil Litigation and Torts as a part-time adjunct instructor at Eastern New Mexico University – Roswell.

From 2008 to 2013, Carson served as general counsel for Mack Energy Corporation, “an independent energy company engaged in oil and gas exploration, development and production in southeastern New Mexico.”<sup>4</sup> In 2012, on behalf of Mack Energy, Carson testified before the New Mexico Legislative Finance Committee to [outline](#) the challenges facing the energy company, including “heightened regulatory burdens, new Environmental Protection Agency greenhouse gas reporting rules, new fracking rules, and new Occupational Safety and Health Administration rules.” Carson also participated as a lobbyist for Caza Ranches, LLC at the New Mexico state legislature.

Since 2014, Carson has been a partner at Carson Ryan LLC. While at Carson Ryan, Carson has represented the Western Energy Alliance, a lobbying

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<sup>1</sup> Press Release, President Donald J. Trump Announces Ninth Wave of Judicial Candidates and Tenth Wave of United States Attorney Nominees, The White House (Dec. 20, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees/>.

<sup>2</sup> Sen. Comm. On the Judiciary, 115th Cong., Joel McElroy Carson III: Questionnaire for Judicial Nominees, 1.

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<sup>3</sup> HINKLE SHANOR LLP, <https://www.hinklelawfirm.com/> (last visited Feb. 7, 2018).

<sup>4</sup> MACK ENERGY CORP., <http://www.mec.com/history/> (last visited Feb. 7, 2018).

group that works on behalf of oil and gas drilling companies. As counsel for Western Energy, Carson filed an amicus brief advocating against an environmental ordinance that banned all oil and gas production in Mora County, New Mexico.<sup>5</sup> Carson argued that state and federal law preempted the ordinance, which was eventually struck down by New Mexico's federal district court. See [Swepi, LP v. Mora County, 81 F. Supp. 3d 1075 \(D.N.M. 2015\)](#).

Carson has periodically engaged in pro bono legal work in criminal appeals, including representing six indigent defendants before the Tenth Circuit.<sup>6</sup>

Carson has also worked as a part-time Magistrate Judge on the United States District Court for the District of New Mexico since 2015.<sup>7</sup> According to his Senate Judiciary Questionnaire, three of his cases have gone to verdict or judgment.<sup>8</sup> One of those cases was a jury trial for a misdemeanor DUI offense where the jury found the defendant not guilty. See *United States v. Bordayo*, Case No. 1:16-CR-3340-JMC (2016).<sup>9</sup> Before the trial, Carson prohibited the government from introducing evidence of the defendant's prior DWI convictions, which the government sought to use as evidence of the defendant's motive "not to blow properly into the

[breathalyzer] machine." Carson ruled that the prior convictions were inadmissible character evidence pursuant to Federal Rule of Evidence 404(b).

Carson's other cases were a bench trial for an alleged assault on an Air Force base where he found for the defendant, see *United States v. Malouf*, Case No. CVB HAFB 3905866 (2016), and a traffic violation on an Air Force base where he ruled from the bench against the defendant, see *United States v. Paige*, Case No. CVB CAFB 6031 (2017).<sup>10</sup>

Finally, Carson recently served as the referral judge in a habeas claim for relief based on ineffective assistance of counsel and competency. See [Thomas v. Hatch, 2018 U.S. Dist. LEXIS 2728, Case No: 1:17-CV-885 WJ/JMC \(Jan. 4, 2018\)](#). Carson recommended that the petition be denied, finding no evidence that the defendant was incompetent at the time of the crime or at the time of trial, and insufficient evidence that his counsel was ineffective. *Id.*

Since 2011, Carson has also served on the New Mexico Judicial Performance Evaluation Commission, which "reviews statistical data on state court judges in order to evaluate them and help them improve their skills on the bench... [and] advise voters on whether or not judges should be retained in office."<sup>11</sup>

<sup>5</sup>See Brief of Amicus Curiae Western Energy Alliance in Support of Plaintiff's Motion for Summary Judgment in *Vermillion v. Mora Cty*, Case No. 1:13-cv-01095 (Dec. 3, 2014), available at [https://www.westernenergyalliance.org/sites/default/files/Western%20Energy%20Alliance%20Mora%20County%20Amicus\\_0.pdf](https://www.westernenergyalliance.org/sites/default/files/Western%20Energy%20Alliance%20Mora%20County%20Amicus_0.pdf).

<sup>6</sup> Sen. Comm. On the Judiciary, 115th Cong., Joel McElroy Carson III: Questionnaire for Judicial Nominees, 29.

<sup>7</sup>*Id.* at 9.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 10.

<sup>10</sup>*Id.* at 11.

<sup>11</sup>*Id.* at 27.

Carson has been a longtime leader in conservative politics. In 2002, he served as county chairman for the Republican candidate Phelps Anderson's campaign.<sup>12</sup> Carson has also held various offices with the Republican Party of New Mexico and the Republican Party of Chaves County.<sup>13</sup> He also served as members of both the Romney and McCain New Mexico Finance Committees.

Carson lists a number of memberships in anti-environmental groups on his Senate Judiciary Questionnaire, including: the New Mexico Oil and Gas Association, which has pushed for fracking as a safe and "proven" technology;<sup>14</sup> the Independent Petroleum Association of New Mexico, which has advocated against government protections for animals, including species that are on the endangered species list;<sup>15</sup> and the Mountain States Legal Foundation, which has described itself as "the litigation arm of the anti-environmental wise-use movement."<sup>16</sup>

On its site, the Mountain States Legal Foundation, where Carson was a member of the Board of Litigation from 2014 to 2016, claims it "has been

one of the Nation's leading legal centers fighting environmental overkill and the use of so-called environmental statutes to achieve other public policy objectives."<sup>17</sup> Among its anti-environmental litigation is opposition to the addition of polar bears to the endangered species list,<sup>18</sup> suing the Bush Administration for continuing to protect land that President Clinton had designated national monuments,<sup>19</sup> and fighting the EPA's regulation of greenhouse gases under the Clean Air Act.<sup>20</sup>

The Mountain States Legal Foundation has also taken controversial positions on civil rights issues.<sup>21</sup> The president of the foundation, William Pendley, using the Mountain States platform, wrote that the Black Lives Matter movement "was built on that terrible lie [of Michael Brown's death], a lie the main stream media perpetrated, that cowardly politicians – fearful of saying 'all lives matter' – emboldened, and that spread like a cancer through inner cities[.]"<sup>22</sup> The Foundation also filed a friend of the court brief in [\*North Carolina State Conf. of NAACP v. McCrory\*, F.3d 204, 214 \(2016\)](#), in support of an unconstitutional voter

<sup>12</sup> *Id.* at 15.

<sup>13</sup> Sen. Comm. On the Judiciary, 115th Cong., Joel McElroy Carson III: Questionnaire for Judicial Nominees, 15.

<sup>14</sup> New Mexico Oil and Gas Association, [https://www.nmoga.org/what\\_is\\_fracking](https://www.nmoga.org/what_is_fracking) (last visited Feb. 7, 2018).

<sup>15</sup> INDEPENDENT PETROLEUM ASSOC. OF NEW MEXICO Endangered Species Page, <https://ipanm.org/category/issues/endangered-species/> (last checked Feb. 7, 2018).

<sup>16</sup> John H. Barnhill, *Mountain States Legal Fund*, in ENCYCLOPEDIA OF THE U.S. GOVERNMENT AND THE ENVIRONMENT 507, 508 (Mathew J. Lindstrom ed., 2011) available at <https://books.google.com/books?id=dPknEkbF4BsC&pg=PA508&dq=Mountain+States+Legal+Foundation%E2%80%8E&hl=en&sa=X&ei=xBb9UrzCKYlK0wHo14HoBg&ved=OCFAQ6AEwBQ#v=onepage&q=Mountain%20States%20Legal%20Foundation%E2%80%8E&f=false>.

<sup>17</sup> MOUNTAIN STATE LEGAL FOUNDATION, ENVIRONMENTAL LAWS LEGAL CASES, <https://www.mountainstateslegal.org/archived-cases/environmental-laws#WoHEiiXwaM8> (last visited February 12, 2018).

<sup>18</sup> William Perry Pendley, *Mountain States Legal Foundation: Polar Bear Listing Upheld*, LEXISNEXIS LEGAL NEWSROOM (Apr. 24, 2013), <https://www.lexisnexis.com/legalnewsroom/environmental/b/fishwildlife/archive/2013/04/24/mountain-states-legal-foundation-polar-bear-listing-upheld.aspx?Redirected=true>.

<sup>19</sup> *Mt. States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002).

<sup>20</sup> <https://www.mountainstateslegal.org/archived-cases/environmental-laws/chamber-of-commerce-of-the-united-states-of-america-vs-environmental-protection-agency#Wntsi66nGM8>

<sup>21</sup> MOUNTAIN STATE LEGAL FOUNDATION, CONSTITUTIONAL LIBERTIES LEGAL CASES, <https://www.mountainstateslegal.org/archived-cases/constitutional-liberties#WoHlm2dFAdk> (last visited February 12, 2018).

<sup>22</sup> Pendley, *Discrediting the Movement That Began With a Lie*, MOUNTAIN STATES LEGAL FOUNDATION (Nov. 1, 2017), <https://www.mountainstateslegal.org/news-updates/summary-judgment/2017/11/01/discrediting-the-movement-that-began-with-a-lie#Wn4OqCXwaM8>.

suppression law in North Carolina that the Fourth Circuit found “target[ed] African Americans with almost surgical precision.”<sup>23</sup>

Given Carson’s lifelong advocacy on behalf of anti-environmental interests, as well as his membership in groups that have pushed extreme viewpoints, the Senate Judiciary Committee should question whether Carson can fairly uphold the law in these areas.

# LEGAL AND OTHER VIEWS

## ANTI-ENVIRONMENTAL WORK

Carson has written that the Takings Clause of the Fifth Amendment is implicated when endangered animals are reintroduced into the wild and prey on privately owned livestock. In an article for the *Natural Resources Journal*, *Reintroducing the Mexican Wolf: Will the Public Share the Costs, or Will the Burden Be Borne by a Few*, Carson criticized the decision of the United States Fish and Wildlife Service to reestablish the endangered Mexican wolf in rural areas of western New Mexico and eastern Arizona by

reintroducing 120 wolves into the environment.<sup>24</sup>

Carson makes the case that “depredations of livestock by reintroduced predators amount[ing] to a taking under the Fifth Amendment present a persuasive argument.”<sup>25</sup> Carson theorized that “the courts should have no trouble finding a compensable taking when a Mexican wolf predated privately owned livestock[.]”<sup>26</sup>

Carson puts this idea forward despite the fact that all controlling federal precedent to date appears to reject the notion that the actions of animals in the wild, even ones that have protected status under the Endangered Species Act, are attributable to the U.S. government. See, e.g., [Christy v. Hodel, 857 F.2d 1324](#) (9th Cir. 1988); see also Congressional Research Service on The Endangered Species Act (ESA) and Claims of Property Rights “Takings” (January 7, 2013).

Carson also entertains the possibility that when an endangered animal hunts livestock it may amount to an unlawful seizure on behalf of federal officers that failed to stop the wolves, and is therefore a Fourth Amendment violation.<sup>27</sup> However, he admits, because the process for recovery under the Takings Clause or a Fourth

<sup>23</sup> Pendley, *Western Legal Group Defends North Carolina Voter ID Requirement*, MOUNTAIN STATES LEGAL FOUNDATION (June 16, 2016), <https://www.mountainstateslegal.org/news-updates/news-releases/2016/06/16/western-legal-group-defends-north-carolina-voter-id-requirement#WoCAvyXwaM8>.

<sup>24</sup> See Joel Carson M. Carson, *Reintroducing the Mexican Wolf: Will the Public Share the Costs, or Will the Burden Be Borne by a Few*, 38 NAT. RESOURCES J. 297, 301-2 (1998), [HTTP://DIGITALREPOSITORY.UNM.EDU/NRJ/VOL38/ISS2/3/](http://digitalrepository.unm.edu/NRJ/vol38/iss2/3/).

<sup>25</sup> *Id.* at 298.

<sup>26</sup> *Id.* at 312.

<sup>27</sup> *Id.* at 317 (citing *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (1972)).

Amendment *Bivens* action is “economically unfeasible,” the government should instead introduce a federal compensation program when endangered wolves kill livestock.<sup>28</sup>

Carson advanced a similarly expansive view of the Takings Clause when he represented the appellants in [Bass Enters. Prod. Co. v. United States, 381 F.3d 1360 \(Fed. Cir. 2004\)](#). His client, Bass Enterprises, owned interest in a federal oil and gas lease, and claimed that the Bureau of Land Management had created undue delay in issuing drilling permits for the land.

In *Bass Enterprises*, the government had not approved the drilling permits for the land because the site was also being considered for the disposal of radioactive waste. Under the Waste Isolation Pilot Plant Land Withdrawal Act, drilling on that land could not be approved until the site was deemed safe for the surrounding public. The Act set out “considerable interagency coordination to permit the site to open” including approval by the Environmental Protection Agency and the Department of Energy. *Id.* at 1362. The EPA was also considering whether to buy Bass’s lease “to ensure the safety of the waste storage site.” *Id.* The Bureau of Land Management delayed the drilling permits to Bass for 45 months while the EPA decided whether to acquire Bass’s lease. *Id.* at 1363. During that time, federal law

prohibited all oil and gas drilling that could impact the integrity of the site.

Eventually, the EPA decided that it did not need to acquire Bass’s lease to ensure the safety of the radioactive waste site, and the government issued the drilling permits to Bass. Bass sued the government, claiming that denying the permits for 45 months constituted a taking of its leasing rights to drill the land. *Id.* at 1364. While the Court of Federal Claims initially found a taking in favor of Bass, it reversed that decision after Bass obtained the permits. *Id.*

In deciding that no taking existed, the court found that “the Government’s delay was reasonable given the importance of protecting the public from the possible release of radioactivity.” *Id.* On appeal, Carson argued that the court “should not have looked at whether the government’s delay was designed to promote public safety, health, and welfare.” *Id.* at 1369. According to Carson, precedent dictated that public welfare concerns should only be considered in the analysis when the government’s action was designed stop a “nuisance.” Since oil and gas drilling is not a public nuisance, Carson argued that the court “improperly considered the concerns for public welfare[.]” *Id.* at 1369.

In rejecting Carson’s argument that the public’s welfare should not be considered, the court reasoned that since Bass was eventually given the permits, and so had suffered at most a

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<sup>28</sup> *Id.* at 323.

“partial” taking, rather than a “total” taking, the court could consider “the public purposes served by the Government’s regulatory actions[.]” *Id.* at 1369 (citing [Palazzolo v. Rhode Island, 533 U.S. 606, 633-34 \(2001\)](#)). Partial takings trigger a test where the court must conduct, “a careful examination and weighing of all the relevant circumstances.” See *Palazzolo*, 533 U.S. at 636 (O’ Connor, J., concurring); see also [Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 \(1978\)](#).

Accordingly, the *Bass Enterprises* court found it “did not commit legal error by considering the potential impact on the public when it evaluated whether the [government’s] delay in permitting drilling near a nuclear waste site constituted a taking... [and] [b]ased on the important and critical nature of the permitting decision and the required procedures to make that decision[]” the delay was reasonable. *Id.* at 1370-71. Accordingly, the court affirmed the decision for government, and subsequently denied rehearing en banc.

Given Carson’s expansive arguments as to what constitutes a regulatory taking, as well as his advocacy against environmental regulations on behalf of corporate oil and gas interests and membership in vehemently anti-environmental groups, the Senate Judiciary Committee must thoroughly question whether Carson could uphold environmental laws without bias.

## LEGISLATIVE REDISTRICTING

In 2001, Carson [defended](#) the New Mexico Legislature’s redistricting plan for the State House of Representatives and U.S. Congress in *Jepsen v. Vigil-Giron*, No. D0101 CV 2001 02177 (1st Jud. Dist. Santa Fe Co. Jan. 24, 2002). The redistricting attracted controversy from Native American groups, the Navajo Nation and the Jicarilla Apache Nation, which had been historically underrepresented in New Mexico.

Following the 2000 census, New Mexico went through an extended process to update its legislative districting, which had last been changed in 1991. After New Mexico Governor Gary Johnson vetoed a redistricting plan passed by the state legislature, a New Mexico state court was forced to [consider](#) multiple plans for the redistricting, including the legislature’s plan and plans proposed by the Navajo and Jicarilla Apache Nations. The Native Americans groups [alleged](#) that the current legislative makeup of the Northwest part of the state violated the constitutional doctrine of “one person, one vote” and therefore violated the Voting Rights Act.

After 14 days of trial, with Carson representing members of the legislature, the court found that the legislature’s plan could only be adopted with revisions to repair its underrepresentation of Native Americans. As the judge, Hon. Frank



Allen, [found](#), “[d]uring the course of trial it became obvious that the New Mexico Legislature failed to provide adequately for equal Native American electoral access in Northwestern New Mexico when it crafted the current plan in 1991.” And to correct this discrepancy, the legislature could only adopt its new plan “in combination with the plans of the two Nations best satisfies [democratic] principles[.]” Therefore, the court adopted the Nation’s plans as modifications to remedy the vote dilution that the legislature had not accounted for.

## CONCLUSION

Given Joel Carson’s troubling advocacy on behalf of corporate oil and gas interests and his work against environmental regulations, the Senate Judiciary Committee should carefully examine his record before putting him in a lifetime seat on the Tenth Circuit Court of Appeals.