

8-1-1986

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Recommended Citation

Gregory L. Hassler and Karen O'Connor, *Woodsy Witchdoctors versus Judicial Guerrillas: The Role and Impact of Competing Interest Groups in Environmental Litigation*, 13 B.C. Env'tl. Aff. L. Rev. 487 (1986), <http://lawdigitalcommons.bc.edu/ealr/vol13/iss4/2>

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WOODSY WITCHDOCTORS VERSUS JUDICIAL
GUERRILLAS: THE ROLE AND IMPACT OF
COMPETING INTEREST GROUPS IN
ENVIRONMENTAL LITIGATION*

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*Karen O'Connor****

I. INTRODUCTION

In the early 1970's, David Brower, then president of the Friends of the Earth, and his preservationist colleagues were portrayed as "the modern-day equivalents of the druidical wizards of ancient Celtic tribes, who sacrificed human lives to the spirits thought to dwell in oak trees."¹ By the early 1980s, such "woody witchdoctors of a revived ancient nature cult' who sought to restore our nation's environment to its disease-ridden, often hungry wilderness state,"² became portrayed as participants in a "pure environmentalism . . . protectionist elitism, betraying a 'last-man-through-the-gate' men-

* The Authors gratefully acknowledge the Emory University Law School for assistance in research of this article.

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¹ R. NASH, *WILDERNESS AND THE AMERICAN MIND* 238 (2d ed. 1973).

² *Id.* For other examples of the vehemence with which conservatives view environmentalists, see Houck, *With Charity for All*, 93 *YALE L.J.* 1415, 1461 (1984). Anti-preservationists, of course, were not immune from caricature by environmentalists. No less than John Muir, the first president of the Sierra Club, described "those who could bring only utilitarian criteria to wild places" as "selfish seekers of immediate Mammon." *Id.* at 158. A former member of another liberal group stated that "[p]ublic interest law . . . should represent 'the breathers as opposed to the polluters.'" Quinn, *Practicing Public Interest Law the Conservative Way*, 1 *WESTERN L.J.* (reprint) (1980).

tality,"³ and as advocates of "preservationist extremism."⁴ The vehemence of such descriptions may have been partly due to the fact that "[e]nvironmentalists made more demands on the federal trial courts than did economic groups during the period from 1970 to 1980."⁵ When these courts began giving victories to organized "woody witchdoctors," "victories [that] were beginning to affect conservative interests that often had a financial stake in the outcome of particular cases,"⁶ other groups were formed to enter the battle.⁷

The suggestion that the courts are battlefields of competing group interests emerges as something of an understatement when environmental issues are the foci of the litigation.⁸ A perusal of the literature of various conservative, business-oriented⁹ public interest law firms such as the Mountain States or Pacific Legal Foundations reveals the intensity of the combatants: "[t]heir reports and brochures are sprinkled with feisty language such as government regulations are 'choking private enterprise' and conservatives must . . . counter 'preservationist extremism.'"¹⁰ The Mid-Atlantic Legal Foundation considers that its organization serves "as a counterforce to narrow-interest groups who exploit the judicial system [creating] delay in

³ PACIFIC LEGAL FOUNDATION, EIGHTH ANNUAL REPORT (1981).

⁴ PACIFIC LEGAL FOUNDATION, NINTH ANNUAL REPORT (1982).

⁵ Wenner, *Interest Group Litigation and Environmental Policy*, 11 POL'Y STUD. J. at 673 (1983).

⁶ O'Connor & Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J.L. & PUB. POL'Y 483, 493 (1984).

⁷ The term conservative interest group as used here and throughout the paper generally refers to pro-business interests and/or groups who began to take a strong stand against government regulation in the 1970s. See also Houck, *supra* note 2, at 1415-1563.

⁸ O'Connor & Epstein, *supra* note 6, at 484. This fact is not surprising. A vast body of research has documented the pervasive role that interest groups play as *amicus curiae* or actual parties/direct sponsors in Supreme Court litigation. O'Connor and Epstein, for example, found that women's groups participated in 73 percent of the cases involving gender-based discrimination decided by the Supreme Court between the 1969 and 1980 terms. O'Connor & Epstein, *Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court*, 67 JUDICATURE 134, 134-137 (1983). Another study by the same authors found that between 1970 and 1980, at least one *amicus* was filed in 53.4 percent of all the non-commercial cases decided by the Court during that period. O'Connor & Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's Folklore*, 16 LAW & SOC'Y REV. 316 (1981-82).

⁹ In one of the first analyses of these firms' *amici* activities, law professors Ellen R. Jordan and Paul H. Rubin first referred to these firms as business-oriented legal foundations. Jordan & Rubin, *Government Regulation and Economic Efficiency: The Role of Conservative Legal Foundations*, in A BLUEPRINT FOR JUDICIAL REFORM 256 (McGuigan and Rader, eds. 1981). They and others soon came to agree on the label "conservative" to describe the regional legal foundations discussed herein. See generally Houck, *supra* note 2, at 1455-56.

¹⁰ Flaherty, *Right Wing Firms Pick up Steam*, Nat'l L.J. May 25, 1983, at 26; col. 3.

developing America's mineral and energy resources."¹¹ Another spokesperson for conservative public interest law described the litigational process as "a real uphill battle against the elitists who are attempting to stop resource development."¹² Phrases such as "we defend," "we've fought," and "we battle [and] combat"¹³ appear as appropriate backdrops to conservatives' own descriptions of their tactics: "legal militancy;" "judicial guerrilla warfare;" and "the new social revolution."¹⁴ In contrast, environmental groups generally have chosen to dismiss their opponents as ideologues unworthy of notice.¹⁵ However, given some commentators' suggestions that conservative public interest law firms are winning the litigation battle against environmentalists, this confidence may be unwarranted. Political scientist Lettie Wenner, for instance, concludes that during the decade of the 1970's, the United States Supreme Court favored economic interests over environmental ones.¹⁶ Professor Wenner also notes that, during the 1980's, "the major hope for environmentalists lies in increasing their organizational strength and legal expertise."¹⁷ Political scientist Frank Sorauf also argues that environmentalists do not present constitutional claims, and thus by necessity they are largely limited to litigating issues, making their task increasingly difficult.¹⁸ Law professors Ellen Jordan and Paul Rubin also have observed that the litigation of rules, as opposed to constitutional issues, is an area of law particularly well suited to successful litigation by conservative legal foundations who seek to convince the courts that environmental rules and regulations markedly detract from the efficient operation of government.¹⁹ And, writing even before the creation of most of the conservative legal foundations created to fight costly governmental regulations,²⁰ law professors

¹¹ MID-ATLANTIC LEGAL FOUNDATION, DEFENDING YOUR RIGHTS (Fall 1981).

¹² *Environmentalists to Use Sale of Timber As National Challenge*, The Anchorage Times, April 26, 1980, at 26, col. 1.

¹³ GULF COAST AND GREAT PLAINS LEGAL FOUNDATION OF AMERICA, ANNUAL REPORT (1984).

¹⁴ Speech by R. Momboisse at the University of Wisconsin Law School, *Public Interest Law — Plague or Panacea* (April 13, 1980).

¹⁵ Interview with representatives of various environmental groups, July-Aug. 1985.

¹⁶ Wenner, *supra* note 5, at 680.

¹⁷ *Id.*

¹⁸ Sorauf, *Winning in the Courts: Interest Groups and Constitutional Change*, in THIS CONSTITUTION 10 (Fall 1984).

¹⁹ Jordan & Rubin, *supra* note 9, at 257.

²⁰ For example, Houck graphically presents data to support his thesis that many of the foundations were created by or continue to be supported by large corporations who saw a

David Trubeck and William J. Gillen noted that the increasing factual and technical complexity of litigation in the environmental law area did not bode well for environmentalists, who had only limited financial resources to devote to this kind of costly litigation.²¹ In contrast, large corporations have a continued, personal stake in the funding of conservative legal foundations who then can appear as *amici* in support of the pro-business position.²²

Moreover, President Reagan's political philosophy includes the notion that quality of life means more than protection and preservation; it also means "the continued economic and technological development essential to our standard of living."²³ The hopes of environmentalists in President Reagan's first administration were dashed by his appointments of James Watt (former president of the Mountain States Legal Foundation (MSLF)) and Anne Gorsuch (who also had close ties to MSLF), as Secretary of the Interior and Administrator of the Environmental Protection Agency, respectively.²⁴

Perhaps even more significant to environmentalists than the appointments of Watt or Gorsuch, was the appointment of Rex E. Lee as Solicitor General of the United States.²⁵ Mr. Lee was a former member of the MSLF Board of Litigation. The potential of this kind of governmental support was immediately recognized by conservative attorneys.²⁶

need to have their view of the "public interest" represented in court. Houck, *supra* note 2, at 1455-56.

²¹ Trubek & Gillen, *Environmental Defense, II: Examining the Limits of Interest Group Advocacy in Complex Disputes*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 195, 215 (B. Weisbrod, J. Handler & N. Komesar eds. 1978).

²² Houck, *supra* note 2, at 1458 (citing *The Powell Memorandum*, Wash. Rep., Supp. No. 2900, U.S. Chamber of Com. (1971)); EPSTEIN, *CONSERVATIVES IN COURT* (1985).

²³ Keisling, *The Reagan Chainsaw Massacre*, THE NEW REPUBLIC, 25, 30 (Oct. 1, 1984).

²⁴ Wenner, *supra* note 5, at 682, noting that Watt and Gorsuch "conspired to eviscerate environmental protections."

²⁵ In an examination of sex discrimination cases, Segal and Reedy found that "when the solicitor general filed a liberal brief, the Court reached a liberal decision 90% of the time. When he filed no *amicus* brief, a liberal decision was reached in 69% of the cases, and when he filed a conservative brief, a liberal decision was reached in only 36% of the cases. The Supreme Court, Representative Democracy and Sex Discrimination: The Role of the Solicitor General, Paper prepared for delivery by J. Segal & C. Reedy, 1985 Annual Meeting American Political Science Association, at 19.

Interviews, in July and September 1984, by one of the authors with several of the Justices confirm these findings. According to one, "the ablest advocates in the U.S. are in the Solicitor General's Office." Another Justice noted that "by tradition" the Solicitor "had a high calibre lawyer working on his staff." This respect, undoubtedly, as Segal, Reedy and others have demonstrated, has been translated into the Court's near adoption of the Solicitor General as its "ninth and a half member." Werdegar, *The Solicitor General and Administrative Due Process: A Quarter Century of Advocacy*, 36 GEO. WASH. L. REV. 481, 482 (1968).

²⁶ For example, the Chairman of the MSLF Board, in commenting on these appointments,

This article challenges the prevailing notion that conservative public interest groups are victors in the battle for the environment. This article presents the contrary view that, since 1979,²⁷ environmental interest groups participating either as sponsoring parties or as *amicus curiae* in United States Supreme Court litigation have been more successful than their conservative counterparts in those cases where environmental issues were at stake. Moreover, this article reveals that, in cases where opposing public interest law firms entered the battle as *amicus curiae*, environmentalists were successful more than twice as often as conservative public interest firms. This conclusion is even more noteworthy in light of the reputed conservatism of the Supreme Court. To further explore these unexpected findings, the participation of eight legal groups in United States Supreme Court litigation is examined. Four environmental groups perceived as representative of liberal interests — Friends of the Earth, the National Wildlife Federation, the Natural Resources Defense Council, and the Sierra Club — and four groups representative of conservative interests — the Mid-America Legal Foundation, the Mountain States Legal Foundation, the New England Legal Foundation, and the Pacific Legal Foundation — were selected for study. The first section of this article presents the major environmental interest groups and the seven cases in which they have participated without any conservative group involvement. The second section examines conservative interest groups and the six cases in which they have participated without any environmental group involvement. The final section analyzes six cases in which representatives from one or more of each ideological group appeared before the Court in a head-to-head confrontation in their respective efforts to resolve the environmental issue(s) at stake in the litigation. In each section, the participation of the United States government is also discussed to gain a better understanding of its role in environmental litigation.

for example, noted the importance of working "in tandem with the new administration to bring about change." MOUNTAIN STATES LEGAL FOUNDATION, 1980 ANNUAL REPORT (1981).

²⁷ The year 1979 was chosen because briefs of all parties and *amicus curiae* are available on LEXIS from that time. Given that most of the conservative public interest law firms included for study here did not become operational until 1977, see generally O'Connor & Epstein, *supra* note 6, at 497-98, we do not believe that use of this late date presents any significant analytical problems. We do, however, recognize that LEXIS, at times, under-reports *amicus* participation as does the *U.S. Reports*.

Attempts were made to contact each of the groups included for study here to obtain evidence of any under-reporting or inaccuracies. These groups were chosen after a list of all groups participating in each environmental case was compiled. The resultant groupings include the four most litigious groups in each category — at least at the level of the United States Supreme Court.

I. THE ENVIRONMENTAL INTEREST GROUPS

There are myriad environmental interest groups bringing suits in various courts throughout the nation.²⁸ These include *ad hoc* groups formed around a single disturbance, regional groups concentrating on a single issue, and other groups with a national focus. Their cases, all with sponsoring groups as named plaintiffs, collectively have had a major impact on the course of environmental law in the United States in landmark cases such as *Sierra Club v. Morton*,²⁹ *Citizens to Preserve Overton Park, Inc. v. Volpe*,³⁰ *Calvert Cliff's Coordinating Committee, Inc. v. United States Atomic Energy Commission*,³¹ and, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.³² The collective participation of all of these groups in United States Supreme Court litigation, however, far exceeds the scope of the present essay. Consequently, cases involving only four environmental interest groups, all of which are national in scope, have been selected for analysis here — the Sierra club, the Natural Resources Defense Council, Friends of the Earth and the National Wildlife Federation.

The Sierra Club (SC), for instance, is recognized as one of the leading conservation groups in the country.³³ It was founded on June 4, 1892, when twenty-seven men formed the organization and unanimously elected John Muir as its first president.³⁴ Its stated purposes include the enhancement and protection of "natural resources and the human environment of the United States and the earth in general."³⁵ In 1971, however, the Sierra Club Legal Defense Fund (SCLDF) was created to provide legal representation for private

²⁸ Examples of such groups include the Animal Welfare Institute, Appalachian Mountain Club, Air Quality Control Coalition, Avoyelles Sportsmen's League, Bass Anglers Sportsman Society, California Coastal Commission, Buffalo River Conservation and Recreation Council, Cabinet Mountains Wilderness, Carolina Environmental Study Group, Citizens Against the Refinery's effects, Citizens committee for the Hudson Valley, Citizens for a Better Environment, Clemont Environmental Reclamation company, Concerned About Trident, Conservation Counsel, Friends of Mommoth, Lake Erie Alliance for the Protection of Coastal Corridor, Life of the Land, 1000 Friends of Oregon, Seacoast Anti-Pollution League, Wilderness Alive, and Wisconsin Environmental Decade.

²⁹ 405 U.S. 727 (1972).

³⁰ 401 U.S. 402 (1971).

³¹ 449 F.2d 1109 (D.C. Cir. 1971).

³² 435 U.S. 519 (1978).

³³ F. SCHAUMBERG, JUDGMENT RESERVED: A LANDMARK ENVIRONMENTAL CASE 16 (1976).

³⁴ R. NASH, *supra* note 1, at 132-33.

³⁵ Brief *Amicus Curiae* by the Sierra Club in support of Petitioner, The State of Minnesota, at 2, *Minnesota v. Clover Leaf Creamery Co.*, 449 US 456 (1981) (79-1171) [hereinafter *Sierra Club Brief*].

interest groups and conservation-minded individuals. Commentators attribute to the SCLDF the filing of more federal environmental cases during the 1970's than any other single environmental group.³⁶ These cases ran the gamut from objecting to the construction of highways and dams to the licensing of nuclear power plants.³⁷ According to the Sierra Club's Executive Director, the SCLDF provides such representation not only to its principal client, the Sierra Club, but also to numerous other national, regional, and local groups interested in protecting environmental quality.³⁸

Similarly, the Natural Resources Defense Council, Inc. (NRDC), embodies the ideals of other environmental interest groups. NRDC claims over 28,000 members residing in all states and territories.³⁹ Its articulated goal is "the prudent management and the wise use of the natural resources of the earth . . . through the advocacy of effective federal, state, and local laws."⁴⁰ Perhaps not coincidentally, the same group of lawyers who founded the NRDC had previously joined in litigating the *Scenic Hudson Preservation Commission v. Federal Power Commission* case⁴¹, which is thought to have directly resulted in the modern environmental movement.⁴²

Friends of the Earth (FOE) filed more than ten federal court cases during the 1970's.⁴³ Organized in July of 1969,⁴⁴ FOE claims 32,000 members and states its goals "to secure preservation and protection of the nation's heritage of outstanding free-flowing rivers and streams, the diminution of which has become an increasing concern"⁴⁵ The National Wildlife Federation (NWF), founded in 1939, initiated the same number of cases in federal courts as the FOE,⁴⁶ and is the largest non-governmental conservation group in the world.⁴⁷

³⁶ See Wenner, *supra* note 5, at 674.

³⁷ *Id.*; see, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974); *Sierra Club v. Coleman*, 421 F. Supp. 63 (D.D. Colo. 1976); *Sierra Club v. Volpe*, 361 F. Supp. 1360 (D. Md. 1973).

³⁸ Response of F.P. Sutherland to Public Interest Survey by one of authors, July 19, 1985.

³⁹ Brief of *Amici Curiae* National Wildlife Federation in Support of Respondents at app. A-4, *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (82-2056). [hereinafter N.W.F. Brief].

⁴⁰ *Id.* at A-4.

⁴¹ 354 F.2d 608 (2d Cir. 1965), *cert denied*, 384 U.S. 941 (1966).

⁴² J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 44 (1978).

⁴³ Wenner, *supra* note 5, at 676.

⁴⁴ R. NASH, *supra* note 1, at 254.

⁴⁵ N.W.F. Brief, *supra* note 39, at A-3.

⁴⁶ Wenner, *supra* note 5, at 676.

⁴⁷ In fact, N.W.F. claims over 4.5 million members worldwide. Brief of the National Wildlife Federation, North Dakota Wildlife Federation, and National Audubon Society as *Amici*

During the 1979 to 1984 terms of the United States Supreme Court, these four environmental groups participated either as *amici curiae*, or as parties in fourteen cases in which environmental issues were the direct focus of the conflict.⁴⁸ The environmentalists were successful in nine cases, enjoying a 64 per cent success rate. The first section of this article explores the seven cases in which these groups participated without involvement of conservative legal groups. In these cases, they enjoyed only a slightly lower success rate of 57 per cent.

A. Public Interest Litigation

Scholars who have examined the role and/or success of interest groups in United States Supreme Court litigation point to several factors deemed necessary for interest group success in constitutional litigation.⁴⁹ These factors include the extent to which the issue is sharply defined; the level of coordination and cooperation with other interest groups; and the intervention or support offered by the federal government. When environmental groups involve themselves in one another's cases as *amici*, they are perceived as both cohesive and efficiently organized in their activities. In fact, such strength in numbers and cohesion triggered the actual creation of the conservative public law movement. The former Managing Attorney of the Washington D.C office of the Pacific Legal Foundation concludes that the environmentalists' united front panicked the public into believing that "industry was spewing poisons into our planet and producing faulty, shoddy products that endangered life and limb."⁵⁰ As a result, many conservative public interest law firms were formed to counteract this perception.

Curiae in Support of Appellee at 2, North Dakota v. United States, 460 U.S. 300 (1983) (81-773) [hereinafter N.W.F. *Amici* Brief].

⁴⁸ The following cases were considered "non-environmental" for purposes of analysis here: Blum v. Stenson, 465 U.S. 886 (1984) (attorney fees in federal civil action calculated according to prevailing market prices); Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) (attorney's fee award held inappropriate); National Ass'n of Greeting Card Publishers v. United States Postal Serv., 462 U.S. 810 (1983) (rate commission's construction of act reasonable); Regan v. Taxation With Representation, 461 U.S. 540 (1983) (tax-exempt organizations cannot lobby); American Paper Inst., Inc. v. American Elec. Power Co., 461 U.S. 402 (1983) (FERC rules valid); Sporhase v. Nebraska *ex rel* Douglas, 458 U.S. 941 (1982) (statute forbidding groundwater removal violative of commerce clause); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (state's severance tax on coal mined in state held constitutional).

⁴⁹ K. O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 17 (1980).

⁵⁰ Momboisse, Anti-Business Public Law Firms vs. Private Enterprise — The Unequal Struggle, Speech at the NAM National Public Affairs Conference in Boca Raton, Florida, Jan. 16, 1981 at 18.

Between 1979 and 1984, environmentalists were involved in litigation before the Court over four major issues: wildlife preservation, effluent pollution, oil and gas leases, and water conservation.⁵¹ In *North Dakota v. United States*⁵² the Department of Interior sought to protect specified wetlands areas because of their importance for the breeding and nesting of migratory waterfowl. The state resisted, and although the governor had consented to the grant of an easement, the state attempted to place limitations and conditions on this easement.⁵³ *Amici curiae* briefs filed in support of the United States included those by the NWF, the North Dakota Wildlife Federation, and the National Audubon Society. The *amici* argued that such limitations and conditions frustrated congressional purposes and objectives, and therefore the state statutes restricting federal easements were preempted by the overriding national interest in protecting migratory birds.⁵⁴ The Court agreed, and held that once the required gubernatorial consent had been given, it could not be revoked.⁵⁵

The nation's beleaguered coastline endured further beleaguering as a result of the decision in *Secretary of Interior v. California*.⁵⁶ This case involved efforts to enjoin the Secretary of the Interior from selling oil and gas leases on the outer continental shelf off the California coast within twelve miles of the Sea Otter Range in the Santa Maria Basin near Santa Barbara.⁵⁷ Respondent NRDC argued that the court below was correct in holding that a proposed lease of oil and gas rights on the outer continental shelf in an area immediately adjacent to the California coast directly affected that area, thus requiring the project to be conducted in a manner consistent with the California coastal management program.⁵⁸ The NRDC sought enforcement by the Court of Congress' careful scheme designed to protect the national interest in our coast through cooperative federalism.⁵⁹ The Court rejected NRDC's argument, and held that the

⁵¹ Other possible issues surrounding environmental concerns recognized, yet not within the scope of this essay, include attorneys' fees. See *Blum v. Stenson*, 465 U.S. 886; *Ruckelshaus v. Sierra Club*, 463 U.S. 680.

⁵² 460 U.S. 300 (1983).

⁵³ NWF *Amici* Brief, *supra* note 47, at 5-17.

⁵⁴ *Id.* at 3-5.

⁵⁵ *North Dakota v. United States*, 460 U.S. at 313.

⁵⁶ 464 U.S. 312 (1984).

⁵⁷ *Id.* at 317-20.

⁵⁸ Brief of Respondents at 1, *Secretary of Interior v. California*, 464 U.S. 312 (1984) (82-1326).

⁵⁹ *Id.* at 3.

sale of oil and gas leases on the outer continental shelf did not "directly affect" the coastal zone, and therefore, compliance with the Coastal Zone Management Act was not required.⁶⁰

In a later case, FOE, NRDC, and SC joined with several other organizations⁶¹ as *amicus curiae* supporting the Environmental Protection Agency in *Ruckleshaus v. Monsanto Co.*⁶² In this case, Monsanto challenged the 1978 Amendment to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which required pesticide manufacturers to register their products with the EPA before marketing them in the United States.⁶³ *Amici* sought to support the EPA in regulating avoidable health hazards resulting from pesticide production.⁶⁴ Recognizing that modern pesticide chemistry involves new chemicals whose effects upon beneficial plants, animals and the environment, as well upon human beings, is not known, these groups had attempted to obtain from the EPA health and safety data they relied upon in a proposed pesticide registration by Monsanto.⁶⁵ Monsanto objected to such a disclosure arguing that it represented an unconstitutional taking of its property.⁶⁶ The Court agreed with *amici*. The Court, finding that the EPA's disclosure data from post-1978 pesticide registration applications does not constitute a taking of property,⁶⁷ vacated the lower court's ruling and remanded.

The NRDC was equally unsuccessful in *Chemical Manufacturers Association v. Natural Resources Defense Council*.⁶⁸ In *Chemical Manufacturers*, NRDC challenged the EPA's interpretation of the Clean Water Act (CWA), which authorized the EPA to control discharges of pollutants into navigable waters. Towards this end, the EPA was authorized to establish nationwide standards limiting the amount of toxic pollutants that could be discharged by any source. The NRDC argued that the language and legislative history of the CWA indicated that Congress intended these pretreatment standards to apply to *all* sources.⁶⁹ The Act accommodated this intention by providing that the EPA be directed to control two types of industrial polluters: (1) the direct dischargers who dump waste water

⁶⁰ 464 U.S. at 315.

⁶¹ *E.g.*, the Environmental Defense Fund, National Coalition Against Pesticides, and the National Audubon Society.

⁶² 463 U.S. 1315 (1983).

⁶³ 7 U.S.C. §§ 136-136y (1982).

⁶⁴ *Amicus* brief for Appellant at 1, *Ruckelshaus v. Monsanto*, 463 U.S. 1315 (1983) (A-1066).

⁶⁵ *Id.*

⁶⁶ *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315 (1983).

⁶⁷ *Id.*

⁶⁸ 105 S. Ct. 1102 (1985).

⁶⁹ Respondent's Brief at 7-10, *Chemical Manufacturers Ass'n v. National Resources Defense Council*, 105 S. Ct. 1102 (1985) (83-1013).

directly into navigable waters; and (2) the indirect dischargers who dump waste water into municipal sewage plants, which, in turn discharge into navigable waters.⁷⁰ On the other hand, the EPA, joined by parties such as the Chemical Manufacturers Association, American Cyanamid Corporation, and Union Carbide Corporation, argued that the EPA had been authorized to grant variances from national pretreatment standards for toxic pollutants.⁷¹ The Court accepted this latter argument, broadly noting that neither statutory language nor legislative history nor goals and operation of the statutory scheme precluded the EPA interpretation of a statute which prohibits modification of toxic pollutant effluent limitations as permitting the grant of fundamentally different factor variances for those pollutants.⁷² It was not altogether surprising that the Court rejected the environmentalists' arguments. This was a case where the actions of the U.S. government's rule-making powers were being directly challenged and the regulations involved were portrayed as costly to the interests of business.

Chemical Manufacturers was not the only water resource management case that was litigated by environmental groups. Since 1979, environmental groups have litigated three such cases, winning two out of the three cases.⁷³ In *California v. Sierra Club*⁷⁴ the SC, joined by the NWF and Operation Wildlife as *amicus curiae*, brought a suit against various state and federal officials to enjoin the further operation or construction of certain water diversion facilities.⁷⁵ The issue before the Court was whether the Rivers and Harbors Appropriation Act of 1899⁷⁶ provided the Sierra Club a right to injunctive relief (i.e., a private cause of action) against officials who sought to alter the operation of California's Delta pumping plant. The Delta pumping plant, according to *amicus curiae*, has the capacity to remove from the Sacramento-San Joaquin Delta millions of acre-feet of water each year.⁷⁷ However, the Court refused to recognize an implied private right of action on behalf of those injured by an alleged violation of the Rivers and Harbors Act.⁷⁸

⁷⁰ Respondent's Brief in Opposition to the Petitioners at 2-4, *Chemical Manufacturers Ass'n v. Natural Resources Defense Council*, 105 S. Ct. 1102 (1985) (83-1013).

⁷¹ *Id.* at i.

⁷² See 105 S. Ct. at 1112.

⁷³ *Escondido Mutual Water Co. v. La Jolla Board of Mission Indians*, 466 U.S. 765 (1984); *Nevada v. United States*, 463 U.S. 110 (1983); *California v. Sierra Club*, 451 U.S. 287 (1981).

⁷⁴ 451 U.S. 287 (1981).

⁷⁵ *Id.* at 289.

⁷⁶ 33 U.S.C. §§ 401-467e (1980).

⁷⁷ Brief for The National Wildlife Federation and for Operation Wildlife as *Amici Curiae* Urging Affirmance at 2-3, *California v. Sierra Club*, 451 U.S. 287 (1981) (79-1252).

⁷⁸ *California v. Sierra Club*, 451 U.S. at 292-98.

In *Nevada v. United States*,⁷⁹ environmentalists participated in litigation that was perceived to be "one of the great resource cases of our time — a rare instance in which the death of a large and wondrous place is at stake."⁸⁰ *Nevada* represents the culmination of litigation that began in 1913 when the United States sued "to adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project."⁸¹ In that first suit, "all water users on the Truckee River in Nevada" were named as defendants.⁸² Thirty-one years later, in 1944, the District Court entered a final settlement decree, awarding various water rights to the Reservation and the Project.⁸³ By this time the Project was under the management of the Truckee-Carson Irrigation District.⁸⁴ In 1973, the United States began the *Nevada* action under consideration "on behalf of the Pyramid Lake Indian Reservation, seeking additional water rights to the Truckee River,"⁸⁵ with the Pyramid Lake Paiute Tribe intervening in support of the government. In this suit, the federal government named as defendants "all persons presently claiming water rights to the Truckee River,"⁸⁶ including the defendants from the earlier 1913 litigation and their successors, individual farmers who owned land in the Newlands Reclamation Project, and the Truckee-Carson Irrigation District.⁸⁷

Nevada, predictably, argued that *res judicata* protects all the defendants in this case, and that the original 1944 decree is not tainted by a conflict on the part of the United States and did not deny due process.⁸⁸ The United States, on the other hand, maintained that *res judicata* does not bar [a] cause of action to quiet title in the United States to a reserved right to Truckee waters to maintain a fishery for the benefit of the [Indian] Tribe.⁸⁹ *Amici* sought to advance the lower court's conclusion that *res judicata* prevents the United States and the tribe from litigating the claim in total against

⁷⁹ 463 U.S. 110 (1983).

⁸⁰ Brief of *Amici Curiae* Sierra Club and Friends of The Earth at 27, *Nevada v. United States*, 463 U.S. 110 (1983) (81-2245) [hereinafter *Sierra Club Brief*].

⁸¹ 463 U.S. at 113.

⁸² *Id.* at 116.

⁸³ *Id.* at 118.

⁸⁴ *Id.*

⁸⁵ *Id.* at 113.

⁸⁶ *Id.* at 118.

⁸⁷ *Id.*

⁸⁸ *Id.* at 119.

⁸⁹ *Id.*

all defendants including those who had not been parties to the original litigation.⁹⁰ *Amici* argued that Indian law and trust law as well as the principles of *res judicata*, due process, and judicial review, required a finding that the tribe's water rights and Pyramid Lake should be preserved.⁹¹ The Court agreed with the environmentalists' assertion, noting that, because the 1944 decree finally determined those rights asserted in the 1973 suit only against additional defendants, *res judicata* prevents the U.S. and the [intervenor] — Pyramid Lake Paiute Tribe — from litigating the instant claim in total against all defendants including those who had not been parties or successors to parties of the original, [1913] litigation.⁹²

In the *Nevada* case, three features of the *amicus* brief filed by the FOE and the SC are noteworthy. In fact, they may provide an insight into the environmentalists' success in this case. First, the brief is written in literary, almost poetic language:

For almost a century and a half visitors from John Charles Fremont to modern travellers in automobiles have come over ridges and caught their breath as they gazed down on an aquamarine sheet stretching out across the high pastel desert for nearly twenty-five miles. It is not the duty of this Court in the first instance to protect Pyramid Lake or its Indian people, future visitors, vistas, fish, or birds. That is for Congress.⁹³

Secondly, the standings in *Nevada* reinforces observations that liberal law firms are either headquartered in a law school or closely affiliated with one.⁹⁴ The *amicus* brief required no less than six authors from six different law schools and the counsel of record included four law professors from four different law schools. The quality of the brief as well as its tone reflects their contribution. Finally, *amici* in *Nevada* had been involved with the litigation since its inception. The Sierra Club, for instance, had established its Pyramid Lake Task Force in 1971 in order to promote the preservation of Pyramid Lake.⁹⁵ Both the SC and the FOE had been active in the effort to maintain desirable spawning conditions in the Truckee River, to reestablish the spawning runs of the Lahontan Cut-Throat Trout and cui-ui, and to protect Pyramid Lake's cormorants and

⁹⁰ *Id.* at 113-22.

⁹¹ *Id.* at 6-11.

⁹² 463 U.S. at 139-44.

⁹³ Sierra Club Brief, *supra* note 80, at 27-28.

⁹⁴ O'Connor & Epstein, *supra* note 6, at 504.

⁹⁵ Sierra Club Brief, *supra* note 80, at 2.

white pelicans.⁹⁶ Thus the combination of strong written advocacy with academic expertise and historical involvement with the litigation's issues may have played a significant role in the outcome of the case.

The decision in *Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*⁹⁷ represents the successful culmination of environmental cooperation. All four environmental groups discussed in this article participated as *amicus curiae* in support of the respondent Native American tribes. In addition to these four groups, sixteen other environmental interest groups joined as *amici*.⁹⁸

Escondido concerned whether the Federal Energy Regulatory Commission may reject the Department of Interior's license conditions that were deemed necessary to mitigate damage to federal reservations from private hydroelectric power projects.⁹⁹ *Escondido* sought to relicense one of its irrigation projects, and the Department of the Interior attached conditions to the license in order to protect the Indians' interest.¹⁰⁰ The Commission then rejected most of the conditions. The Court agreed with the *amici* and affirmed the lower court's decision that the Commission must include in hydroelectric licenses those conditions deemed necessary by land management agencies.¹⁰¹

Thus, as Table I below confirms, environmentalists have fared well before the present Supreme Court. Another pattern emerges from the analysis in Table 1: the United States government not only participated in all seven cases, but was, in fact, victorious in every case except *Escondido*.

II. THE "CONSERVATIVE" INTEREST GROUPS

Just as there are myriad "liberal" environmental interest groups, so too there are "conservative" public interest law firms. Unlike their liberal counterparts, most are regional, and thus are neither

⁹⁶ *Id.*

⁹⁷ 466 U.S. 765 (1984).

⁹⁸ Other *amici* included American Rivers Conservation Council, California Trout, Colorado Wildlife Federation, Environmental Defense Fund, Environmental Policy Institute, Friends of the River, Idaho Environmental Council, Idaho Wildlife Federation, Izaak Walton League of America, Montana Wildlife Federation, National Audubon Society, Oregon Wildlife Federation, Trout Unlimited, Wilderness Society.

⁹⁹ N.W.F. Brief, *supra* note 39, at i.

¹⁰⁰ *Id.* at 4.

¹⁰¹ 466 U.S. at 772-79; N.W.F. Brief, *supra* note 39, at 4-21.

TABLE 1.
Cases With Environmental Group Participation

| Case | Environmental Group(s) | U.S. gov't | SU (W/L) | Environmental Groups Success (W/L) |
|---------------------------------|------------------------|------------|----------|------------------------------------|
| North Dakota v. U.S. | NWF | X | W | W |
| Sec. of the Int. v. Cal. | NRDC | X | W | L |
| Ruckelshaus v. Monsanto | FOE, NRDC, SC | X | W | W |
| Chemical Manufacturer's v. NRDC | NRDC | X | W | L |
| California v. SC | NWF, SC | X | W | L |
| Nevada v. U.S. | FOE, SC | X | W | W |
| Escondido Mutual v. LaJolla | FOE, NRDC, NWF, SC | X | L | W |

Total U.S. success rate: 86%

Total Environmentalists success rate: 57%

local nor national in scope. Four groups in particular have been involved in environmental litigation: the Mid-America Legal Foundation, the Mountain States Legal Foundation, the New England Legal Foundation, and the Pacific Legal Foundation.¹⁰²

The Pacific Legal Foundation (PLF) was founded in Sacramento, California in 1973 by members of Governor Reagan's administration who were concerned about perceived gains being made by environmentalists in the courts.¹⁰³ According to Attorney General Edwin Meese, one of the founding members of the PLF, Governor Reagan's staff decided that the courts must be presented with a different perspective on the public interest.¹⁰⁴

Public support for PLF and its goals soon led other conservatives to explore the possibility of creating a nationwide system of such firms.¹⁰⁵ Thus, assisted by a grant from the Scaife Foundation, the National Legal Center for the Public Interest (NLCPI) was created in 1975 to facilitate the establishment of regional law firms modeled

¹⁰² For a more detailed discussion, see O'Connor & Epstein, *supra* note 6, at 493-501; Houck, *supra* note 2, at 1454-1514.

¹⁰³ See Houck, *supra* note 2, at 1458-68.

¹⁰⁴ Interview with Edwin Meese, United States Attorney General, in Washington, D.C. (Aug. 1983).

¹⁰⁵ For a detailed discussion of the creation of N.L.C.P.I., see Houck, *supra* note 2, at 1474-78.

on PLF.¹⁰⁶ By 1978, six firms, including the Mid-America and Mountain States Legal Foundations, had been created.¹⁰⁷ The Mountain States Legal Foundation has been involved in environmental issues since its creation. The philosophy of its first president, James Watt, made a clear imprint on the direction of the firm as it moved to litigate a variety of environmental cases including those involving issues of public access to federal lands and state water rights.¹⁰⁸

The next section of this article examines more carefully the involvement of these groups as either *amicus curiae* or as parties in environmental litigation in the United States Supreme Court from 1979 to 1984. The Mid-America Legal Foundation (MALF), the Mountain States Legal Foundation (MSLF), the New England Legal Foundation (NELF), and PLF have participated either as *amici* or as parties in thirteen environmental cases before the Court,¹⁰⁹ and they were successful in thirty percent of the cases. This section of the article examines closely six of these cases. Environmental interest groups did not participate in any of them.

NELF possesses the most successful litigation record of the foundations. NELF was an *amicus curiae* in *New England Power Co. v. New Hampshire Public Utilities Commission*.¹¹⁰ *New England Power* involved an order by the New Hampshire Public Utilities Commission that required utilities operating hydroelectric facilities in the state to obtain permission to transmit electricity out-of-state.¹¹¹ In essence, the order would have forced New England Power Company to halt all interstate transmission of hydroelectric

¹⁰⁶ *Id.*

¹⁰⁷ O'Connor & Epstein, *supra* note 6, at 496-97.

¹⁰⁸ Interview with James Watt in Washington, D.C. (Aug. 1983).

¹⁰⁹ Cases determined to be "non" environmental ones include: *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985); *Grove City College v. Bell*, 104 S. Ct. 1211 (1984); *Motor Vehicles Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29 (1983); *Mueller v. Allen*, 463 U.S. 388 (1983); *Illinois v. Gates*, 462 U.S. 213 (1983); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Plyler v. Doe*, 457 U.S. 202 (1982); *Merrion v. Jicarilla-Apache Indian Tribe*, 455 U.S. 130 (1982); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Rowan Cos. v. United States*, 452 U.S. 247 (1981); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *City of Rome v. United States*, 446 U.S. 156 (1980); *Aaron v. Securities & Exch. Comm'n*, 446 U.S. 680 (1980); *Martinez v. California*, 444 U.S. 277 (1980); *Babbit v. United Farm Workers*, 442 U.S. 289 (1979); *Cleland v. National College of Business*, 435 U.S. 213 (1978).

¹¹⁰ 455 U.S. 331 (1982).

¹¹¹ *Id.*

energy.¹¹² The power company argued that the Commission's order was preempted by sections of the Federal Power Act¹¹³ and imposed impermissible burdens on interstate commerce.¹¹⁴ The Commission, on the other hand, maintained that the Act "granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the State."¹¹⁵ The Commission argued, furthermore, that the Act's delegation of authority to the Federal Energy Regulatory Commission "shall not . . . deprive a . . . State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."¹¹⁶ The Court disagreed with the Commission and agreed with NELF holding that its order violated the commerce clause.

NELF and MALF both filed *amicus curiae* briefs in *City of Milwaukee v. Illinois*.¹¹⁷ NELF and MALF, curiously, sought *different* results. The procedural postures of *City of Milwaukee* defy simplistic delineation. In previous litigation, the state of Illinois filed a complaint alleging that untreated sewage overflows and inadequately treated sewage discharges from Milwaukee entered Lake Michigan that constituted a threat to the health of Illinois citizens.¹¹⁸ Illinois filed its complaint under the original jurisdiction of the United States Supreme Court.¹¹⁹ Though the Court recognized the existence of a federal common law that could give rise to a claim for abatement of a nuisance caused by interstate water pollution, it declined jurisdiction.¹²⁰

Illinois then sought relief in both the Illinois state court and the federal district court. Illinois filed in the federal district court, seeking abatement under federal common law, of the alleged public nuisance created by the sewage discharges.¹²¹ In 1972, however, during the pendency of the case, Congress enacted the Federal Water Pollution Control Act¹²² that established a new system of pollution

¹¹² *Id.*

¹¹³ Federal Power Act, 16 U.S.C. §§ 792-824k (1982).

¹¹⁴ 455 U.S. at 337.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 341.

¹¹⁷ 451 U.S. 304 (1981).

¹¹⁸ *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1971).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 107-08.

¹²¹ *People of Illinois v. City of Milwaukee*, 366 F. Supp. 298 (N.D. Ill. 1973), *aff'd in part, rev'd in part*, 599 F.2d 151 (7th Cir. 1979), *vacated*, 451 U.S. 304 (1981).

¹²² Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972).

regulation which prohibited the discharge of pollutants into the nation's waters without a permit.¹²³ When Milwaukee continued to discharge sewage in violation of the permit requirements, the Illinois state court ordered the city to comply with effluent limitations set forth in the permit.¹²⁴ The federal district court determined that Illinois had proved the existence of a nuisance under federal common law.¹²⁵ On appeal the Seventh Circuit held that the Act did not preempt the federal common law of nuisance,¹²⁶ but that the state effluent limitations set by the state court were more stringent than those in the federal permits.¹²⁷ The court ordered the city to eliminate overflows and to comply with the federal permit effluent limitations.¹²⁸ On appeal, the Supreme Court vacated the Seventh Circuit's judgment and held that the remedy under federal common law of nuisance was not available to Illinois.¹²⁹

In *Milwaukee*, the court was confronted with the issue of whether a federal common law of nuisance was available to Illinois in its efforts to abate Milwaukee's sewer discharges. Milwaukee argued forcefully that "federal legislation on the subject of interstate waters establishes the federal law in place of previously applicable federal common law principles."¹³⁰ The State of Illinois also sought to apply its state law of tortious nuisance. Moreover, Illinois argued that its long-arm statute reached non-resident defendants who commit acts in other states which result in injury in Illinois.¹³¹

The NELF brief supporting Illinois focused primarily upon the contention that federal common law provided the correct remedy:

The exercise . . . of control over air and water emissions implicates a host of values — land use and planning, municipal finance, industrial development, protection of the public health, and the preservation of ecological rights — traditionally within the ambit of state and local government. When the determination of those values by one state may conflict with that of another, the maintenance of the federal relationship requires that the federal judiciary fashion an equitable resolution from the federal common

¹²³ 33 U.S.C. §§ 1311, 1342 (1976 and Supp. 1979).

¹²⁴ See *City of Milwaukee*, 451 U.S. at 311.

¹²⁵ *Id.*

¹²⁶ *People of Illinois*, 599 F.2d at 162.

¹²⁷ *Id.* at 177.

¹²⁸ *Id.*

¹²⁹ *City of Milwaukee*, 451 U.S. at 332.

¹³⁰ Brief of Petitioners, *City of Milwaukee* at 25, *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304 (1981) (79-408).

¹³¹ Brief of Respondent, *State of Illinois* at 24-26, *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304 (1981) (79-408).

law The Federal Water Pollution Control Act represents a plainly and purposely limited expression of federal policy intended to supplement, rather than to subvert, both the state and federal interests which here justify the application of the federal common law.¹³²

In contrast, MALF asserted in its brief that the Court of Appeals improperly applied the federal common law of nuisance in the context of a comprehensive federal statutory and regulatory program for water pollution control.¹³³ Pointing out the potential risks in enlarging the scope of common law remedies, MALF maintained somewhat nebulously that

where a statutory framework of regulation tolerates certain risks of harm, the expansion of common-law remedies to protect against the same risks interferes with the efficient operation of the regulatory scheme, upsets reasonable expectations, and requires vast expenditures without any clear hope of significant improvements in public health or safety.¹³⁴

Of the four conservative public interest groups examined in this article MALF appears the most amorphous. While MSLF, NELF, and PLF articulate a precise vision of their role within the judicial process, MALF states that it seeks "to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. . . ." ¹³⁵ The fact that MALF has been successful only twice in its participation in environmental cases before the Court may well be a reflection of its lack of a precise focus.

Another example of a conservative group's attempt to influence environmental litigation as *amicus* is seen in MSLF's involvement in *United States v. Ward*¹³⁶ which involved an oil leak from an oil and gas well. When the well owner reported the spill to the EPA, the Coast Guard imposed civil penalties on the basis of the report. In its brief, the MSLF asserted that a person cannot be required, under penalty of fine or imprisonment, to report the violation of a

¹³² Brief of *Amicus Curiae*, New England Legal Foundation, in Support of Respondents at 29, *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304 (1981) (79-408).

¹³³ Brief of Mid-America Legal Foundation as *Amicus Curiae* at 4-14, *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304 (1981) (79-408).

¹³⁴ *Id.* at 9.

¹³⁵ Motion of Mid-America Legal Foundation for Leave to File as *Amicus Curiae* at 2, *City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304 (1981) (79-408).

¹³⁶ In its March 15, 1985 "package" sent to one of the authors, MSLF enclosed sixty pages of "briefs" of their current court participation. These notations, consequently, refer to the page numbers MSLF designated for these cases.

statute or regulation, and then be fined for such violation on the basis of his own report.¹³⁷ The Tenth Circuit agreed with this reasoning and ruled in favor of the well owner.¹³⁸ Upon review of the Tenth Circuit's decision, the U.S. Supreme Court reversed and upheld self-reporting requirements.¹³⁹ Here again, MSLF was arguing for the interests of the individual over the interest of the government in regulating the environment. While issues of self-incrimination clearly existed in the EPA reporting requirement, the Supreme Court adopted the government's position on the issue of clean waters.

MSLF experienced another adverse decision in its efforts to persuade the Court to find the Crude Oil Windfall Profit Tax Act unconstitutional in *United States v. Ptasynski*.¹⁴⁰ MSLF participated in *Ptasynski* as co-council for the state of Louisiana.¹⁴¹ The State argued that the tax was an irrational and discriminatory tax that impedes U.S. energy independence and seizes the private property of a politically unpopular minority.¹⁴² As enacted, the tax act of 1980 grants an exemption from the tax to domestic crude oil produced in wells north of the Alaskan pipeline. Believing that this kind of an exemption unfairly discriminated against other oil producers and violated the Uniformity Clause's provision that all taxes must be uniform throughout the United States, the MSLF argued strenuously against the tax, but to no avail. The Court instead found that Congress had deliberately considered the issue and concluded that Alaskan oil was more difficult to produce. Again, the Court deferred to the findings of another branch of government.

Further evidence of the conservative public interest group's unsuccessful advocacy before the Court is illustrated by *Costle v. Pacific Legal Foundation*.¹⁴³ The Pacific Legal Foundation filed petitions with the Court of Appeals seeking a review of the EPA's denial of PLF's request for an adjudicatory hearing concerning the extension of Los Angeles's permit to discharge sewage into the Pacific

¹³⁷ Brief of the *Amici Curiae*: Mountain States Legal Foundation, *et al.* at 2, *United States v. Ward*, 448 U.S. 242 (1980) (79-394).

¹³⁸ *Ward v. Coleman*, 598 F.2d 1187, *rev'd sub. nom.* *United States v. Ward*, 448 U.S. 242 (1980).

¹³⁹ *United States v. Ward*, 448 U.S. 242 (1980).

¹⁴⁰ 462 U.S. 74 (1983).

¹⁴¹ *Ptasynski*, 462 U.S. at 75.

¹⁴² Brief of State of Louisiana, Appellee at 7-50, *United States v. Ptasynski*, 462 U.S. 74 (1983) (82-1066).

¹⁴³ 445 U.S. 198 (1980). Tony Quinn mentions in his article PLF's involvement against EPA when EPA "tried to force Los Angeles to build a new . . . sewage treatment plant . . ." Research continues as to whether this refers to *Costle*. See Quinn, *supra* note 2.

Ocean. Los Angeles's current permit was to expire and the EPA advised the city (pursuant to the Federal Water Pollution Control Act Amendments of 1972 § 402 (33 U.S.C.S. § 1342)) that it proposed to extend the expiration date.¹⁴⁴ When neither the City of Los Angeles nor any other party (e.g., PLF) requested a hearing concerning the proposal, the EPA determined that a public hearing was not warranted.

The EPA presented two arguments. First of all, the EPA maintained that even when [the Clean Water Act] calls with seeming unequivocation for a full hearing before the denial of a license, the agency may condition such a hearing on filing an application that would warrant hearing.¹⁴⁵ Secondly, the EPA argued that PLF failed to present any material issues of fact in its application for a hearing.¹⁴⁶

PLF centered upon the EPA's inadequate notice of the license hearing. PLF argued that the EPA did not provide due notice of its decision to terminate consideration of revised discharge requirements. PLF contended that a fundamental requirement of due notice is that it be communicated in a manner reasonably calculated, in all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.¹⁴⁷ In short, according to PLF, the EPA's *Los Angeles Times* notice was statutorily inadequate.

In *Costle* the PLF argued that it sought to present to EPA, on a public record, at a hearing, information and arguments relating to the adverse impacts on people, fish, and wildlife that would result if the EPA modified the wastewater processing requirements for the Los Angeles Hyperion Wastewater Treatment Plant.¹⁴⁸ The EPA had decided to order an alternative sludge disposal method to the Hyperion Plant and to terminate the development of revised permit requirements.¹⁴⁹ PLF argued in its *amicus* brief that the current wastewater treatment program discharged sludge containing large amounts of nutrients into the marine waters which supports much of the marine life.¹⁵⁰ Moreover, PLF contended that the EPA was obligated by the National Environmental Policy Act to hold a hearing

¹⁴⁴ *Costle*, 445 U.S. at 207.

¹⁴⁵ *See id.* at 211.

¹⁴⁶ *See id.* at 213.

¹⁴⁷ Brief for Respondents at 26, *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980) (78-1472) (citations omitted).

¹⁴⁸ *Id.* at 5-6.

¹⁴⁹ *Id.* at 6-7.

¹⁵⁰ *Id.* at 7.

prior to issuing any new permits.¹⁵¹ The Court disagreed: EPA regulations only required that there be "opportunity for public hearing" with respect to action on National Pollution Discharge Elimination System permit.¹⁵² The Court determined that the requirement was valid and properly applied in extending the permit expiration date.¹⁵³

Similarly, the Court's decision in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*¹⁵⁴ represents another significant loss for conservatives, although *Pacific Gas* included efforts to support the construction of nuclear power plants. This case involved a challenge of a California statute by two California electric utility companies. The controversy arose when the California Legislature enacted the statute that prohibited the construction of new nuclear plants until the State Energy Resources Conservation and Development Commission certified that the Federal government had approved a disposal method for high level nuclear wastes.¹⁵⁵

The plaintiffs argued for federal preemption. According to the Pacific Gas and Electric Company, the Atomic Energy Act preempted state prohibition or regulation of construction and operation of nuclear power plants.¹⁵⁶ The Act's amendments manifest a continuing congressional purpose to encourage and foster the private development of nuclear power plants as electric power resources in the United States¹⁵⁷ The state statute, in the utility's view, was invalid because it was in conflict with, and preempted by, the federal law.¹⁵⁸

The State's position, argued by Lawrence Tribe, contended that the Atomic Energy Act leaves each state free to decide for itself how best to meet its citizens' electrical energy needs and thus to make precisely the kinds of choices which the State made.¹⁵⁹ According to the commission, the fact that the state's laws expressly take into account problems of nuclear waste and disposal, created no conflict with the Nuclear Regulatory Commission's role in the licensing nuclear facilities and the regulation of radiation hazards.¹⁶⁰

¹⁵¹ *Id.* at 9.

¹⁵² 445 U.S. at 214.

¹⁵³ *Id.* at 216.

¹⁵⁴ 461 U.S. at 190 (1983).

¹⁵⁵ *Id.* at 193-200.

¹⁵⁶ See Petitioners' Brief at 20-32, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (81-1945).

¹⁵⁷ See *id.* at 33-37.

¹⁵⁸ *Id.* at 1044.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

In *Pacific Gas*, MALF, NELF, and PLF all filed *amicus curiae* briefs. Though submitted separately, the fact that each brief argues the issue from a somewhat different perspective suggests a certain degree of cooperation and coordination among them. MALF asserted that the state statute was preempted by federal regulations because it obstructed Congress' express policy to encourage the development of nuclear power for the public good.¹⁶¹ Sounding much like MSLF, MALF argued that if the statute was upheld it would open the floodgates for similar measures in other states and, in general, undermine federal preemption standards.¹⁶² In contrast, PLF relied on economic arguments to convince the Court of the statute's invalidity. PLF raised the issue of the statute's impact on energy supplies and jobs both in California and in the United States.¹⁶³ PLF maintained that the nuclear moratorium was an invasion of an area reserved for federal regulation as well as an obstruction of the federal policy to encourage nuclear energy.¹⁶⁴ NELF harmonized a constitutional argument with a pragmatic one, arguing that the California statute violated the Supremacy Clause and threatened development of safe nuclear waste disposal facilities.¹⁶⁵

The Court rejected the arguments forwarded by the *amici* and held that the federal legislative goals expressed in the Atomic Energy Act did not preempt the California statute.¹⁶⁶ In concluding his opinion, Justice Blackmun stated that "the promotion of nuclear power is not to be accomplished 'at all costs' . . . Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons."¹⁶⁷ Thus, in the past, the conservative legal foundations have not fared well in litigation before the Supreme Court. Additionally, as illustrated in Table 2, the conservative legal foundations, unlike their liberal counterparts, appear more frequently before the Court to oppose the position advanced by the United States government.

¹⁶¹ Brief of Hans A. Bethe, *et al.*, Members of Scientists and Engineers for Secure Energy, Inc. and Mid-America Legal Foundation as *Amici Curiae* Supporting Petitioners at 4-5, *Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983) (81-1945).

¹⁶² *Id.* at 5-9.

¹⁶³ Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioners at 2-3, *Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983) (81-1945).

¹⁶⁴ *Id.* at 3-4.

¹⁶⁵ Brief of *Amicus Curiae*, New England Legal Foundation, in Support of Petitioners at 11-12, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983) (81-1945).

¹⁶⁶ 461 U.S. at 205-16.

¹⁶⁷ *Id.* at 222-23.

TABLE 2.
Cases with Conservative Firm Participation

| Case | Conservative Firm | U.S. gov't/success (W/L) | | Conservative Firm Success (W/L) |
|--|-------------------|--------------------------------|---|---------------------------------------|
| New England Power Co. v. N.H. Public Utilities Comm'n | NELF | | | |
| City of Milwaukee v. Del. | NELF, MALF | | | W |
| Ward v. Coleman | MSLF | X | W | L |
| U.S. v. Ptasynski | MSLF | X | W | L |
| Costle v. PLF | PLF | X | W | L |
| Pacific Gas & Electric v. State Energy Resources Conserva- tion and Development Comm'n | MALF, NELF, PLF | | | L |

Total U.S. success rate: 100%

Total conservative firm success rate: 33%

III. FROM RHETORIC TO CLEAR CONFRONTATION¹⁶⁸

Environmental "woody witchdoctors" confronted conservative "judicial guerrillas" in seven environmental cases before the Court from 1979 to 1984.¹⁶⁹ The environmentalists prevailed in five of those battles; the conservatives were successful in two. The first confrontation between the foundations selected for examination in this article was between the NELF and the NRDC in *Environmental Protection Agency v. National Crushed Stone Association* in 1980.¹⁷⁰ The NRDC asserted that the issues presented by the case revolved around one of the Clean Water Act's most important principles.¹⁷¹ In *Crushed Stone*, the EPA sought to enforce its limitation on in-

¹⁶⁸ Hill, *The Politics of Environmental Law*, 64 MICH. B.J. 164, 164-65 (1985).

¹⁶⁹ The following represents "non"-environmental cases in which both environmental and conservative public interest law firms participated: Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (provisions of Utility Act constitutional); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (denial of monetary remedies for taking dismissed); Agins v. City of Tiburon, 447 U.S. 255 (1980) (zoning ordinances not on their face a taking) Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (commission's order barring enclosures by utilities discussing nuclear power violates Constitution).

¹⁷⁰ 449 U.S. 64 (1980).

¹⁷¹ National Resources Defense Council as *Amicus Curiae* Brief at 1-6, *Environmental Protection Agency v. National Crushed Stone Assoc.*, 449 U.S. 64 (1980) (79-770) [hereinafter *N.R.D.C. Amicus Brief*].

dustrial pollutant discharges pursuant to the Clean Water Act.¹⁷² The regulations permit polluting industries to seek a variance from these nationally applicable limitations if they are able to show that the factors relating to equipment or facilities involved, the process applied, or other such factors related to the discharge are fundamentally different from the factors considered in the establishment of the guidelines.¹⁷³ The Court thus addressed the issue of whether costs of compliance or extraordinary economic hardship that arise from the enforcement of uniform effluent standards constitute special circumstances worthy of consideration in a variance application.¹⁷⁴ The Court agreed that polluters' economic capability for meeting 1977 best practicable technology under the Act was not a factor in considering an application for a variance.¹⁷⁵

Arguments set forth by competing *amici* reflect the competing interests involved in *Crushed Stone*. The NELF introduced itself to the Court as helpful to the case "due to its unique public interest perspective and extensive work on environmental and economic issues."¹⁷⁶ The NELF maintained that "substantially divergent costs of compliance and extraordinary economic hardship arising from enforcement of uniform effluent standards are both special circumstances worthy of consideration in a variance application."¹⁷⁷ Present also in the NELF's argument is a common conservative theme: the implications of a particular decision upon the nation's welfare. "The Foundation is concerned," the NELF's brief notes, "that the enforcement of the [EPA]'s inflexible variance provision will unnecessarily jeopardize the economic health of the New England community."¹⁷⁸

The decision in *Crushed Stone*¹⁷⁹ represented the culmination of NRDC's efforts to force the EPA to enforce environmental statutes. NRDC maintained in its brief that the Court's decision in *Crushed Stone* potentially affected the integrity and validity of the EPA regulations.¹⁸⁰ The NRDC's argument was primarily one of statutory

¹⁷² See *Crushed Stone*, 449 U.S. at 66-68.

¹⁷³ Brief of *Amicus Curiae* New England Legal Foundation in Support of Appelles at 6, *Environmental Protection Agency v. National Crushed Stone Assoc.*, 449 U.S. 64 (1980) (79-770) [hereinafter N.E.L.F. *Amicus* Brief].

¹⁷⁴ *Crushed Stone*, 449 U.S. at 68-69.

¹⁷⁵ Federal Water Pollution Control Act, 33 U.S.C. § 301(b) (1977), amended by § 1311(b) (1982).

¹⁷⁶ See N.E.L.F. *Amicus* brief, *supra* note 173, at 2.

¹⁷⁷ *Id.* at 8.

¹⁷⁸ *Id.* at 2.

¹⁷⁹ 449 U.S. at 64 (1980).

¹⁸⁰ See N.R.D.C. *Amicus* Brief, *supra* note 171, at 6.

interpretation; it argued that the act neither requires nor authorizes consideration of economic affects. The Court agreed with the NRDC arguments, which strengthened environmentalists' confidence that the Court would protect the integrity of environmental statutes.

Two months after the Court decided *Crushed Stone*, the Sierra Club and MALF participated in *Minnesota v. Clover Leaf Creamery Co.* as amici.¹⁸¹ The *Clover Leaf* litigation began when suit was filed in the Minnesota district court by manufacturers of plastic milk cartons, seeking to enjoin enforcement of the Minnesota statute banning retail sale of milk in plastic containers.¹⁸² The state district court agreed with the manufacturers and enjoined enforcement of the statute, finding that it violated the fourteenth amendment, the commerce clause of the United States Constitution, as well as the due process provisions of the state constitution.¹⁸³ The state supreme court, without reaching the commerce clause or state law issues, agreed that the statute violated the federal equal protection and due process guarantees.¹⁸⁴

Once again, the case embodied the culmination of the participation by environmentalists throughout the entire process. The Sierra Club for instance, "participated in the legislative processes leading to the enactment" of the statute itself.¹⁸⁵ One senses, however, that the statute did not go quite far enough for their environmental interests. The Sierra Club admits in its brief that while it "strongly supports the use of returnable containers for food, beverages, and other items wherever feasible . . . [it] does not support the use of either non-returnable paper milk containers or non-returnable plastic milk containers."¹⁸⁶

In its *amici* brief to the court in *Clover Leaf*, MALF argued that the statute does not advance environmental goals, and that a ban on plastic containers, without a similar ban on paperboard containers, is a step backward from the environmental goals of the Act.¹⁸⁷ The arguments forwarded by MALF were primarily economic ones: "The statute reflects the very type of economic protectionism which the commerce clause was designed to prevent."¹⁸⁸ The Court's rejection

¹⁸¹ 449 U.S. 456 (1981).

¹⁸² *Id.* at 459-60.

¹⁸³ *Id.* at 460.

¹⁸⁴ *Id.*

¹⁸⁵ Sierra Club Brief, *supra* note 35, at 1-2.

¹⁸⁶ *Id.*

¹⁸⁷ Brief of Mid-America Legal Foundation as *Amicus Curiae* Supporting Respondents at 3-4, *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981) (79-1171).

¹⁸⁸ *Id.* at 15.

of MALF's economic argument and its favorable stance toward the enforcement of local environmental statutes were greeted with enthusiasm by environmentalists who were wary that the Justices might be persuaded by MALF's economic arguments.

Hodel v. Indiana (Hodel I)¹⁸⁹, and *Hodel v. Virginia Mining and Reclamation Association* (Hodel II)¹⁹⁰ were decided by the Court during the same term as *Clover Leaf*, and added to the number of environmental successes before the Court. The litigation defeat for the conservative public interest firms is greater in *Hodel I* because not one, but three conservative groups submitted *amicus* briefs. Although these are two independent cases, they involve similar environmental issues. In fact, the environmentalists who submitted *amici* briefs, treated both cases in the same brief.

Both cases involved the regulatory parameters of the *Surface Mining Control and Reclamation Act* (The Act).¹⁹¹ Essentially Congress intended the Act to preserve "the productive capacity of mined land and [to protect] the public from health and safety hazards that may result from surface coal mining."¹⁹² In *Hodel I*, the state of Indiana and coal mine operators sought to overturn the Act on the grounds that it was violative of the equal protection, due process, and just compensation clauses, as well as the tenth amendment.¹⁹³ Of major concern in *Hodel I* was the effect of the Act upon surface mining on prime farmland. In *Hodel II* [a]n association of coal producers engaged in surface coal mining operations in Virginia, member coal companies, and individual landowners sought declaratory and injunctive relief against various provisions of the Surface Mining Control and Reclamation Act.¹⁹⁴ Specifically, the plaintiffs alleged that provisions of the Act establishing an interim regulatory program violated the commerce clause as well as the equal protection and due process guarantees of the due process clause of the fifth amendment.¹⁹⁵ The challenged provisions included performance standards for steep slopes, regulations governing the conditions under which surface coal mining operations may be conducted, and the Secretary's authority to issue orders for the immediate cessation of surface mining operations determined to be in violation of the Act.¹⁹⁶ Of

¹⁸⁹ 452 U.S. 314 (1981).

¹⁹⁰ 452 U.S. 264 (1981).

¹⁹¹ Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1202 (1977).

¹⁹² 452 U.S. at 327.

¹⁹³ *Id.* at 320.

¹⁹⁴ 452 U.S. 264, 273 (1981).

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 269-70.

concern here was the argument that "the Act operated to displace the state's freedom to structure operations in numerous areas of traditional functions."¹⁹⁷ The constitutional challenges were identical to those at issue in *Hodel I*.

The NWF and FOE joined the litigation as *amici curiae*, in addition to the Appalachian Coalition, Council of the Southern Mountains, Illinois South, Save Our Cumberland Mountains, and Tug Valley Recovery Center.¹⁹⁸ These *amici* urged the reversal of the lower courts' decisions on the grounds that provisions of the Surface Mining Act are fully consistent with the requirements of the Constitution.¹⁹⁹ The environmentalists maintained that "[t]hose provisions . . . are vital to the preservation of significant social and environmental values."²⁰⁰ These groups argued that neither "summary cessation" nor "payment into escrow of proposed civil penalty assessment" nor the "return of mined land to approximate original contour" violated any constitutional provisions.²⁰¹

Both *Hodel I* and *Hodel II* attracted the brief-writing attention of three conservative public interest groups. MALF submitted an *amicus* brief in *Hodel I*,²⁰² PLF participated in *Hodel II* as an *amicus*,²⁰³ and the MSLF participated as an *amicus* in both cases.²⁰⁴

MALF's argument in *Hodel I* asserted that individual states should regulate surface mining reclamation since it is an inherently local activity.²⁰⁵ Furthermore, MALF argued, sections of the Reclamation Act exceed congressional authority.²⁰⁶ PLF used an argument

¹⁹⁷ *Id.* at 274.

¹⁹⁸ Brief *Amici Curiae* in Support of Appellants by The National Wildlife Federation, Appalachian Coalition, Council of Southern Mountains, Inc., Illinois South, Save Our Cumberland Mountains and The Tug Valley Recovery Center, Inc., *Hodel v. Virginia Mining Co.* 452 U.S. 264 (1981) (79-1538).

¹⁹⁹ *Id.* at 24-25.

²⁰⁰ *Id.* at 30.

²⁰¹ *Id.* at 3-5.

²⁰² Brief of Mid-America Legal Foundation Supporting the Position of Appellees, *Hodel v. Indiana*, 452 U.S. 314 (1981) (80-231) [hereinafter M.A.L.F. Brief].

²⁰³ Brief of *Amici Curiae* Pacific Legal Foundation in Support of Appellees, *Hodel v. Virginia Mining Co.*, 452 U.S. 264 (1981) (79-1538) [hereinafter P.L.F. Brief].

²⁰⁴ *Amicus Curiae* Brief in Support of the Virginia Surface Mining and Reclamation Association and the State of Indiana, *Hodel v. Indiana*, 452 U.S. 314 (1981) (80-231); *Hodel v. Virginia Mining Co.*, 452 U.S. 264 (1981).

²⁰⁵ M.A.L.F. *Amicus* Brief, *supra* note 202, at 3.

²⁰⁶ The suits included challenges to the "prime farmland" provisions of the Surface Mining Control and Reclamation Act, §§ 507(b)(16), 508(a)(2)(c), 510(d)(1), 515(b)(7), (20) and 519(c)(2), 91 Stat. 475-502 (codified at 30 U.S.C. §§ 1257(b)(16), 1258(a)(2)(c), 1260(d)(1), 1265(b)(7), (20), and 1269(c)(2) (1982)). As Justice Marshall indicates in his opinion for the Court, the "prime farmland" provisions "establish special requirements for surface mining operations

that in many of its publications it had criticized the environmentalists for using: the threat of energy dependency. PLF argued that surface mining of domestic coal reserves is one of the best solutions for the problems posed by American dependence on foreign energy sources.²⁰⁷

United States v. Locke represents the most recent confrontation between environmentalists and conservative legal foundations in which the environmentalists prevailed.²⁰⁸ In *Locke*, the United States Bureau of Land Management informed mining claims owners that their claims were void because they failed to file a timely notice pursuant to the Federal Land Policy and Management Act. One section of that Act provided that holders of unpatented mining claims must file to protect their claims prior to December 31 and the respondents filed on December 31. As a result, their claims were forfeited.²⁰⁹ The Court held there was not a taking and that the owners failure to file voided their mining claims.

The Sierra Club filed an *amicus curiae* brief in *Locke* to further its members' interests in protecting recreational areas — an idea not addressed by the U.S. in its brief. According to the Sierra Club, "protection of recreational areas is dependent in large measure on the effective performance" of the Secretary, and thus a judicial finding of the constitutionality of the filing provision would enable the Secretary "to manage the public lands, to enhance and encourage outdoor recreational uses."²¹⁰ The Sierra Club asserted that the applicable section of the Act furthered a legitimate state goal and that the Court should defer to Congress' choice of means to effectuate that purpose.²¹¹ The Sierra Club thus endorsed the statute and its filing provisions, even though the result in this particular case was severe.²¹² In contrast to the lengthy Sierra Club brief, the Mountain States Legal Foundation catalogued "more than 800"²¹³

conducted on land that both qualifies as prime farmland . . . and has historically been used as cropland . . ." *Hodel v. State of Indiana*, 452 U.S. at 318. As the Act states, such factors as "moisture, availability, temperature regime, chemical balance . . . and erosion characteristics," among others are used in determining "prime farmland" status. § 701(20), 91 Stat. 517 (1977), 30 U.S.C. § 1291(20) (1982).

²⁰⁷ P.L.F. *Amicus* Brief, *supra* note 203, at 15.

²⁰⁸ *U.S. v. Locke*, 105 S.Ct. 1785 (1985).

²⁰⁹ *Id.* at 1790.

²¹⁰ *Amicus Curiae* Brief of Sierra Club in Support of Appellants at 2, *U.S. v. Locke*, 105 S. Ct. 1785 (1985) (83-1394).

²¹¹ *See id.* at 9-27, 54-57.

²¹² *Id.* at 57.

²¹³ *Brief Amicus Curiae* Mountain States Legal Foundation at 3-7, *U.S. v. Locke*, 105 S. Ct. 1785 (1985) (83-1394).

other instances in which unpatented mining claims resulted in the loss of 20,000 active sites due to strict interpretation of the regulations. The MSLF describes the Act and its filing regulations as a "Byzantine regulatory labyrinth" which deprives individuals of private property rights without due process of law."²¹⁴ MSLF maintained that even competent attorneys cannot comprehend relevant provisions of the Act.²¹⁵

The MSLF brief caught the attention of Justice Brennan. In his dissent, Justice Brennan noted that *amici* attempted to employ "every technical construction of the statute to suck up active mining claims much as a vacuum cleaner, if not watched closely, will suck up jewelry or loose money."²¹⁶

The conservative public interest law firms were successful as *amicus curiae* in only two environmental cases where they were opposed by an environmental group: *Baltimore Gas v. Natural Resource Defense Council*,²¹⁷ and *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*.²¹⁸ At issue in *Baltimore Gas* was a Nuclear Regulatory Commission (NRC) rule that assumed the permanent storage of nuclear wastes had no environmental impact and therefore that storage should not be an issue in licensing decisions.²¹⁹ In challenging the validity of the NRC's rule, the NRDC posited two main arguments. First, that agencies may not exclude significant potential environmental impacts from their decisions merely because such effects are not considered likely to occur.²²⁰ Second, should the NRC conclude that there is no significant environmental risk from high-level nuclear waste, it would be arbitrary and capricious in light of the facts of the record.²²¹

In opposing these arguments, the Pacific Legal Foundation as *amici* asserted that "scientific uncertainty"²²² concerning the potential hazards of nuclear waste storage should be subordinate to judicial deference to administrative findings. This argument was persuasive and the Court unanimously upheld the NRC rule.

²¹⁴ *Id.* at 2.

²¹⁵ *Id.* at 1-2.

²¹⁶ 105 S. Ct. 1785, 1808 n.12 (1985) (Brennan, J. dissenting).

²¹⁷ 462 U.S. 87 (1983).

²¹⁸ 467 U.S. 837 (1984).

²¹⁹ 462 U.S. at 89-90.

²²⁰ Brief for Respondent Natural Resources Defense Council, Inc. at 28-37, *Baltimore Gas v. Natural Resources Defense Council*, 462 U.S. 87 (1983) (82-524).

²²¹ *Id.*

²²² Pacific Legal Foundation Response for Petitioners at 2-8, *Baltimore Gas v. Natural Resources Defense Council* 462 U.S. 87 (1983) (82-524).

Rules also were involved in *Chevron, U.S.A. Inc. v. National Resources Defense Council*.²²³ In *Chevron*, the Court's decision was a decided victory for the conservative legal foundations. Newspapers proclaimed that the Court's 6-0 decision represented support for President Reagan's effort to relax certain national air pollution regulations and was a defeat for environmentalists.²²⁴ The issue in *Chevron* was whether the Clean Air Act²²⁵ permits the EPA to define the term "stationary source" to mean the industrial plant, but not major new units built within plants, for purposes of pollution control requirements.²²⁶

The NRDC, as the respondent in *Chevron*, noted that implementation of the rules may be costly, but that environmental concerns required the Court to find that administrative determinations which in effect excepted some polluters from coverage under the Act should be found invalid. NRDC argued that the term "stationary source" includes individual units of production and pollution within a major pollution emitting facility.²²⁷ Furthermore, according to the NRDC, the EPA rules

discriminate between established firms and newcomers to an area. The newcomer must meet all five statutory conditions because it builds at a new site. The established firm can expand its facilities while meeting only one of the five conditions, and only partially at that. Nothing in the Act or its legislative history suggests that Congress intended to create such a distortion of economic competition.²²⁸

MALF submitted an *amicus curiae* brief in *Chevron* that combined two arguments: one had been set forth before; the other was relatively new.²²⁹ The familiar argument was based on the notion that should the Court decide against the EPA, the result would detrimentally affect states' ability to protect the environment.²³⁰

²²³ 467 U.S. 837 (1984).

²²⁴ *Court Allows EPA to Ease Rules*, Atlanta Journal, June 25, 1984, at 3-A.

²²⁵ Clean Air Act Amendments of 1977 providing for the "stationary source standards" which apply to emissions regulations within plants. They include: 42 U.S.C. §§ 111(a)(3), 172(b)(6), 302(j), 741(a)(3), 7502(b)(3), 7602(j) (1977).

²²⁶ Brief for Respondents, Natural Resources Defense Council, Inc. at i, *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (82-1005).

²²⁷ *Id.* at 22-26.

²²⁸ Brief of Respondents, *supra* note 226, at 22-26.

²²⁹ Brief of Mid-America Legal Foundation as *Amicus Curiae* Supporting the Position of Petitioners, *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (82-1005) [hereinafter M.A.L.F. *Amicus* Brief].

²³⁰ *Id.* at 3.

MALF's argument was grounded in technical data provided to the Court.²³¹ The data purported to show that use of the bubble concept improves air quality and accelerates state compliance with clean air standards.²³²

PLF also filed an *amicus* brief in *Chevron*.²³³ Its brief recognized the gradual integration by environmentalists of an economic dimension to its legal efforts to preserve the nation's resources. In fact, PLF's brief focused on the economic factors that the Court should consider in making its decision by asserting that "that there is great public interest in achieving clean air by means which consider the economic well-being of this nation."²³⁴ The EPA's bubble concept, according to PLF, could be invalidated only at the risk of producing adverse economic and environmental consequences.²³⁵ On the other hand, to uphold plant-wide definition of "stationary source" would provide industry with the necessary economic incentives to "replace older, polluting equipment with newer, less polluting equipment."²³⁶

By finding in favor of the arguments advanced by the conservative legal foundations and the EPA, the Court upheld the EPA's regulations that permit states to treat all pollution emitting devices within the same industrial complex similarly.²³⁷ This interpretation, in effect, exempts pollution-emitting units within plants of major emitters, and demonstrates again the Court's deference to administrative actions.

Finally, as Table 3 shows, the environmentalists' rate of litigation success is closely related to the support of, and cooperation by the Justice Department. This fact is important in light of its implication that, at least in two terms, it demonstrates a more vocal opposition to environmental interests on the part of the Reagan administration.

²³¹ *Id.*

²³² M.A.L.F. *Amicus* Brief, *supra* note 229, at 4.

The bubble concept is a method of measuring emissions from a factory as if there were a plastic bubble over the entire plant with only a single opening at which all the emissions from the plant are measured and controlled. This alternative to the smokestack by smokestack regulation generally imposed under the [Clean Air] Act gives a company the flexibility to achieve the same or better overall emission reductions at a lower cost.

Rhineland, *The Proper Place for the Bubble Concept Under the Clean Air Act*, 13 ENVTL. L. REP. 10406, 10406 (1983).

²³³ Pacific Legal Foundation *Amicus Curiae* Brief for Petitioners, *Chevron U.S.A. Inc. v. Natural Resources Defence Council*, 467 U.S. 837 (1984) (82-1005).

²³⁴ *Id.* at 3.

²³⁵ *See id.* at 19.

²³⁶ *Id.* at 5.

²³⁷ *See, e.g., Chevron*, 467 U.S. 837.

TABLE 3.
Head-to-Head Confrontation Between
Environmentalists and Conservative Firms

| Case | Environmental Groups | (W/L) | Conservative Groups | (W/L) | U.S. | (W/L) |
|--|----------------------|-------|---------------------|-------|------|-------|
| E.P.A. v. Nat'l Crushed Stone | NRDC | W | NELF | L | X | W |
| Minnesota v. Clover Leaf Creamery | SC | W | MALF | L | X | W |
| Hodel v. Indiana | FOE | W | MALF, MSLF, PLF | L | X | W |
| Hodel v. Va. Mining & Reclamation Assoc. | FOE, MWF | W | MSLF, PLF | L | X | W |
| U.S. v. Locke | SC | W | MSLF | L | X | W |
| Baltimore Gas v. NRDC | NRDC | L | PLF | W | X | W |
| Chevron v. NRDC | NRDC | L | PLF, MALF | W | X | W |

Total success rate—environmentalists: 71%

Total success rate—conservative firms: 29%

Total success rate—U.S. government: 100%

IV. CONCLUSION

This article is intended to challenge the prevailing conception that liberal, environmental interest groups are losers in the legal battles to preserve natural resources. Given the increasing costliness and complexity of this kind of litigation, environmentalists were expected to falter, and others saw the development of conservative firms and the philosophy of the Reagan administration as a potential death knell for the cause of environmental protection.

In quantitative terms, liberal legal foundations were successful in five of the seven cases where conservative legal foundations also participated. The liberals' legal foundations also won four of seven United States Supreme Court in which no conservative legal foundation participated. Conservative legal foundations, on the other hand, have prevailed in environmental litigation in only four of thirteen cases.

The reasons underlying such data are several. One explanation is that environmental interest groups have included more economic analysis and arguments in their response to legal challenges by conservative groups. The National Wildlife Federation, for instance,

recently established the Corporate Conservation Council designed to encourage communication between business leaders and environmentalists.²³⁸ Similarly, Natural Resources Defense Council has provided detailed policy recommendations as to how energy conservation replaces energy resources at a reduced environmental and economic cost.²³⁹ As their *amicus* briefs in *Chevron* demonstrate, environmental interest groups have become more economically sophisticated.²⁴⁰

Another explanation for environmentalists' litigation success is that many groups, like the NRDC report dramatic increases in annual income.²⁴¹ The Environmental Defense Fund reported an increase of 22.6 percent from its 1982 revenues.²⁴²

²³⁸ National Wildlife Federation, *Its People, Its Purposes, Its Progress*, p.13.

²³⁹ NATURAL RESOURCES DEFENSE COUNCIL, INC., 1981-1982 ANNUAL REPORT at 11. The Environment Defense Fund also states that its "economists have developed strategies to protect the environment in economically sound ways." ENVTL. DEFENSE FUND, ANN. REP. 1982-1983, 1.

²⁴⁰ See generally M.A.L.F. *Amicus* Brief, *supra* note 229; Brief of Respondents, *supra* note 226; Brief for Petitioners, *supra* note 233.

²⁴¹ NATURAL RESOURCES DEFENSE COUNCIL, INC., 1983 ANNUAL REPORT at 43 (1984).

²⁴² ENVIRONMENTAL DEFENSE FUND, 1983 ANNUAL REPORT at 12 (1984).