The Other Rights Revolution:
Property Rights and the Shaping of Conservative Legal Activism

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In March 1971, California Gov. Ronald Reagan unveiled a seventy-point plan to overhaul the state's public assistance system. The proposal included reductions of welfare payments to people with outside incomes or family members who could support them, residency requirements for welfare recipients, a program to deduct child support payments from fathers' wages, and incentives for prosecutors to investigate and punish welfare fraud.[1] The plan was the work of a task force of lawyers and government officials established the previous year to study welfare policy and recommend reform, in the hope of reining in spending on public assistance and undercutting support for a federal solution to the welfare crisis (such as the Nixon administration's proposed Family Assistance Program). Reagan's proposals initially faced opposition from California Democrats, who controlled the state legislature. But that resistance did not last. In August, the Reagan administration negotiated a compromise with Bob Moretti, the Democratic speaker of the state assembly. The outcome was a triumph for Reagan, who called the legislation "probably the most comprehensive reform of welfare ever attempted, not only here in California but in the United States." Moretti predicted that the legislation would defuse the welfare issue in California for the foreseeable future.[2]

But the battle over California's welfare system did not end there. Before the bill was signed, lawyers for the American Civil Liberties Union and the California Welfare Rights Organization told reporters that they planned to sue.[3] A few weeks later, legal services attorneys filed a class-action lawsuit claiming that a provision cutting off recipients with outside incomes violated federal law, since it left some people with

[1] Tom Goff, "Reagan Offers 70-Point Plan to Cut Welfare Expenditures," *Los Angeles Times*, 4 March 1971, 1.
[2] "California Legislature Approves Welfare Reform Bill after Compromise with Reagan," *New York Times*, 12 August 1971, 24. Lou Cannon, *Governor Reagan: His Rise to Power* (New York: Public Affairs, 2003), 348-62. Ronald A Zumbrun, Raymond M. Momboisse, and John H. Findley, "Welfare Reform: California Meets the Challenge," *Pacific Law Journal* 4 (1973): 747-50.
[3] Tom Goff, "Two Rights Lawyers Predict Suit Over Welfare Measure," *Los Angeles Times*, 11 August 1971, A3.

incomes below a federally defined standard of need. A subsequent lawsuit sought to overturn a new $50 limit on the travel expenses that welfare recipients could deduct from their work incomes. And these were just two of more than a dozen major challenges to the bill.[4] Within weeks, courts began to issue injunctions to prevent parts of the law from going into effect. And in December 1971, the California Supreme Court ruled unanimously that a major feature of the law—its cutbacks on aid to recipients with outside incomes—violated the Social Security Act. "While manifestly the states are not required to participate in the federal AFDC program," Chief Justice Stanley Mosk wrote in the court's unanimous opinion, "as long as they accept federal funds for this purpose they must comply with federal law in the administration of their programs."[5]

Ronald Zumbrun watched the legal challenges to the welfare bill unfold in 1971 and 1972 with a mixture of anger and awe. An attorney and Reagan aide, Zumbrun worked on the welfare reform task force and helped to organize its legal defense. He realized that the governor's public policy goals would hinge on litigation, since each legal challenge had the potential to reshape the law piece-by-piece and change the outcome of the broader reform package. He also realized that state governments across the country faced a formidable opponent in welfare cases: a constellation of left and liberal legal groups determined to defend public assistance as a matter of legal right. This informal network of attorneys and welfare rights organizations fought cutbacks in public assistance through legal and direct action.[6] It included talented, ambitious lawyers willing to challenge the reforms in court and motivated activists willing to take on the state bureaucracy. And its principles found considerable sympathy among state and federal judges. As the defense of the welfare bill got started, Zumbrun began speaking with other members of the task force—as well as California Human Relations chief James M. Hall and Reagan chief-of-staff Edwin Meese—about ways to fight back.[7]

Around the same time, in Southern California, construction magnate J. Simon Fluor was talking politics with William French Smith, a Los Angeles attorney and

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[4] Robert Fairbanks, "Welfare Reform Act Hit by New Legal Setback," *Los Angeles Times*, 9 October 1971, A10. Zumbrun, Momboisse, and Findley, "California Meets the Challenge," 750-70.

[5] *Villa v. Hall*, 6 Cal. 3d 227 (1971), 236. See also Daryl Lembke, "Portion of Welfare Reform Act Invalidated by State High Court," *Los Angeles Times*, 7 December 1971, B3.

[6] Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (New Haven: Yale University Press, 1993).

[7] "Background on the Formation of the Pacific Legal Foundation" (circa 1981), RRSC Box 10.

Republican Party activist. "Si" Fluor, as he was known, ran the Fluor Corporation, a massive construction and engineering company, best known for building mines, oil rigs, pipelines, and platforms in the United States and in the Persian Gulf. Fluor had his own complaints about the state of the American legal system. Of specific concern were a series of lawsuits brought by environmentalist groups that were slowing down big industrial projects, including construction on the Alaska Pipeline project, development of the Mineral King area of Northern California, and off-shore drilling in the Gulf of Mexico.[8] In such cases, environmentalists and other opponents of certain projects did not need to win every case to be successful. At Mineral King, for example, the Sierra Club filed suit in 1969 to prevent the Walt Disney Corporation from building an enormous ski resort on federally owned land near Sequoia National Park. Although they lost their case at the U.S. Supreme Court in 1972, environmentalists managed to delay the project for several years.[9] By that point, Disney was tiring of rising prices and bad publicity and losing interest in the idea. (Congress would eventually add the site to Sequoia National Park.[10]) Fluor wondered how he might pre-empt such delays the future.

Smith had heard about the welfare committee's discussions through the California Chamber of Commerce, and he put Zumbrun in contact with Fluor. In March 1973, they met with a handful of other West Coast businessmen and attorneys and established the Pacific Legal Foundation, the first non-profit, public-interest law firm explicitly designed to promote a conservative worldview in the courts on a range of issues.[11] According to the firm's official history, "It appeared that no one was litigating in support of our basic system of government, the free enterprise system, traditional private property rights, and a balanced approach to weighing economic, social and environmental concerns." Pacific would attempt to do just that. Zumbrun took charge as the firm's first legal director, with an initial budget of $177,000. Fluor was elected chairman of the board, a position that he

[8] Ibid.

[9] *Sierra Club v. Morton*, 405 U.S. 727 (1972).

[10] Robert A. Jones, "Controversial Mineral King Resort Plan Dies in Congress," *Los Angeles Times*, 15 October 1978, B1.

[11] Conservatives had formed non-profit groups dealing with legal issues before, including Citizens for Decency through Law (founded 1957), the Christian Legal Society (1959), Morality in Media (1962), Americans for Effective Law Enforcement (1966), and the National Right to Work Legal Defense Foundation (1968). But these tended to be single-issue groups, and with the exception of the Right to Work group, focused primarily on culture and morals. See Ann Southworth, "Conservative Lawyers and the Contest over the Meaning of 'Public Interest Law'," *UCLA Law Review* 52 (2005): 1277.

held until his death one year later. In June 1973, the firm received tax-exempt status from the Internal Revenue Service as a public-interest, charitable foundation. This freed it to raise more money and to begin to initiate litigation.[12]

The watchword for the foundation was "balance." "The practices of public interest law should not be solely concerned with civil rights, poverty law or environmental law," explained Pacific's annual report for 1974-75. "It should be just as concerned with the interests of the working men and women in this country—industry, business, and agriculture."[13] These interests were not being adequately served by the American legal system, Pacific's lawyers believed, because government attorneys and the private bar were no longer capable of checking liberal activism in the courts. "Faced with the dilemma of countering numerous lawsuits for temporary restraining orders, injunctions and damages, public attorneys have become hopelessly outmanned," Zumbrun wrote in a 1973 prospectus for the foundation. Meanwhile, the "private sector, whose interests are equally at stake, has failed to bring its combined resources to bear in the common areas of interest which are under attack by those that would effect change regardless of cost or adverse results upon society."[14] The founders of Pacific believed they could "serve the citizen" by presenting a unified voice for the interests of business and taxpayers in the justice system, thereby balancing the power of the legal left. Zumbrun concluded the prospectus with a long quote from the Powell Memorandum (see Chapter One) on the threat to free "enterprise" in the early 1970s and the need for new institutions to fight back.[15]

The founders of Pacific Legal Foundation had good reason to acknowledge the power and influence of liberal lawyers in the early 1970s. The American left had spent more than a half-century of experience using strategic "impact" litigation to push for political change through the legal system. In 1920, advocates of political liberties created the American Civil Liberties Union (ACLU) out of the wartime National Civil Liberties

[12] "Background on PLF."
[13] Pacific Legal Foundation, *Second Annual Report 1974-75* (Sacramento: Pacific Legal Foundation, 1975).
[14] Ronald Zumbrun to PLF Board of Directors, 1 February 1973, RRSC Box 10.
[15] On balance, see also "Balance Best Defines Purpose," *The Reporter*, Vol. 3, No. 2 (February/March 1977): "If one word were chosen to best define Pacific Legal Foundation's reason for being, it would be 'balance' in the American system."

Board. The ACLU soon became the country's foremost voice for freedom of speech.[16] In 1939, the National Association for the Advancement of Colored People spun off its Legal Defense Fund (LDF), which led the legal campaign against segregation in education that led to *Brown v. Board of Education* in 1954.[17] By the late-1960s, dozens of other left or liberal groups, some of them modeled on the ACLU and LDF, were active in the courts. Environmentalists had the Natural Resources Defense Council (NRDC) and Sierra Club attorneys; antipoverty activists had the National Welfare Rights Organization and various legal services groups; consumer advocates had a series of specialized legal groups founded or inspired by Ralph Nader. Other firms advocated on behalf of women, the disabled, and other groups. By litigating many of the precedent-setting legal cases of the 1950s and 1960s, liberal lawyers helped to create what some political scientists have called "the rights revolution." This was a considerable expansion of the claims that individuals could make as a matter of fundamental right. That is, an expansion of the sort of claims that (whether established originally by statute, constitutional principle, or judicial interpretation) transcended specific policy choices or government discretion.[18]

And the strength of the liberal legal network went beyond the U.S. Supreme Court cases its members litigated. By accepting cases that other lawyers would not—because the clients were unable to pay or politically undesirable—liberal lawyers opened up access to the legal system. A non-profit bar devoted to civil rights and poverty law made it more likely that African-Americans and the poor would have their cases heard and receive adequate representation. Meanwhile, by defending abstract or hard-to-define interests, such as the "public interest" in clean air or the ecological needs of endangered

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[16] Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990).

[17] Richard Kluger, *Simple Justice: The History of Brown V. Board of Education and Black America's Struggle for Equality* (New York: Knopf, 1976). Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987). Kenneth Walter Mack, "Race Uplift, Professional Identity and the Transformation of Civil Rights Lawyering and Politics, 1920-1940" (Ph.D. Dissertation, Princeton University, 2005).

[18] See, in particular, Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998). John David Skrentny, *The Minority Rights Revolution* (Cambridge, Mass.: Harvard University Press, 2002). The long-term effectiveness of rights-based and judicially oriented activism has been the subject of an immense amount of scholarship. See, e.g., Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991). Lucas A. Powe, *The Warren Court and American Politics* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2000). Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford and New York: Oxford University Press, 2004).

species, liberal lawyers gave voice to constituencies that had not previously found an advocate in the courtroom. For many of the new public-interest attorneys, winning precedent-setting cases at the appellate level was not always essential. Simply by fielding enough attorneys to serve a community, liberal legal groups changed the balance of social power—they empowered some groups and pushed back against others. For example, the battle over welfare rights included not only the constitutional litigation that resulted in the 1970 Supreme Court decision in *Goldberg v. Kelly*,[19] but also the aggressive use of forums such as the administrative fair hearing process by welfare recipients themselves to secure tangible resources and force changes in the welfare bureaucracy.[20] This day-to-day, client-by-client service work made many liberal firms part of a "support network" in various communities or interest groups. Of course, service work and impact litigation were often related, since day-to-day cases helped lawyers identify promising test cases for wide-reaching impact litigation.[21]

The liberal legal network grew stronger in the 1960s, as liberal groups found new sources of funding and in some cases formed a symbiotic relationship with government. In 1965, as part of the national War on Poverty, the federal government began to subsidize legal services clinics. Liberals in the Johnson administration believed that legal aid was a way of creating opportunity: by helping the poor navigate the pitfalls and problems of the legal system, government could give people the tools they needed to escape poverty and join in the bounty of American affluence. Private foundations, eager to use their wealth to eradicate need, also kicked in significant finding, with the Ford Foundation leading the way. (Ford donated $7.4 million to the National Legal Aid and Defender Association, between 1953-72.[22]) Meanwhile, acts of Congress in the 1960s and early 1970s boosted the liberal legal network by writing legislation designed to be enforced by lawsuits (rather than by the executive branch).[23] Combined with courts that

[19] *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[20] Felicia Kornbluh, *The Battle over Welfare Rights: Poverty and Politics in Modern America* (Philadelphia: University of Pennsylvania Press, 2007).

[21] The term "support structure" comes primarily from Charles Epp, who argues that "the rights revolution depended on widespread support made possible by a democratization of access to the judiciary." See Epp, *Rights Revolution*, 4.

[22] Ibid., 58.

[23] See Sean Farhang, "The Litigation State: Public Regulation and Private Lawsuits in the American Separation of Powers System" (Ph.D. Dissertation, Columbia University, 2006). Farhang argues that

were loosening rules of "standing"—that is, whether an individual or group has sufficient interest in a case to bring suit—such bills eased the path of lawsuits with broader social consequences. Judicializing policy administration had its critics: As political scientist Karen Orren argued at the time, it was "false pretense" to think that "a dispute between, say, the Disney Corporation and the Sierra Club is a legal dispute in any basic sense."[24] Pretense or not, direct or indirect subsidies allowed liberal legal organizations to grow. This often had an ironic consequence, especially in the field of poverty law: since legal services lawyers challenged decisions that denied their clients welfare benefits, governments were paying lawyers to sue themselves.

None of this means that the American legal system had, by the early 1970s, become "imbalanced"—that depends on how you define equilibrium and your expectations for how the balance of power should shape up. After all, the liberal legal movement came into being out of its own concept of balance. The small fraction of the legal profession that engaged in non-profit, public-interest advocacy believed that its task was balancing the power of large corporations, conservative interests groups, and the biggest law firms of the for-profit, for-hire bar. For all of their growth during the 1960s, that task still appeared Sisyphean. Liberal advocacy firms remained a small fraction of the legal profession, with few of the resources and power of a large corporate law firm.[25] From their perspective, the pushback by the right was less about balancing liberals than restoring the advantages that the wealthy and powerful had traditionally held in the courtroom. And even if it were possible to restore the status quo before 1965, it was unclear how forming a conservative firm, in Sacramento, would accomplish that. Founding Pacific was one step toward building a countervailing power within the non-profit, public-interest legal community. But the firm still needed to develop a strategy for making its impact felt in the legal and political arenas.

Congress made it easier for private litigants to enforce laws in part to check the authority of the president, especially during periods of divided government.

[24] Karen Orren, "Standing to Sue: Interest Group Conflict in the Federal Courts," *American Political Science Review* 70, no. 3 (1976): 740.

[25] For a critique of the traditional law firm, see Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976). For recent case studies of politically oriented alternatives, see Austin Sarat and Stuart A. Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998).

In his prospectus for Pacific Legal Foundation, Zumbrun argued that the firm would have its maximum effect by supporting government against the legal left. Pacific, he wrote, would "serve the citizen" by defending the discretion of public officials to make policy and assisting "hopelessly outmanned" public attorneys in their fights against the liberal legal network. "Unless adequate legal protection is afforded in the near future," he wrote, "governmental functions may well be without adequate defense in the courts." By helping out the state, Pacific would "insure the smooth functioning of the economy and governmental bodies, and protect the public interest." The foundation's proposed practice areas reflect this commitment. Welfare was the first, and by far best developed, "area of interest" on the group's prospectus. Education (especially the legal consequences of campus political protest in the state university system) came in second. The environment was the third priority, followed by taxes, labor, government, transportation, and natural resources. The commitment to helping out elected officials ran deep enough that Zumbrun proposed funding Pacific, in part, through consulting contracts with government agencies that were facing down "the highly organized, government subsidized 'poverty attorney.'" He cited California, New York, and the Nixon administration as the most likely contractors.[26] By June 1973, the Pacific Legal Foundation was up and running. Zumbrun drew on the welfare reform task force when putting together the staff; the first seven lawyers eventually hired by the firm were former attorneys for the state of California who had participated in the welfare battle.[27] In its first months, the firm secured a contract from the government of Illinois to help figure out how to save money on welfare by tracking down "dead-beat dads" and demanding child-support.[28]

In several early cases, the firm made good on its plans to defend government authority on welfare issues. Pacific produced a friend-of-the-court brief defending California's right to exclude normal pregnancy from the list of qualifying disabilities for the state's disability insurance program. And it filed another friend-of-the-court brief in a U.S. Supreme Court case that arose when New York attempted to tighten its welfare laws

[26] Ronald Zumbrun to "PLF Board of Directors," 1 February 1973.
[27] "Background on the Formation of Pacific Legal Foundation."
[28] John Berthelsen, "Group Fighting Antipoverty Lawyers, Ecologists Is Growing," *Sacramento Bee*, 2 November 1973, clipping in GRA Box 262.

by forcing fathers to provide more child support.[29] In cases on unrelated topics, the firm also defended the discretion of government agencies. For example, Pacific worked on behalf of several local governments that supported plans to dam the American River, in California's Central Valley. (Pacific argued the public interest in having more hydroelectric power and controlling flood patterns.[30]) It also contributed a brief on behalf of the U.S. Navy in a 1974 dispute over the basing of Trident submarines in Bangor, Washington. As in the welfare cases, the firm took the position that government-knew-best, and it worked to defend the decisions of government officials against legal challenges.[31]

But the firm soon ran into some of the limits of this approach to public-interest lawyering. For one thing, welfare rights began to fade as a national legal issue in the mid-1970s. The legal campaign to enshrine welfare rights in the Constitution hit its high-water mark with the U.S. Supreme Court decision *Goldberg v. Kelly* (1970), which declared that welfare recipients were entitled to "due process of the law"—including an evidentiary hearing—before their welfare benefits could be cut off.[32] It began to stall soon thereafter. A turning point came in 1972, with the Court's decision in *Jefferson v. Hackney*. In *Jefferson*, a 5-4 majority on the Court upheld Texas's ceiling on welfare benefits, even though the spending cap left some recipients below the Social Security Act's standard of need.[33] *Jefferson* had a direct impact on welfare litigation in California: Based on its precedent, the California Supreme Court reversed its earlier decision and reinstated parts of the California Welfare Reform Act that it had declared void one year earlier.[34] Nationally, it signaled that the U.S. Supreme Court would be willing to protect the procedural rights of welfare recipients, but it would likely reject a key goal of the welfare rights campaign: a constitutionally protected "right to live," in the form of a government-provided income.[35] Even before Pacific Legal Foundation entered the scene,

[29] "Disability Program Preserved," "Foundation Joins Welfare Appeal," *Pacific Legal Foundation Fall Report*, 10 October 1974.
[30] "Auburn Dam Gets Go-Ahead," *Pacific Legal Foundation Fall Report*, 10 October 1974.
[31] Pacific Legal Foundation, *Third Annual Report* (Sacramento: Pacific Legal Foundation, 1975).
[32] *Goldberg v. Kelly*, 397 U.S. 254 (1970), 261.
[33] *Jefferson v. Hackney*, 406 U.S. 535 (1972).
[34] *Villa v. Hall*, 7 Cal 3d 926 (1972).
[35] Davis, *Brutal Need*, 99-141.

California's public attorneys managed to turn back twelve of the first thirteen major challenges to the bill.[36]

Meanwhile, the political environment in the Golden State changed. In 1974, Jerry Brown won the race to succeed Reagan as California governor. A Democrat sympathetic to the New Left and countercultural elements within his party, Brown was not about to spend state money on consulting contacts for Zumbrun and friends. Nor did the post-Watergate political environment leave the foundation with a great deal of hope of finding long-term allies in office elsewhere. And even when the group was on the same page as the government in Sacramento, there were limits to what Pacific could reasonably hope to accomplish as an appendage to the state attorney generals' office. Trying to counterbalance liberal legal activism put the firm in the fundamentally defensive position of responding to liberals rather than initiating cases of its own. And it placed Pacific in a position of institutional redundancy, since the firm ended up intervening in cases that state attorneys general or other officials were already defending as a matter of obligation. To be sure, the firm could contribute expertise on particular legal issues—though its small size and varied caseload limited the potential for developing unique skills. But state officials, having taken office through democratic means, usually had a more specific and legitimate claim to represent the general public interest than an independent law firm.[37]

Pacific needed to branch out, and in relatively short order it did. In the firm's second annual report, Pacific declared that 1975 would be a "Year of Challenge," in which it would take on a variety of new projects: for example, testing the legality of the Occupational Health and Safety Act and determining whether public school teachers had a legal right to strike.[38] In subsequent years, it represented strikebreaking agricultural workers whose homes were being picketed by the United Farm Workers Union. It challenged affirmative action programs on the grounds that they constituted "reverse discrimination." It sought to block a federal mandate that new cars be equipped with

[36] See "Welfare Reform," *San Francisco Sun Reporter*, 23 September 1972. Zumbrun, Momboisse, and Findley, "California Meets the Challenge," 780-85.
[37] Steven M. Teles, *Parallel Paths: The Evolution of the Conservative Legal Movement* (2007), ch. 3.
[38] Pacific Legal Foundation, *Second Annual Report*.

airbags for added safety.[39] Although these cases took up a variety of policy issues, the majority of Pacific's docket challenged what the firm called "runaway government"—excessive regulations or inappropriate use of discretion by government officials. A 1979 fundraising brochure spelled out this new focus: "HALT …overregulation by big government! Overindulgence by the courts! Excessive interference in the American way of life by extremist organizations and their attorneys!"[40] And in doing so, Pacific found that legal tactics pioneered by liberal lawyers—indeed, some of the very tactics that had originally disturbed Si Fluor and associates—could be useful in the fight against liberal government. It began to use delaying tactics and challenge administrative discretion, at times with mercenary glee.

This was particular evident in Pacific's environmental work. In 1973, the foundation took up the fight against the Tussock Moth, a bug that was destroying trees in the Pacific Northwest and diminishing the timber harvest. The U.S. Forest Service wanted to use the banned chemical DDT to control the infestation; the EPA refused to allow its use, for fear of the chemical's documented effects on other wildlife. Pacific sued the EPA under the National Environmental Policy Act of 1969, which required government agencies to consider the environmental impact of any policy decisions. Pacific argued that the damage done to the forest ecosystem by the moth infestation compelled the use of pesticides, since the act required the government to take steps to save the trees. According the firm's "Legal Activities Report," the case "represented the first attempt to utilize the National Environmental Policy Act, among other laws, to sue the EPA, in the public interest, to force them to protect the environment by using the pesticide that they originally banned."[41] The firm later used similar arguments to challenge the creation of "diamond lanes"—lanes reserved for cars with two or more people—on the California freeway system. The restricted lanes were designed to promote energy conservation by rewarding people who carpooled. But because restricting non-carpool traffic into fewer lanes led to further congestion (at least in the short term),

[39] "Air Bags Mandate Upheld," *The Reporter* Vol. V, No. 2. (March/April 1979). "Reverse Discrimination Test," *The Reporter* Vol. IV, No. 4 (August/September 1978), "Home Picketing Intimidates Families of Non-Strikers," *The Reporter*, Vol. V, No. 4 (August/September 1979).

[40] Pacific Legal Foundation brochure (undated but probably 1979), GRA Box 262, Columbia University.

[41] *Pacific Legal Foundation Legal Activities Report, 1973-75* (May 21, 1975), 3, RRSC Box 10. Case was *PLF v. Train.*

Pacific fought them on environmental grounds, for allegedly increasing net air pollution.[42]

The use of tactics pioneered by the left continued in 1979 litigation over plans to build a new sewage treatment plant for Los Angeles. The new plant would have allowed waste to be transported over land for eventual disposal instead of being dumped in the ocean. Pacific's lawyers objected to the plan on cost-benefit grounds, since it would have cost $350 million for what they believed to be little benefit. But their legal challenge came upon environmental lines. They filed complaints demanding an Environmental Impact Statement (EIS) on the consequences of reducing the amount of waste being dumped into the ocean—a strategy that conservatives frequently complained about environmentalists using as a delaying tactic. They also argued, under the Endangered Species Act, that the proposed plant would endanger the habitats of the El Segundo Blue Butterfly, the California Gray Whale, and the Brown Pelican. (Pacific argued that the butterfly could only be found in sand dunes near the proposed plant, while the whale and the pelican feasted on marine life that was sustained by nutrients in the sewage.) The case mimicked the famous "snail darter" case, in the courts at the same time, in which opponents stopped construction on the Tellico Dam on the Little Tennessee River after a small, previously unknown fish was discovered nearby.[43] According to Pacific's newsletter, employing legal tactics the lawyers themselves considered illegitimate "demonstrated that the Endangered Species Act is a two-edged sword with equal impact on all projects, regardless of who initiates them" and might provoke legislative reforms.[44]

The shift from defending government discretion to challenging it freed up Pacific to take a greater variety of cases and bring new legal issues to the game. And it eliminated some of the firm's institutional redundancy. But it complicated the firm's claim to the public interest, since they were no longer helping public officials carry out the wishes of the voters who elected them. As an article in *Foundation News* reported,

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[42] "Los Angeles' Diamond Lane Freeway Situation Snarls Traffic, Tempers," *The Reporter* Vol 2., No. 1 (July 1976).

[43] Shannon Petersen, *Acting for Endangered Species: The Statutory Ark* (Lawrence: University Press of Kansas, 2002), 39-59. Jeffrey K. Stine, "Environmental Policy During the Carter Presidency," in *The Carter Presidency: Policy Choices in the Post-New Deal Era*, ed. Gary M. Fink and Hugh Davis Graham (Lawrence: University Press of Kansas, 1998), 179-201.

[44] "Costly Environmental Mandate Defers to Blue Butterfly," *The Reporter*, Vol. V, No. 3 (June/July 1979).

there was considerable debate in the 1970s over who ought to be able to claim the public-interest mantle. "Even when people can agree that public interest law can be policy-oriented and precedent setting on a national or even international scale," the article explained, "still the questions arise: 'What is the public interest? Who should represent it?"[45] For many liberals, public interest law meant representing people or interests that would not otherwise be able to hire a lawyer—individuals who were too poor or public goods that were too diffuse. As a result, many of them viewed conservative public-interest law—especially the business-friendly, anti-regulatory public-interest law practiced by Pacific—as a contradiction in terms. After all, the corporations and developers who stood to gain from limits on government regulation had the resources and the inventive to hire paid lawyers to fight the government on these issues. Indeed, some liberals thought efforts such as the Pacific Legal Foundation were essentially a tax dodge—a way to use tax-deductible charitable donations to fund self-interested legal work.[46]

Pacific's lawyers were aware of the perception. "Sometimes Pacific Legal Foundation is pictured as 'the bad guy,' challenging regulations for what would appear to be desirable objectives such as clean air, clean water and a healthy environment," the firm admitted in its newsletter.[47] Pacific argued that they nevertheless represented the *true* public interest of the American people. For Pacific, liberal groups actually represented the "special interests" of relatively few Americans: lefties with a particularly zealous interest in the environment, the minority of Americans in poverty or working with the poor, busybodies who wanted government to regulate every aspect of people's lives. Pacific represented the real interests of the majority, which were low taxes, economic growth, and inexpensive consumer products. As the firm explained to its members:

> There are at least 86 major federal programs to enhance and protect the environment. Each program is backed by hundreds of regulations and administrative requirements. The salaries for all the people in the agencies which administer and enforce these laws come out of your pocket. Pacific

[45] Julian Weiss, "Pacific Legal Foundation: The Right Sees Wrongs," *Foundation News* (May/June 1978), 34-38.

[46] Southworth, "Conservative Lawyers," 1223-77.

[47] "Runaway Government… What is PLF Doing About It?" *The Reporter,* Vol. V, No. 5 (October/November 1979).

> Legal Foundation attempts to ensure that the government regulations for which the public pays are both necessary and worth the price—not just someone's 'good idea.'[48]

The real "public interest" came from fighting the temptation to overgovern, and by keeping tax and regulatory burdens as low as possible. Or, at the very least, the firm argued, there was "no single public interest but rather a multitude of publics, each with dissimilar and, often, conflicting interests." Pacific intended to make sure a variety of those interests were heard—not only "the affluent, the elitist, or the outspoken activist."[49]

The practical issue was making this commitment more than abstract. It was easy enough to present balance by writing amicus briefs in ongoing litigation, but it was unclear that many of those briefs actually changed court decisions. Pacific's founders had not intended to create a legal lobbying firm, which would sit back and argue an abstract principle in litigation instigated by other parties. They wanted litigators. But to litigate, Pacific needed more than a set of legal tactics; it needed to find a client base, a constituency that needed their help and could plausibly claim that they were unable to hire a for-profit lawyer. They eventually found that constituency among middle-class taxpayers, small business owners, and farmers. Generally speaking, these were people who owned property but did not have the resources of a large corporation or similar entity. "It has been the Foundation's experience that many governmental restrictions designed for large organizations can be calamitous to the small organization, businessman or farmer," Pacific argued in 1975. "The individual is at a further disadvantage in that he does not have a ready access to public interest representation. The Foundation intends to be attentive and responsive to this type of need."[50] The welfare cases did not do that. Nor did the environmental work, so long as it was focused on large projects such as dams, the treatment of solid waste, and forestry. But Pacific found its niche in an area of law that was becoming increasingly contested in the mid-1970s: land use, preservation, and zoning.

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[48] "Runaway Government… What is PLF Doing About It?" *The Reporter*, Vol. V, No. 5 (October/November 1979).

[49] Pacific Legal Foundation, *Seventh Annual Report 1979-80* (Sacramento: Pacific Legal Foundation, 1980).

[50] PLF, *Second Annual Report*.

In November 1976, Viktoria Consiglio, a middle-aged bookkeeper, used some inheritance money to purchase a plot of land overlooking the Pacific Ocean on Kaiser Point, just south of Carmel, California. Two years later, Consiglio and her husband prepared to build a one-bedroom house on the site, only to have their requests for a building permit denied. The main impediment was the California Coastal Commission, a state-wide regulatory agency set up to protect the state's coastline. The Commission declared that Consiglio's house would block the view of the ocean from a nearby highway, disrupt a path to a rocky cliff above the sea, and potentially limit access to the beach below. After legal bills began to pile up, Consiglio found the Pacific Legal Foundation, which decided to take her case. The firm put a photo of Consiglio, standing on a rocky cliff overlooking the ocean, on the front page of their newsletter, under the headline "What Happened to the American Dream?" The article began: "Viktoria Consiglio, unhappy, confused, and angry, wonders what happened to her dream of owning a home by the sea. A dream that has turned into a nightmare of government red tape and legal costs that have taken a big chunk of her income from her job as a clerk-bookkeeper."[51]

Consiglio's legal team came from Pacific's land use division, a practice area that the firm created in autumn of 1974, and initially headed up by Donald M. Pach, an eminent domain specialist who had served previously at California's Department of Public Works. Land use issues had only received minor attention in Zumbrun's original prospectus for the firm, but the new division became a crucial part of the foundation's activities.[52] The division was charged with monitoring "governmental activities and litigation in areas of just compensation, coastal zone legislation, regional planning, down zoning, open-space and wilderness areas" and giving "careful scrutiny [to] instances where government may be improperly interfering with the reasonable ownership and use of private property."[53] As the firm explained to its membership, ideas about property rights had been going through a shift in the 1960s and 1970s. "Land in America is increasingly valued as a priceless resource," they wrote. "No longer is it seen as a

[51] "What Happened to the American Dream?" *The Reporter*, Vol. VI, No. 2 (March/April 1980). Philip Hager, "Big Sur Dream Clashes with Bureaucracy," *Los Angeles Times*, 2 April 1980, B3.
[52] "New Attorneys and Administrator Join Team," Pacific Legal Foundation Fall Report, 10 October 1974.
[53] Pacific Legal Foundation, *Second Annual Report*.

commodity to be bought, sold, and used freely—but rather, it has earned respect as a resource to be conserved and managed in the public interest."[54] The foundation decided to tease out the limits on public control of private property. Cases like Consiglio's allowed it that opportunity.

Pacific Legal Foundation believed that many land use rules went too far. While acknowledging environmental and other problems, its attorneys suggested that Americans' "guilt" at having "ignored environmental problems has grown so strong that we are now allowing Congress, state legislatures and local governments to implement 'panic regulations and controls' which may destroy America in another fashion…. To placate our guilty feelings, we are sacrificing the very foundations upon which America was built—the right of the individual."[55] The issue was, in part, a matter of constitutional principle. The Fifth Amendment to the U.S. Constitution declared that property could not be taken for public use without "just compensation." The Pacific Legal Foundation set up the land use unit in part to ask, "How far can government properly regulate land use without the payment of compensation? Should the property owner, who relying on existing zoning purchases property for development, acquire rights that would entitle him to compensation when his development plans are frustrated by a down zoning which is to promote the public welfare?" They also wondered what sort of process would be required of land use decisions, and how many opportunities for legal redress property owners would receive.[56]

In the mid- to late-1970s, the foundation fought the "downzoning" of land owned by the San Diego Gas and Electric Company from "industrial" to "open space." Their suit argued that a zoning change that rendered land without a practical, beneficial, or economic use should be considered a "taking" and required compensation.[57] Its newsletter criticized the California Supreme Court's decision in *Agins v. Tiburon* to allow

[54] Pacific Legal Foundation, *Second Annual Report*. See also "Property—Is Private Ownership Outdated?" *The Reporter* (July/August 1980). "Today's social property enthusiasts view property as belonging to the 'public' for the 'good of the people.' An individual cannot own property, say the advocates. It can only be held for the good of society as that good is perceived by a select few…."

[55] "Protecting Property Rights is Major Concern of Foundation," *The Reporter*, Vol. III, No. 1 (January 1977).

[56] Pacific Legal Foundation, *Second Annual Report*.

[57] "Downzoning of Property to be Fought," *The Reporter* Vol. III, No. 5 (November/December 1977).

restrictions on development amounting to what Pacific called "inverse condemnation."[58] It also took on the Federal Flood Insurance program for acting as a *de facto* land planner in many communities. As Pacific explained to its members, "The Act requires localities which participate in the federal insurance program to regulations dictated by federal requirements. Since local agencies must enact and enforce the federally outlined provisions, the federal government is not accountable to individual owners for the loss of their property rights."[59] And it tried to stop regional planning authorities from abusing the building permit process. For example, the firm sued the California Coastal Commission and the South Central Regional Planning Commission after a winter storm damaged the seawall protecting seaside homes in Malibu. The commissions attempted to extract public-use easements before it would allow homeowners to rebuild the seawall—and demanded land dedications for repair work that had already been completed.[60]

The Coastal Commission created a particularly inviting target. Created by a state-wide referendum in 1972 and made permanent by legislation in 1976, the California Coastal Commission was intended to protect the Pacific shoreline from environmental damage (especially oil spills) and to preserve public access to beaches and scenic views, both of which were threatened by private development along the coast. Though tackling these problems had considerable popularity among Californians, there was no simple way to achieve those objectives. The agency's jurisdiction overlapped with scores of local governments, some of which were hostile to its objectives and its authority. It also held the considerable mandate of guarding access to and maintaining the natural beauty of the California coastline, without a budget commensurate with that task. (For example, it lacked the funds to purchase significant quantities of land outright, which would have been one of the easier ways to preserve them.) Some of the commission's controversial policies—for example, demanding public-use or open-space easements in exchange for approving building permits—grew out of the realization that the Commission would have to do a job on the cheap. "There are a number of advantages in relying on regulation as a

[58] "Agins Decision Threatens Private Property Rights," *The Reporter* Vol. V, No. 3 (June/July 1979). *Agins v. Tiburon*, 24 Cal. 3d 266 (1979). One year later, a unanimous opinion of the U.S. Supreme Court affirmed the California decision. *Agins v. Tiburon*, 447 U.S. 255 (1980).

[59] "Flood Insurance Act is Land Use Tool," *The Reporter* Vol. IV, No. 1 (January/February 1978).

[60] "Coastal Commission Uses Permit Authority to Take Private Property," *The Reporter* Vol. V, No. 1 (January/February 1979).

major means for implementing the Coastal Plan," noted its chief planner in 1975. "Primary among them is that regulation does not require the immediate expenditures of large sums of public money as do acquisition techniques."[61]

Pacific's lawyers represented a variety of people and institutions in cases challenging the authority of the Coastal Commission, from individuals hoping to build a single family home (like Consiglio); to a businessman who wanted to build a motel in the Big Sur area; to the Southern California city of Chula Vista, whose local coastal development plan was rejected by the Commission for failing to preserve adequate amounts of open space. The battles allowed Pacific's lawyers to develop specific knowledge about the details of government planning, and also gave them a pool of clients who might otherwise be unable to hire a lawyer: property owners angry that the Commission denied their building permit or made an excessive easement demand. These sorts of cases gave Pacific a *raison d'etre* once the welfare issue receded: it could be a legal services office for property owners who could not otherwise afford to fight it out with a state agency. It could claim to defend some sort of "public interest" value in property rights (beyond the immediate collective well-being of its funders), while giving voice to conservative frustrations with over-government. It also gave the foundation an opportunity to develop case law on property rights, since each case asked, in its own way: Where does the power to regulate private property stop? When might government restrictions on use become a "taking" of property requiring compensation? The questions were central to those who saw private property rights as the most important bulwark against the power of the state.[62]

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[61] E. Jack Schoop to "State Commissioners," 13 January 1975. CCC Box 12, Folder 1. State lawyers were well aware that this strategy might face legal challenges. A 1974 strategy memo pointed out "the absence of a precise standard" or a "firm dividing line" that would explain when regulation infringed on private property rights. Evelle J. Younger and Raymond Williamson to Thomas A. Crandall, undated but probably 1974, CCC Box 12, Folder 6. This was a particularly acute example of a general problem in the new social regulation. By 1981, the Environmental Protection Agency had four times as many employees as the Interstate Commerce, Securities and Exchange, Federal Trade, and Federal Power Commissions combined—even though some of those old-line agencies had existed for more than half a century. See Donald J. Pisani, "Promotion and Regulation: Constitutionalism and the American Economy," *Journal of American History* 74, no. 3 (1987). And yet, because the EPA had a much broader mission than any of those agencies, it arguably still found itself in a weaker position with respect to those it regulated.

[62] Of course, these questions were of more than academic interest to big business and large developers, who could stand to benefit from legal precedents that restricted open space zoning or limited the power of government to block construction projects in ecologically sensitive areas.

By the early 1980s, the Pacific Legal Foundation had grown substantially from the small firm established in June 1973 with a budget of just more than $100,000. In 1981, it reported 12,000 contributions, coming from every state in the United States. According to the firm, major donors included "the Lilly Endowment, Wm. Hearst Foundation, John M. Olin Foundation, the Wm. Volker Fund, Murdock Charitable Trusts, … Southern Pacific Company, San Diego Federal Savings and Loan Association, and Safeco Insurance, to name a few."[63] The firm's caseload grew as well: In PLF's first year, the foundation accepted 10 cases for litigation; by the end of 1979, it had ninety cases active.[64] In 1979, it initiated a regular conference, co-sponsored by the American Bar Association, on "The Compensation Issue" in land use policy. The series of seminars brought together activist lawyers, government regulators, and practicing real estate attorneys to discuss the practical consequences of zoning laws—including when property owners have a right to "just compensation."[65] The firm also founded a Washington office and initiated a public-interest internship program for right-leaning law students, with well-connected California lawyers (including Meese and Pacific Law School's Gordon Schaber) participating in the orientation.[66] Ronald Reagan praised Pacific in his newspaper column, which called attention to the law firm's fight against mandatory airbags in new cars and its efforts to keep the tan riffle shell off the endangered species list. ("It's about as cute and cuddly as a Pet Rock," Reagan wrote of the unfortunate freshwater mussel, "but it is the latest in a string of exotic pets favored by ultra-environmentalists intent on halting construction projects they don't like."[67]) Reagan also contributed a blurb for the foundation's fundraising literature, which read: "[A]t least one public interest law firm is working on behalf of the public instead of, as is so often the

[63] Pacific Legal Foundation, "Statement on Funding," March 1981, RRSC Box 10.
[64] Pacific Legal Foundation, *Seventh Annual Report.*
[65] Ronald Zumbrun, "PLF/ALI-ABI Continuing Legal Education Seminar," November 9, 1981. RRSC Box 10.
[66] "PLF Inaugurates its College of Public Interest Law," *The Reporter*, Vol. V, No. 5 (October/November 1979).
[67] Ronald Reagan, "How Safe Are Air Bags?" Sacramento Bee, 29 October 1977, clipping in RRSC Box 10. Ronald Reagan, "The Tan Riffle Shell Case," Sacramento Bee, 8 October 1977, clipping in RRSC Box 10. "Tan Riffle Shell Determined to be Endangered," Fish and Wildlife Service News Release, 9 September 1977, http://www.fws.gov/news/historic/1977/19770909c.pdf

case with such firms, working for left-wing special interest groups at the expense of the public."[68]

But with that growth, came an evolution in the kind work that occupied most of the firm's attention. Pacific stopped trying to "serve the public" by defending government discretion and began limiting the planning capacity of government bureaucracies. Rather than playing defense against the National Welfare Rights Organization or the Sierra Club, Pacific was using its own combination of strategic and mercenary litigation in an attempt to change public policies and reshape the administration of the law. And doing so meant that the firm had to repeatedly challenge the discretion and legitimacy of California's government and planning agencies—to monitor an agency like the Coastal Commission as closely as civil rights groups monitored a public school system or prison conditions, caring less about the making the system "run smoothly" than protecting individual liberties. Instead of containing or rolling back a rights revolution, Pacific sought a rights revolution in new (or, at least, forgotten) areas of the law. In doing so, its attorneys began to find occasional common ground with some of the liberal groups they originally planned to fight—a shared distrust of governing institutions and frustration at the way that those institutions often worked to reinforce unfair or illogical public policies.

Some of this overlap worked its way into 1977 article on land-use law written by Zumbrun and his Pacific Legal Foundation colleague Thomas Hookano. Zumbrun and Hookano described a variety of ways that lawyers might attack zoning and land use ordinances, for example arguing that zoning laws prevent newcomers from building in a community violate a "right to travel" that had been recognized in earlier voting rights cases. And they eventually connected their libertarian skepticism about the work of governments and planning commission to more traditional civil rights litigation. For example, Zumbrun and Hookano cited *Southern Burlington County NAACP v. Township of Mount Laurel* (1975) as an example of a successful challenge to government planning. In *Mount Laurel*, civil rights attorneys convinced the New Jersey Supreme Court that zoning laws mandating minimum floor space, minimum lot size, and restrictions on multi-family dwellings were designed to exclude black and Latinos from the community and its schools. While the article did not lay out a legal strategy (and was not designed

[68] "The Other Side" (Pacific Legal Foundation brochure), not dated but circa 1976, GRA Box 262.

to), it made a clear point. By focusing on the "racial and economic bias" inherent in much zoning and planning, Pacific identified a new wedge to roll back any number of restrictions on market-driven development.[69] The firm was building a rights revolution on the work of the very liberal legal groups it generally opposed.

Denver

Pacific Legal Foundation had only been in existence for two years when it began to inspire imitators. Between 1975 and 1977, conservative activists founded a half-dozen regional litigation centers modeled on Pacific, including legal centers in Denver, Kansas City, Atlanta, Chicago, and Springfield, Mass. Each of the firms was affiliated with a National Legal Center for the Public Interest, a Washington-based clearinghouse and coordinating committee. They were governed by interlocking boards of directors, with representatives of the National Legal Center sitting on the board of each regional firm—and each regional firm having a voice in the national group (more on this in Chapter Three).

The Mountain States Legal Foundation, the Denver affiliate, was organized primarily by Joseph Coors, a Colorado businessman and conservative activist. Along with his brother Bill, Coors ran the Adolph Coors Company, his family's Golden, Colorado brewery and ceramics business. An economic and cultural conservative, Coors blamed egalitarian social policies not only for imposing expensive burdens on businessmen but also for moral decay and cultural conflict. His intellectual heroes included the traditionalist philosopher Russell Kirk, whose book *The Conservative Mind* made a case for orders and classes, the link between property and freedom, and the idea that change is not usually a good thing.[70] Coors's company tried to promote those sorts of values among its employees. One company-run "employee awareness program"

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[69] Ronald A. Zumbrun and Thomas E. Hookano, "No-Growth and Related Land-Use Legal Problems: An Overview," *Urban Lawyer* 9 (1977): 122-26, 33-35. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975). Pacific was not interested the NAACP's challenges to white suburban privilege as a general matter. Indeed, in *Serrano v. Priest* the firm had presented a brief arguing that urban school districts were actually the "rich" ones because of property taxes on commercial and industrial real estate, while suburban districts (which relied primarily on residential real estate) were relatively "poor." See "PLF Legal Activities Report," 21 May 1975, RRSC Box 10.

[70] Dan Baum, *Citizen Coors: An American Dynasty* (New York: William Morrow, 2000), 68-72. Russell Kirk, *The Conservative Mind, from Burke to Santayana* (Chicago: H. Regnery, 1953), 7-8.

distributed pamphlets blaming looting during the 1977 blackout in New York City on "Robin Hood government," which "made thievery respectable."[71] The same program offered a free trip to Hawaii to the employee who wrote the best 300-word essay on the subject: "What does the American business system mean to me?" and "What has it done for my family?"[72] During a brewery workers strike in the late-1970s, employees accused the company of using extreme measures to maintain a virtuous workplace—for example, requiring workers take lie detector tests containing specific questions about sexual orientation and practice.[73]

Between the 1960s through the 1980s, the Adolph Coors Company transformed its product (from a medium-size, regional beer with a cult following outside of the West to a major national brand) and production process (it added a new brewery in Virginia and broke its brewery workers union, at the cost of a decade-long AFL-CIO boycott of its products).[74] At the same time, Joseph Coors became a major figure in the financing and operation of the conservative counter-establishment inspired by the Powell Memorandum. In the 1960s, he served as a regent at the University of Colorado, where he funded a conservative alternative to the student newspaper and criticized professors for assigning books by prominent leftists. (When other regents raised the issue of academic freedom, Coors responded, "You just don't let the enemy into your camp, give them all the privileges and courtesies they ask, and then let them plot your destruction."[75]) In the early 1970s, Coors put up money to kick-start the Committee for the Survival of a Free Congress, and pressure group established by former congressional aide Paul Weyrich. He later donated $250,000 in start-up funds to another Weyrich operation: a Washington, D.C. think-tank called the Heritage Foundation.[76] When the National Legal Center opened its doors, Coors took the opportunity to establish a Denver affiliate. One of his employees, political operative Cliff Rock, recruited the firm's first

[71] Bill Coors to "Employee," 20 August 1976, GRA Box 97. Project Confidence Pamphlet, "Night of the Animals," undated but circa 1977, GRA Box 97.
[72] Coors Industries Employees Project Confidence, "Fall 1976 Essay and Slogan Contest Information," GRA Box 97.
[73] "Please Don't Buy Coors Beer," Coors Strike-Support Coalition Flyer (1977), CBSC Manuscript 42.
[74] Baum, *Citizen Coors*, page #s TK.
[75] Ibid., 88-89.
[76] Ibid., 90. Sidney Blumenthal, *The Rise of the Counter-Establishment: From Conservative Ideology to Political Power* (New York, N.Y.: Times Books, 1986), 45.

legal director, an outgoing member of the Federal Power Commission named James Watt. Rock acted on the advice of an oil industry lobbyist, who said of the commissioner: "He used to work on the Hill. He's a hard-core conservative and a born-again Christian to boot."[77] It helped that Coors's wife, Holly, knew Watt's wife, Leilani, from evangelical circles.[78]

Born in 1938, Watt grew up in Wheatland, Wyoming, where his father practiced law and his mother ran a hotel. He earned his bachelor and law degrees at the University Wyoming, and then moved to Washington, as an aide to U.S. Sen. Milward Simpson (R-Wyoming). With the exception of a two-year stint as a Chamber of Commerce lobbyist, Watt remained in government work for nearly twenty years.[79] In 1969, he joined the Nixon administration as a deputy assistant secretary for Water and Power Resources in the Department of Interior; in 1972, he was promoted to assistant secretary for Outdoor Recreation.[80] In 1975, President Ford appointed Watt to the Federal Power Commission, where he pushed for the removal of price controls on natural gas and voted to triple the price ceiling on newly discovered gas. In interviews, he characterized himself as "a free enterprise type guy" and touted his "blue-ribbon Republican credentials."[81] He embodied a peculiar political space: a career Washington, D.C. public official who stood for states' rights and less bureaucratic meddling. The journalists Ronald Brownstein and Nina Easton described him as "basically a traditional bureaucrat, working a 40-hour week, peppering his walls with flow charts and angling for advancement."[82] Leilani Watt concurred. "For my husband," she recalled a few years later, "the nearly twenty years since college had been a steady climb up the political ladder."[83] That climb took a detour

[77] Baum, *Citizen Coors*, 153-54. H.A. True Jr. to Harold Garrett, 9 November 1977, photocopy in GRA Box 242.

[78] Ron Arnold, *At the Eye of the Storm: James Watt and the Environmentalists* (Chicago: Regnery Gateway, 1982), 22.

[79] Jerry Adler, "James Watt's Land Rush," *Newsweek*, 29 June 1981, 24.

[80] Arnold, *Eye of the Storm*, 8-21. As early as 1969, the close connection between Watt and his former lobbying clients raised eyebrows in Washington. Sens. William Proxmire and Edmund Muskie complained about a "credibility gap" at Interior because of Watt's presence. At the time he was working as "some sort of consultant" without an informal title, but was reputed to be an influential advisor to Interior Secretary Walter J. Hickel. See, "Top Hickel Aide Fought U.S. Curbs," *New York Times*, 10 February 1969, 22.

[81] Edward Cowan, "Conservative New Guard at the F.P.C," *New York Times*, 22 February 1976, F1.

[82] Ronald Brownstein and Nina Easton, *Reagan's Ruling Class: Portraits of the President's Top 100 Officials* (Washington, D.C.: Presidential Accountability Group, 1982), 112.

[83] Leilani Watt and Al Janssen, *Caught in the Conflict: My Life with James Watt* (Eugene, Oregon: Harvest House, 1984), 32.

when Jimmy Carter won the 1976 presidential election. Watt resigned his job at the Federal Power Commission (which would soon be folded into the Department of Energy, anyway) and started looking for other work.[84]

Watt was also a committed Christian whose faith infused his worldview and his work. Born-again in his twenties, Watt prayed with the Assembly of God and developed connections with other evangelicals in Washington. In 1976, he wrote to Doug Coe of the Fellowship House wanting "to come in contact with and grow with some committed Christians in Government who carry responsibilities similar to mine…. In my office we meet daily for scripture reading and prayer, but there is a difference between that type of group and a group of men carrying like responsibilities."[85] He did not find any particular conflict between a life of faith and work in the relatively unspiritual bowels of the Washington bureaucracy. As he explained in a 1976 letter:

> Upon reflection, I am satisfied that a Christian who knows he is in the place God wants him to be and is doing the things that God wants him to do should aggressively and ambitiously apply himself so that the outlined goals will be realized and success achieved. I feel that if we know what God wants for us and are unsuccessful, we will be held accountable for how we managed our time, talents and resources. If He that is in us is greater than he that is in the world, we should be better because of Christ.[86]

In other words, God would want Watt to use his talents and opportunities to the best of his abilities—to be an effective bureaucrat and determined advocate for what he believed.

Despite the Christian connection, the founders of Mountain States envisioned their institution as a "pro-business" organization, not a tool to fight a culture war. Once again, the idea was "balance." "Many 'public interest' lawsuits exceed the bounds of redressing legitimate grievances and are sometimes even frivolous, designed more to impede the orderly process of government than to produce policies which are responsible to public needs," noted a prospectus for Mountain States put together by the National Legal Center. "The proposed Mountain States Legal Foundation will bring a necessary balance to the pleadings in cases before the courts in the eight states of Colorado,

[84] James G. Watt to Jimmy Carter, 31 May 1977.

[85] James Watt to Doug Coe, 29 April 1976, JGW Box 3, Folder 4. He also discussed organizing a group of Christians in the nuclear energy field. See James Watt to Vic Uotinen, 10 November 1976, JGW Box 3, Folder 7.

[86] James G. Watt to Paul L. Goodman, 14 September 1976, JGW Box 3, Folder 7.

Arizona, Utah, New Mexico, Nevada, Montana, and Wyoming."[87] Rather than talking up his faith to the foundation's founders, Watt touted his prior experience. "I have worked at all three points of the iron triangle—the Congress (Senate), the Executive Branch, and as a representative of corporate business, plus the energy regulating interests of Washington," he noted, adding that he knew "how to get along and make things happen with the Democrats.[88]

This open identification with business interests gave the group an immediate fundraising constituency, though it also raised some problems. Namely, it blurred the already thin line between promoting some sort of broad, "public" interest and simply channeling the self-interested legal work of its donors through a non-profit. Liberals blasted Mountain States for being, in the words of one critic, "at best superfluous and at worst parasitic," since the foundation used tax-exempt funds to bring cases that might well have been brought by an ordinary, commercial law firm.[89] The foundation did not work very hard to dispel this concern. According to minutes of a 1978 Board meeting, when Coors solicited donations from Board Members he "stressed that this was more than charitable contribution and was, in effect, an investment in each member's personal and business life future."[90] In correspondence, foundation employees often thanked contributors for their "investment," not their "donation" or "contribution"; fundraisers were asked to target executives in specific industries and explain how Mountain States' legal work would "directly affect" their cause.[91]

Mountain States did attract people from outside the immediate business community to serve on the group's board of directors, which oversaw finances and hiring decisions, and its separate litigation board, which recommended cases and could veto

[87] National Legal Center for the Public Interest, "Proposal for the Mountain States Legal Foundation" (circa 1977), WNA Box 34, Folder 43

[88] James G. Watt, "Notes on MSLF," JGW Box 7, Folder 4.

[89] See Arnold, *Eye of the Storm*, 22. For an excellent general discussion of this problem, see Ann Southworth, "Conservative Lawyers and the Contest over the Meaning of 'Public Interest Law'," *UCLA Law Review* 52 (2005).

[90] James G. Watt to Board of Directors, 8 August 1978, "Minutes of the Board of Director's Meting at the Stapleton Plaza Hotel in Denver, August 3, 1978," WNA Box 34, Folder 44.

[91] James G. Watt to Wayne N. Aspinall, 29 August 1979, WNA Box 34, Folder 48; Watt to John F. Bonner, 8 December 1977, WNA Box 34, Folder 43. On the problems posed by the close identification of the conservative litigation movement and business interests, see Steven M. Teles, *The Rise of the Conservative Legal Movement: Organizational Mobilization and Political Competition* (Princeton: Princeton University Press, 2008), 58-89.

new litigation projects. This included Rex Lee, the dean of the law school at Brigham Young University and a writer of books and articles constitutional law aimed at a general audience.[92] It also included John Runft, an Idaho attorney who was already doing work on behalf of business owners who resisted the Occupational Health and Safety Administration (OSHA). Meanwhile, the board of directors included Wayne Aspinall, a former congressman from the Western Slope of Colorado. For more than half of his 24-year congressional career, Aspinall had been chairman of the House Committee on Interior and Insular Affairs. In Aspinall, Mountain States got an elder statesman of Western politics, with considerable expertise on land and resource issues. It also got a measure of bipartisan respectability: Aspinall was a Democrat, albeit one who had endorsed Gerald Ford in the 1976 presidential election and was known by environmentalists as a "most durable foe" for his advocacy of federally funded dams, irrigation projects, and managed use of natural resources.[93] Aspinall took part in fundraising for the firm, based on lists of prospective donors that Cliff Rock assembled for him.[94]

Watt and company got started by arranging to file friend-of-the-court briefs that would "directly affect" their business supporters. In *Marshall v. Barlow's*, the firm commissioned a brief on behalf of Bill Barlow, an Idaho electrician (and one-time John Birch Society member) who refused to allow an Occupational Health and Safety Administration employee on his business premises without a search warrant. The Mountain States brief had little impact on the outcome of the case, which Barlow won in a 5-3 decision of the U.S. Supreme Court, largely on civil libertarian grounds.[95] (Barlow's lawyer, John Runft, was a member of the Mountain States Legal Foundation's Board of Litigation, but Runft represented Barlow in his normal capacity as a firm attorney.) But the Foundation's participation, albeit minor, allowed it to claim victory in

[92] Rex E. Lee, *A Lawyer Looks at the Constitution* (Provo, Utah: Brigham Young University Press, 1981).
[93] Steven C. Schulte, *Wayne Aspinall and the Shaping of the American West* (Boulder: University Press of Colorado, 2002), 2, 45, 227.
[94] Clifford Rock to Wayne Aspinall, 8 December 1977, Box 34, Folder 43.
[95] *Marshall v. Barlow's*, 436 U.S. 307 (1978). Given that MSLF entered the case in part to bring ideological clarity to the issue, it is worth noting that the Justices did not vote on obviously right-left lines. Justice White, Burger, Stewart, Marshall, and Powell made up the majority, while Justices Stevens, Blackmun, and Rehnquist dissented. (Justice Brennan did not take part.) The decision required considerable follow-up legislation to determine what standards of probable cause would be required of future OSHA warrants.

future fundraising appeals. Conservative public-interest outfits celebrated the OSHA cases with banner headlines: "Small Businessmen Have Same Rights as Criminals," read one.[96] Mountain States followed up that case with an amicus brief in the *L.O. Ward* cases, litigation arising out of an oil spill that contaminated a creek bed. Watt and company argued that Environmental Protection Agency reporting requirements for industrial accidents violated the Fifth Amendment's protection against self-incrimination. This time their brief was filed in a losing cause, as the U.S. Supreme Court ruled against Ward in an 8-1 decision.[97]

But Watt was not satisfied for Mountain States to mostly sit around and produce *amicus* briefs making the "pro-business" case in some ongoing litigation. In a presentation to some of the original funders of Mountain States, he argued that the group should focus directly on reshaping public views about the law and the Constitution. Mountain States, he explained, should be "an activist group not an ivory tower for legal scholars to prepare briefs to go to the Supreme Court." The key was aggressively challenging liberals on all fronts. "We should be looking—and aggressively looking—for cases to file in our right which will bring about a change or preserve the rights of privative property and private enterprise," he wrote in notes for the speech. "We should have a drawer full of complaints, injunctions, writs of mandamus and be ready to go after the Sec of Interior, the Sec of Energy or the Director of the Fish and Wildlife Service or the Governor of any of the States." And he argued that legal tactics were hardly the only—or even the most important—tool his group could wield. "I believe the President of MSLF should have an aggressive public relations program," Watt explained:

> Our goal should not be to pick cases to take to the Supreme Ct. Our goal should be to protect private property rights and the private enterprise system. If we can head off a problem—we win…. If we can intimidate a govt official who is about to make a bad mistake by threatening litigation and going before the TV cameras great![98]

A few months into his tenure, Watt went to his board of directors to ask for more leeway to enter cases and local controversies that might not result in a published legal decision,

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[96] "Small Businessmen Have Same Rights as Criminals," *The Reporter*, Vol. V, No. 4 (August/September 1979).

[97] *United States v. Ward*, 448 U.S. 242 (1980). Justice Stevens was the only dissent.

[98] James G. Watt, "Notes on MSLF," JGW Box 7, Folder 4.

never mind Supreme Court precedent—with "the caveat that any case of this nature … should have some universal application."[99] Amicus briefs in Supreme Court cases were not Watt's idea of energetic defense of Western business interests.

For Watt, the chief enemies of those interests were liberals in general and environmentalists in particular. He made these views clear in a speech in Dallas, in 1978, which Mountain States Legal Foundation excerpted in a fundraising pamphlet. Titled "Environmentalists: A Threat to the Ecology of the West," the speech blasted the environmental movement for policies that restricted the development of Western energy sources. Unlike "conservationists" (who, in Watt's view, wanted to develop energy resources, albeit gradually), "environmentalists" were extremists who wanted to lock up the West on a long-term basis. Within environmentalism, Watt made a distinction between average supporters of the movement, whose motivations were good (if misguided), and its leadership, whose motivations were "suspect." Watt ascribed complicated and Manichean motives to what he called "the extreme environmentalists." He argued that limits on oil drilling or strip mining would provoke a massive energy crisis, at which point energy users in the East and Midwest would demand that Western resources be developed willy-nilly, without regard for the ecological consequences or long-term conservation. Thus, environmentalism should be understood not as movement to preserve natural beauty or promote healthy air and water, but rather as an Eastern plot to undermine the economy and steal the West's oil, coal, and uranium. "What is the real motive of the extreme environmentalists?" Watt asked. "Is it to weaken America?"[100] A strong America and a free West needed activists who would fight for their rights and their livelihood.

So, Mountain States began a series of litigation campaigns focused on natural resource policy. "We need to establish a special expertise in the law concerning the energy issues—oil, gas, coal, uranium; mining, underground and surface; agricultural-timber, livestock, crops, and particular attention to our state water rights and the federal

[99] James G. Watt to "Board of Litigation," 19 April 1978. WNA Box 34, Folder 45.
[100] James G. Watt, "Environmentalists: A Threat to the Ecology of the West," speech before the Conservation Foundation (Dallas: May 1978), JGW Box 11, Folder 8. Mountain States pamphlet based on the speech located at MSLF Box 1.

encroachment on them as well as the management of the public lands," he explained.[101] These were issues that Watt had dealt with for much of his Washington career at Interior and the Power Commission. They were also topics of considerable interest to the foundation's early funders. The Mountain States board of directors was not simply made up of Rocky Mountain businessmen. Rather, it consisted primarily of businessmen from mining, timber, agriculture, and oil—industries that dealt with (and to some sense, relied upon) the federal government on a regular basis. This included ranchers whose cattle grazed on federally owned lands, farmers dependant on large-scale irrigation projects, and oil wildcatters prospecting on the public domain.[102] These were business interests with a higher-than-average interest in the outcome of environmental policy; they also did substantial business in the federal domain. Though the Board cautioned Watt that he should "be careful about getting the reputation for handling only one type of case," the foundation supported his plans to develop expertise in this area.[103]

In 1977 through 1980, the foundation went after the second Roadless Areas Review and Evaluation (RARE II), a study of the National Forests to determine which portions deserved the designation "wilderness" and protection from future roads, logging, or development. Mountain States opposed the Department of Interior's decision to exclude areas under study from present development, and tried to determine "whether the effective removal of RARE II lands from internal leasing constitutes … a proper exercise of the Secretary's discretion under the Mineral Leasing Act."[104] It represented a mining company that wanted access through a wilderness study area in order to get to an otherwise inaccessible lease on property owned by the state of Utah.[105] It launched a project to hold government officials "personally liable for financial injuries resulting

[101] Watt, "Notes on MSLF."

[102] For example, in 1978 Mountain States received $10,000 from Pierre DuBois of the Colorado Contractor's Association, $3,000 from Amos Plante of Exxon, and $4,000 from Ralph Cox of the Anaconda Company. "Colorado Donors List 1978," WNA Box 34, Folder 44. The foundation also got significant funding from conservative charitable foundations. For example, the Scaife Foundation sent $55,000 in May 1978. James Watt to "Board of Directors," 8 June 1978, WNA Box 34, Folder 45. In 1980, the Sierra Club identified 20 corporate donors to Mountain States that did significant business with the Department of the Interior. "Contributor's List: Dealing with the Department of Interior," SLF, Box 118, Folder 27.

[103] James G. Watt to "Board of Directors," 3 March 1978, quoting the minutes of a February 1978 board meeting in Denver. WNA Box 34, Folder 45.

[104] James G. Watt and Kea Bardeen, "Report on the RARE II proceedings" (20 June 1978), 17, WNA Box 34, Folder 45.

[105] James G. Watt to "Board of Litigation," 20 June 1979, WNA Box 34, Folder 48.

from actions taken outside their authority." This led to a case against a regional director of the Bureau of Land Management who, according to the foundation, failed to properly manage the herd of protected wild horses on the public lands. (The horses strayed onto and damaged privately owned rangelands.[106]) And it represented thirty ranchers from New Mexico whose grazing leases were reduced after an environmental impact statement found that their district was suffering from erosion.[107]

The New Mexico case, like some of Pacific's work on endangered species, was an example of conservatives using the tactics of environmentalist lawyers against environmentalist policy objectives. In 1974, the Natural Resources Defense Council successfully sued the Department of Interior over grazing rules on federally managed land: the NRDC argued successfully that the granting and renewal of leases required the completion of an environmental impact statement as required by the National Environmental Policy Act.[108] In response, the Bureau of Land Management prepared impact statements for its grazing districts, including the Rio Puerco Grazing District, outside of Albuquerque. In New Mexico, the investigation catalogued significant soil erosion and recommended significant cutbacks in grazing in the Rio Puerco area. Mountain States sued on behalf of thirty-three small-scale ranchers whose grazing allotments were reduced in response. Mountain States argued that the reductions were capricious and based on slipshod environmental science, since the report seemed to extrapolate long-term trends based on evidence from a single year (in which rainfall was lower than normal). They argued the ranchers had a right to challenge the leasing decisions in federal court.[109]

A judge in federal District Court refused to give the group a preliminary injunction before the regulations went into effect; it argued that the regulations had not shown irreparable harm. But the U.S. Court of Appeals for the Tenth Circuit reversed that decision. While agreeing that "the public has an interest in protecting the range from overgrazing," the Court argued that "the public also has in an interest in the economic

[106] James G. Watt to "Board of Directors," 8 August 1978, WNA Box 34, Folder 44.
[107] James G. Watt to "Board of Litigation," 18 August 1978, WNA Box 34, Folder 46.
[108] *Natural Resources Defense Council v. Morton*, 388 F.Supp. 829 (1974).
[109] *Valdez v. Applegate*, 616 F.2d 570 (1980).

stability of the area."[110] Given that the grazing decisions would "force some permittees out of business and that the combined allotments would adversely affect breeding programs, cause weight loss, and require more time in moving cattle from one pasture to another," the ranchers deserved a full trial in federal court. The Court enjoined the implementation of the management program for the Rio Puerco district until such a formal legal proceeding could be held.[111] This decision was a potentially significant expansion of judicial review in land cases. Earlier courts made clear that "only the most egregiously arbitrary decisions … would be reversed"; in *Valdez*, "the court seemed to assume that the trial court would retry the entire matter de novo, giving little or no deference to the agency's discretion or expertise."[112] Just as environmentalists could use the courts to force the government to study (and re-study) environmental impacts, conservatives could force the courts to review environmental decisions when they had an impact on individual's economic well-being. And just as welfare-rights attorneys had fought to create due process rights for recipients of public assistance, Mountain States tried to enforce rights of due process for users of public lands.

Around the same time that Watt was proposing a legal foundation with a special interest in resource policy, a group of politicians in Nevada were preparing their own challenge of federal land policy. In the early 1970s, the Nevada state legislature had created a committee to study public land issues and to work with the U.S. Congress to acquire federal land for the state. Due to a combination of historical circumstance and intentional policy choices, the feds owned approximately 85 percent of Nevada, as well as significant portions of other Western states. (The federal domain makes up about one-third of the land area of the United States, most all of it located west of the Great Plains.[113]) The Nevada group believed that the federal presence was thwarting economic development. They were disappointed when a comprehensive land review conducted by

[110] Ibid., 572.

[111] Ibid., 572-73.

[112] George Cameron Coggins, Parthenia Blessing Evans, and Margaret Lindberg-Johnson, "The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power," *Environmental Law* 12 (1982): 617.

[113] U.S. Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress* (Washington, D.C.: U.S. Government Printing Office, 1970).

Congress in the late 1960s under the direction of Wayne Aspinall failed to deliver them many new properties. (Thanks in part to redistricting, Aspinall lost the Democratic primary and thus his seat in Congress in 1972; his successors on Capitol Hill did not follow through with his recommendations.) They were further frustrated in the mid-1970s when RARE II threatened to place more of the West in protected "wilderness" status and the Federal Land Policy Management Act (FLPMA) of 1976 declared Congress' intention to hold onto and manage the federal land in perpetuity. They also opposed management decisions intended to improve the environmental qualities of the land made during the Ford and Carter administrations. Frustrated at the federal level, the state legislators plotted a legal challenge to Washington. A wire services report called the effort a "Sagebrush Rebellion," and the name stuck.[114]

In 1979, the Nevada legislature passed a bill claiming all unappropriated federal lands—that is, any lands that did not have another specific use, such as a park or military facility—for the state. Primarily, this meant lands under the jurisdiction of the U.S. Bureau of Land Management (as well as some of the lands of the U.S. Forest Service). The Nevada politicians justified the act with two constitutional theories. First, they argued that the "equal footing" doctrine—the Supreme Court precedent under which all new states must be admitted on equal terms with existing states—prevents the federal government from holding onto land in one state while disposing of it in another. (Nevada, they argued, was an economic colony of Washington, D.C., not one of 50 co-equals.) Second, they argued that the federal government could not constitutionally own land within the states, except as a temporary "public trustee" for the state (or when the state explicitly donates land to the feds for military facilities or some other specific purpose). Along this reasoning, the Federal Land Policy Management Act of 1976, in which Congress expressed an intention to hold onto the federal domain, was unconstitutional. As the Nevada committee explained in a strategy memo: "The power of Congress to

[114] Western Coalition on Public Lands, "Questions and Answers on the 'Sagebrush Rebellion'" (circa 1979), NGSR Box 1, Folder 4. This particular conflict was not the first flare-up between the federal government and Western land users. Similar fights broke out in the 1930s and again in the 1940s. See Karen Merrill, *Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them* (Berkeley: University of California Press, 2002); William L. Graf, *Wilderness Preservation and the Sagebrush Rebellions* (Savage, Md.: Rowman & Littlefield, 1990).

admit new states into the Union does not carry with it the authority to maintain colonies or territories in perpetuity."[115]

The legislators involved knew that those arguments were unlikely to prevail in a federal courtroom. BYU's Rex Lee, whom the Nevada legislators hired to write a brief, expressed optimism that a "case of first impression" might go the rebels' way.[116] (Lee wrote the brief in his for-profit capacity as a constitutional lawyer, not in his non-profit capacity on the Mountain States litigation board, and was remunerated for his efforts.) Other legal observers were less sanguine. A conference of Western attorneys general in 1978 had already reached the private consensus that "there does not appear to be a viable, legal basis for such action" against the federal government.[117] And so the Nevada group looked for ways to fight the legal battle outside of the courts. First of all, they approached other state legislatures, across the West, in hopes of building a groundswell of support that would force Congress to enact some sort of legislative solution. In 1979-80, almost all the Western state legislatures considered, and several of them passed, land bills modeled on Nevada's. Meanwhile, supporters of the movement on Capitol Hill (led by Republican Orrin Hatch of Utah in the Senate and Democrat Jim Santini of Nevada in the House) introduced legislation devolving the federal domain. Supporters also formed a handful of activist groups with names like the League for the Advancement of States' Equal Rights (LASER) and Sagebrush Rebellion, Inc. to try to build up grassroots support.[118]

The Sagebrush Rebellion attracted a diverse collection of activists and supporters. The original Nevada group was a bipartisan committee, which included moderate Democrats from the Las Vegas area (who thought the city needed more room to expand)

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[115] Nevada Legislative Counsel Bureau, "Legal Theories Applicable to the Disposition of Public Lands" (Annual Meeting, Western Conference of the Council of State Governments, Santa Fe, New Mexico, September 1977), 3, NGSR Box 1, Folder 4.

[116] Minutes of the Committee on Public Lands, Carson City, Nevada, 6-7 June 1980. NGSR Box 3, Folder 28. See also Rex E. Lee to Richard H. Bryan, 31 December 1980, WNA Box 31, Folder 47. ("[T]he theory which we would file litigation vindicating Nevada's claim to vacant unappropriated lands lying within its borders rests on sound constitutional principle.")

[117] Michael Deamer to Scott Matheson, 23 May 1978, NRWF Box 15, Folder 8. Those concerns were well-founded. When the Nevada legislature's claims finally did make it to the courts, the state lost.

[118] Western Conference of the Council of State Governments, "Alternatives for Coalition Building around Public Lands Issues," 20 August 1980, NGSR Box 3, Folder 27. Sagebrush Rebellion, Inc.'s contribution included a fundraiser-rally in Caldwell, Idaho featuring talk-show host Paul Harvey and country singer Sandy Pickard.

and conservative Republicans from the sparsely populated mining/ranching region around the northern city off Elko. Its supporters included independent miners annoyed at the reclamation costs that the federal government was demanding of them to some groups on the right-wing fringe. For example, the Committee to Restore the Constitution (CRC), a group founded by former military officer named Archibald Roberts to oppose World Government, considered the Sagebrush Rebellion a key front in its long-running battle against "Regionalism," the conspiracy to achieve the "final consolidation of city and county governments, elimination of elected officials, and reduction of Americans to the status of economic serfs on the land which once was theirs."[119] An officer of the CRC urged Nevada State Sen. Norm Glaser to up the ante on the Sagebrush Rebellion by arresting some Bureau of Land Management employees for trespass. [120] (Glaser declined.) In Moab, Utah, one man undertook the rebellion's only act of civil disobedience by driving a flag-draped bulldozer 200 yards into a wilderness study area during a Fourth of July celebration. He did so despite a preemptive reprimand from the Utah attorney general's office: "Whatever the [state] strategy [on dealing with the unappropriated lands] turns out to be, it is very unlikely that it will include a physical assault on federal lands."[121] Indeed, some politicians involved in the effort worried that the very term "Sagebrush Rebellion" gave the wrong impression. Utah Attorney General Robert Hansen complained that the term implied "that the movement is a rebellion in the sense of the Civil War" instead of a procedural legal challenge.[122]

At the same time, the term proved effective at building political solidarity across party and state lines, by promoting the idea that westerners were locked in battle with Washington, Easterners, and the Carter administration—and at defining the interests of "the West" as the opposite of the interests of "the environmentalists." As one observer pointed out, "To some westerners, the sagebrush rebellion anticipates an event—namely,

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[119] "Regionalism: The Montana Rip-Off," *Bulletin of the Committee to Restore the Constitution* (July/August 1974), WNA Box 29, Folder 12. "What is Regionalism?," CRC Flyer (circa 1974), WCX ephemera 1294, Folder 2.

[120] David Horton to Norman Glaser, 13 March 1979, NGSR Box 1, Folder 5. "Statement of David Horton, Legal Counsel, National Committee to Restore the Constitution, before the joint meeting of the Senate Natural Resources Committee and the Assembly Environment and Public Resources Committee," 4 April 1979, NGSR Box 1, Folder 5.

[121] Richard Dewsup to Ron Steele, 27 June 1980. NRWF Box 15, Folder 12.

[122] "Report of the Public Lands Task Force," Western Conference of the Council of State Governments Annual Meeting, 28 September-1 October 1980, NGSR Box 3, Folder 26.

the transfer of ownership of the public lands from the federal government to the states…. To others, the sagebrush rebellion is a strategy—a way to focus the nation's attention on the impact of federal administrative actions in the West."[123] Ronald Reagan probably intended the latter meaning during his 1980 presidential campaign, when he told a crowd at a Utah convention hall: "I happen to be one who cheers and supports the Sagebrush Rebellion. Count me in as a rebel."[124] The same goes for Watt and his colleagues at Mountain States. They shared the rebel's complaints about Washington turning the West into de facto colonies and wanted to "unlock" the region for development. They promised their members that they would be "providing research to the offices of the attorneys general of our region as they develop 'Sagebrush Rebellion' litigation."[125] But they kept their distance from most of the activist groups popping up around the issue. One organizational chart describing the division of labor among Sagebrush groups misnamed Mountain States the "Rocky Mountain Legal Foundation." The director of Sagebrush Rebellion, Inc. did not meet Watt until Watt became interior secretary in 1981.[126] Like many of the business groups to which they were allied, Mountain States wanted to preserve rights of access and use of federal land—not devolve control of the range to a new set of managers.

Which is not to say that Mountain States did not take a stand for states' rights in a similar context. In *Mountain States Legal Foundation v. Costle*, the firm represented several dozen Colorado state legislators who challenged a federal clean-air law. The feds had required that Colorado adopt a system of testing vehicles and reducing their emissions of pollutants. Colorado was asked to come up with its own plan for doing so, and submit it to the EPA for approval. When the EPA failed to approve Colorado's plan, the agency threatened the state's highway funds. The EPA's decision infuriated the state assembly, which voted unanimously to voice its dissatisfaction with the decision.[127]

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[123] Philip M. Burgess, "Rebels with a Cause: The Sagebrush Movement and the Future of Federalism," League for the Advancement of States' Equal Rights, Salt Lake City, 21 November 1980, NGSR Box 2, Folder 15.

[124] William Body, "Sagebrush Rebels: Are These Embattled Ranchers Really 'the Best Enviornmentalists of All?'" *New West*, 3 November 1980, 22.

[125] "Sagebrush Rebellion Rages," The *Litigator*, Spring 1980.

[126] Western Conference, "Alternatives for Coalition-Building"; Vernon Ravenscroft to James Watt, 25 February 1981, NGSR Box 2, Folder 16.

[127] Fred Anderson to Roger L. Williams, 2 June 1980, NRG File 276-05-051, Box 32.

When a new, EPA-approved bill came to the floor of the Colorado state house, Rep. Joe Spano complained that the EPA "in essence forced this General Assembly to adopt a bill that fit the mold of the Environmental Protection Agency…. They did not want us to come up with an alternative plan…. And this to me is a sham of the system that we supposedly stand for." Another representative, Robert Burford, told his colleagues that he had begun talking to the Mountain States Legal Foundation about possible litigation. The bill eventually passed—the highway funds were too important to risk over this or any issue. But several state legislators claimed that their votes for the bill had come under duress and sought legal remedy for what they viewed as bureaucratic extortion.[128]

Unfortunately for the legislators, Colorado's Democratic governor, Richard Lamm, decided not challenge the law in court. (Lamm disapproved of the EPA's decision, but nevertheless believed that it was a legitimate and legal exercise of power; the state attorney general also passed on a challenge.[129]) But Mountain States sued on behalf of its membership and twenty-seven state legislators who had opposed the measure. In their brief, Mountain States lawyers Watt, Gale Norton, and James Sanderson argued that the EPA, by threatening sanctions, "overstep[ed] the proper role of the national government in our federal system. It interfere[ed] with a sovereign function of the state as reserved to the state by the tenth amendment, i.e., legislative decisionmaking." They also argued that the agency "violat[ed] the legislators' rights to freedom of speech by compelling political expression, whether or not the legislators agree[d] that the EPA's idea of an inspection/maintenance program is suitable for Colorado or not."[130] The case was not the only time the firm tried to take on schemes of "cooperative federalism," in which the federal government requires state or local governments to take actions. In an amicus to another case, Watt and company argued that such policies violate the separation of powers between state and federal governments and turn state governments into "departments of the national government whose elected

[128] "House Debate on Senate Bill 52," 2 May 1980, 3-5, 22-23, NRG File 276-05-051 Box 32.
[129] J.D. MacFarlane et al., "Brief of Intervenor, *MSLF v. Costle*," 8 February 1980, 2, NRG File 276-05-051, Box 32.
[130] James Watt, Gale Norton, James W. Sanderson, "Opening Brief of Petitioners, *MSLF v. Costle*," 8 February 1980, 10th Circuit, Docket # 79-2261, 4, NRG File 276-05-051, Box 32.

legislatures must take orders from Congress and federal administrators,"[131] echoing some of the Sagebrush Rebels' complaint that the federal government was using the administrative process to crush the West. In the end, the Colorado lawsuit failed, when a federal judge decided that the foundation lacked standing to sue. The judge refused to extend the concept of "private attorney generals"—the doctrine by which private lawyers could sue to force the government to comply with its own rules, frequently used by civil rights and environmental lawyers—to a separation of powers dispute in which the real attorney general was perfectly capable of representing the state.[132]

In October 1980, Watt gave a speech at the University of Wyoming, his alma mater, in which he described his goals for Mountain States. "I want to reduce government restraints on the individual," he explained. "I want to develop a responsible and dependable role for the judiciary. I want to control those extreme special interest groups which seek to stop economic growth and deny civil liberties." Doing so, Watt told the audience, required the active use of the judicial system. "I am an activist!" he declared. "I seek change!... The courtroom is my forum. It is there that I practice my profession as a public-interest lawyer championing individual rights and economic freedom."[133] The language Watt chose for the speech suggests some of the ways that Mountain States had evolved under his leadership. At least to this audience, Watt portrayed himself as an "activist"—no more buttoned-up in his occupational choice than any consumer or environmental lawyer. And he suggested that there was a "responsible and dependable" role for the judiciary protecting economic growth and access to resources—a move away from conservatives simply stumping for "judicial restraint." Rather, the political and legal environment of the late 1970s opened up the law for a new kind of courtroom activist—someone who could use the tactics, techniques, and organizational forms of the left to challenge government discretion from the right. The Pacific and Mountain States Legal

[131] Mountain States Legal Foundation, "Amicus Curiae in Support of the Virginia Surface Mining and Reclamation Assocation, et al., and the States of Indiana," 1979 U.S. Briefs 1538 (1980).

[132] See *Mountain States Legal Foundation v. Costle*, 630 F.2d 754 (1980).

[133] James G. Watt, "Making Business Decisions, The Courts, Politics, and Special-Interest Groups," Roy Chamberlain Distinguished Speaker Series, University of Wyoming, 28 October 1980, JGW Box 11, Folder 8.

Foundations took a handful of property and land use rights and tried to make sure those were enforced by courts or administrative agencies.

This rights revolution was driven as much by opportunity, ambition, and the exigencies of running a non-profit, public-interest law firm as it was by the intellectual evolution of its founders. Pacific began having success on land use after trying—and continuing to work on—a number of other issues, from labor law to affirmative action; and it tried to attach itself to the state through consultancy fees and contract work before it started challenging its authority. Mountain States did not take an "activist" stance based on the master plan of its creators, who expected the firm to churn out amicus briefs taking a side in ongoing litigation, but because Watt and his colleagues became impatient with that strategy and sought a greater role for litigation. In both cases, much of their work was shaped by the need to find a client base and a fundraising constituency for their form of public-interest law. Pacific was nevertheless able to tease out, and in the 1980s work to shift, the sometimes messy line between legitimate government police power and the "taking" of private property by the state.[134] Mountain States tried to prevent the environmental legislation of the 1960s and 1970s—and the changing attitudes and values of some federal land managers—from locking Western businessmen out of the land on which they did business. Both of these concerns would grab considerable attention within the Reagan administration during the 1980s, and serve at the center of the firm's institutional memory about their early work.[135]

At the same time, the somewhat haphazard and contingent way that Pacific and Mountain States came to their positions caused their respective property right revolutions to diverge in important ways. In attacking welfare rights and defending real-estate property, Pacific could be seen as trying to reverse the ideas (and influence) of left-liberal scholars such as Charles Reich, who famously argued that a "new property" based in "government largess" (by which he meant welfare states benefits, but also government licenses, military contracts, research and development funding, and a host of other explicit or implicit cash transfers) had replaced traditional real property at the center of

[134] Most famously in *Nollan v. California Coastal Commission* 483 U.S. 825 (1987), which was litigated by Pacific Legal Foundation. See Chapter Five.

[135] See Ronald A. Zumbrun, "Life, Liberty, and Property Rights," in *Bringing Justice to the People: The Story of the Freedom-Based Public Interest Law Movement*, ed. Lee Edwards (Washington: Heritage Foundation, 2004), 41-53.

American life.[136] But they were also challenging courts to find property that could be "taken" through regulation in new places—such as the marginal changes in market value of an assert that occurred when new rules or regulations governed its use, an application of economic theories of incidence that went beyond older notions of "liberty of contract." Meanwhile, Mountain States often defended a certain type of "largess," namely the right to use the federal domain for commercial activities, especially if their business model had developed around the fact of federal dominance of Western lands. In that sense, they challenged the federal government's attempt to exercise one of the most traditional of property rights: the "right to exclude." And these assertions continued in the 1980s, as the Reagan administration—staffed in several key places by veterans of the conservative litigation movement—tried to change the development of American government.

Footnote Abbreviations

CBSC: Coors Boycott and Strike Support Coalition of Colorado Records 1974-1977, Auraria Library, University of Colorado-Denver.
CCC: California Costal Commission, Records of the Executive Director, California State Archives, Sacramento
GRA: Group Research Archives, Columbia University
JGW: James G. Watt Papers, American Heritage Center, University of Wyoming
MSLF: Mountain States Legal Foundation Collection, Hoover Institution Archives
NGSR: Normal Glaser Sagebrush Rebellion Collection, Getchell Library, University of Nevada-Reno
NRG: Natural Resources Record Group, National Archives and Record Administration, Denver Regional Branch, Colorado.
NRWF: Scott Matheson Natural Resources Working Files, Utah Historical Society, Salt Lake City
RRSC: Ronald Reagan Subject Collection, Hoover Institution Archives
SLF: Sierra Club National Legislative Office Records, Bancroft Library, University of California
WLX: Wilcox Collection on Contemporary Political Movements, Spencer Library, University of Kansas
WNA: Wayne N. Aspinall Papers, Norlin Library, University of Colorado at Boulder

[136] Charles A. Reich, "The New Property," *Yale Law Journal* 73, no. 5 (1964): 733-87.