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Lines in the Sand: Contrasting Advocacy Strategies for Environmental Protection in the Twenty-First Century

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INTRODUCTION

When the Natural Resources Defense Council (NRDC) was founded in 1970, it was a small organization of lawyers.¹ NRDC's membership was virtually nonexistent, and the staff's singular focus was environmental law—its creation and enforcement, in Congress and the courts, starting with the National Environmental Policy Act (NEPA)² and ultimately including over twenty federal statutes, from the Clean Air and Clean Water Acts to the Endangered Species Act (ESA).³ NRDC's work was legislative advocacy and litigation, and a look through any environmental law textbook will attest to the central role that NRDC has played in the development of the regulatory structure that, for forty years, has cleaned our air, restored our dying rivers, and slowed the relentless march of development and pollution through our disappearing open space and wild lands.⁴

1. NRDC began with John Adams and a handful of determined young environmental lawyers primarily from Yale Law School. JOHN H. ADAMS & PATRICIA ADAMS, *A FORCE FOR NATURE* 15 (2010). According to Adams,

NRDC was the first public interest law firm dedicated to the environment, and there was no roadmap for where we would go. And in those early days, we barely had office space or payroll. We were living dollar to dollar, and some of the first staff members had to stay on couches at our apartment.

John Adams, *Earth Day, 40 Years On*, HUFFINGTON POST, Apr. 16, 2010, http://www.Huffingtonpost.com/john-adams/earth-day-40-years-young_b_540854.html.

2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4361 (2006). NEPA established, for the first time, a comprehensive, nationwide policy and goals for the protection, maintenance, and enhancement of the environment. NEPA also provides a process for implementing these goals by requiring federal agencies to prepare environmental assessments and impact statements discussing the environmental effects of proposed federal agency actions. *Id.*; see also *NEPA Basic Information*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/oecaerth/basics/nepa.html> (last visited Aug. 12, 2011).

3. Clean Air Act, 42 U.S.C. §§ 7401–7671q (1969); Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1970); Clean Water Act, 33 U.S.C. §§ 1251–1387 (1972); Noise Control Act, 42 U.S.C. §§ 4901–4918 (1972); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1974); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6908a (1976); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2695d (1976); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9628 (1980); Nuclear Waste Policy Act, 42 U.S.C. §§ 10101–10108 (1982); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1361–1423h and §§ 1431–1445c1 (1988); Shore Protection Act, 33 U.S.C. §§ 2601–2609 (1988); Oil Pollution Act, 33 U.S.C. §§ 2701–2720 (1990); Pollution Prevention Act, 42 U.S.C. §§ 13101–13109. (1990); Federal Insecticide, Fungicide, and Rodenticide Act, §§ 135–136y (1996); Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, 42 U.S.C. §§ 7401–7431 (1999); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399a (2002); Energy Policy Act, 42 U.S.C. §§ 13451–13458 (2005); Energy Independence and Security Act, 10 U.S.C. §§ 2911–2925 (2007). These statutes have been enacted over time to deal with the growing complexity of industry, human life, and their relationship to the environment.

4. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116 (1985); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60 (1975).

As NRDC and the environmental movement grew and matured, their capacity expanded. Issues became more complex. Scientists and policy advocates joined the staff.⁵ Membership grew.⁶ Communications emerged.⁷ And with these and other changes, the tools of environmental advocacy broadened. Focusing on three significant Southern California examples in which NRDC has recently been involved, this Article will consider that expansion and the transformation of environmental advocacy, from its legislation- and litigation-focused roots to the relative diversity of approaches and complex issues in play today. While legislative advocacy and litigation remain at the heart of environmental protection—just as essential as they were forty years ago—the use of other strategies (or a combination of strategies in a comprehensive campaign) can, in some cases, significantly increase the likelihood of success.

In each of the matters discussed below, there were significant environmental resources at stake. In each there were formidable proponents of activities that threatened those resources and powerful interests behind them. In the case of the battle to protect the California State Park at San Onofre State Beach, the Transportation Corridor Agencies of Orange County argued that construction of a major toll road through the heart of the state park is necessary to address traffic congestion in the region—an issue of primary concern to residents and commuters.⁸ In the case of the battle to conserve the 270,000-acre Tejon Ranch, the Tejon Ranch Company and the consortium of developers aligned with it announced plans for large-scale residential, commercial, and industrial development potentially worth billions of dollars over the next century.⁹ And in

From its inception, NRDC has brought many high profile environmental and administrative law cases. For instance, *Chevron* is the most cited case in U.S. judicial history. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 289 (5th ed. 2002).

5. As of June 2010, the NRDC had 384 staff members, comprising approximately fifty-five attorneys, forty advocates, twenty policy analysts, and the remainder communications, development, administrative and support staff. E-mail from Angeliki Ebbesen, Human Resources Generalist, NRDC, to Damon Nagami, Staff Attorney, NRDC (June 16, 2010, 16:10 EST) (on file with author).

6. As of June 2010, NRDC had 1.3 million members and e-activists. *About Us*, NAT. RES. DEFENSE COUNCIL, <http://www.nrdc.org/about/> (last visited Oct. 7, 2011).

7. As of June 2010, NRDC had a staff of almost forty communications specialists spanning diverse areas such as the web (including several traditional websites, two blogs and a rapidly growing social media capacity), media relations, multi-media (including TV film and advertising production and web-based video), publications, public opinion research, and the award-winning *OnEarth Magazine*. E-mail from Daniel Hinerfeld, Deputy Dir. of Comm., NRDC, to Damon Nagami, Staff Attorney, NRDC (June 30, 2010, 16:53 PST) (on file with author).

8. “Supporters argue [that the toll road is] critical to relieve overburdened I-5 in southern Orange County. . . . ‘Maybe at the end of the day, this project will mean more jobs, but it also will help relieve congestion,’ Esparza [secretary for Laborers’ Union Local 652] said. ‘Look at our freeways now—the 91 and the 710. They are all congested. People are now coming in from San Diego County to work in Orange County. That creates a bottleneck on the 5.’” David Reyes & Dan Weikel, *Panel Rejects Beach Toll Road*, L.A. TIMES, Feb. 7, 2008, at A1.

9. According to one “Tejon investor[,] . . . the value of Centennial’s development to the ranch corporation is \$500 million.” Jon Gertner, *Playing SimCity for Real*, N.Y. TIMES: KEY MAG., Spring

the case of the United States Navy, whose primary (but not exclusive) mission is national security, its training in biologically rich waters along our coasts with high intensity military sonar—the principal submarine detection system in use today—is considered essential to protecting our armed forces and securing our national defense.¹⁰

Given the seriousness of these interests, protection of the environmental resources at risk has been especially challenging, and the advocacy strategies required have necessarily been multifaceted and individually tailored to address the particular circumstances and maximize the likelihood of success. Of course, in each case various strategies have been employed, and none has been exclusive. But each of the three cases provides a real-world, current example of a particular advocacy focus—citizen action administrative campaign, negotiation, and litigation, respectively. Collectively, they illustrate the broadening scope of environmental advocacy in the twenty-first century. And each has been successful, to a significant degree at least, in achieving the fundamental conservation objective that motivated the advocacy in the first place.

I. THE FOOTHILL-SOUTH TOLL ROAD: CITIZEN ACTIVISM AND THE FIGHT TO SAVE SAN ONOFRE

There has perhaps been no environmental controversy in recent decades in Southern California that has so galvanized public opposition as the proposal to build a major toll road through the heart of the California state park at San Onofre State Beach (San Onofre). For NRDC and other environmental and conservation organizations, this project generated a commitment to high level, unyielding opposition rarely found in a region renowned as the antithesis of smart growth—ground zero for a wealth of development projects, each deserving of opposition,

2007, at 78, 80; see also Edward Humes, *The Last Frontier*, L.A. MAG., June 1, 2009, at 95 (“The raw land [of Tejon Ranch] alone was reportedly valued at \$1.5 billion in 1999, and if developed as envisioned, the ranch would be worth up to 30 times that amount, perhaps much more when all is said and done.”).

10. Navy officers have explained that antisubmarine warfare training employing the use of MFA (mid-frequency active) sonar is “mission-critical.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008); see Daniel Slocum Hinerfeld & Joel Reynolds, *Our Environmental Laws Are Meant to Protect Marine Life*, SAN DIEGO UNION-TRIB., Feb. 10, 2008, http://legacy.signonsandiego.com/uniontrib/20080210/news_lz1e10slocum.html; J.F. Kelly Jr., *Whale Wars: The Battle Over Marine Mammals and the Navy's Use of Sonar*, SAN DIEGO UNION-TRIB., Feb. 10, 2008, http://legacy.signonsandiego.com/uniontrib/20080210/news_lz1e10kelly.html. Further, government filings have challenged court-ordered mitigation of this type of training, asserting that it “profoundly interferes with the Navy’s global management of U.S. strategic forces, its ability to conduct warfare operations, and ultimately places the lives of American sailors and Marines at risk.” Marc Kaufman, *Navy Wins Exemption from Bush to Continue Sonar Exercises in California*, WASH. POST, Jan. 17, 2008, at A02. In 2008, then-President Bush even issued an order exempting the Navy’s mid-frequency sonar training from the Coastal Zone Management Act, citing national security. *Id.*

that trade wild lands and environmental quality for sprawl development and concrete.¹¹ In the case of San Onofre, a broad coalition of organizations¹² aligned to “draw a line in the sand” and develop a coordinated, multifaceted statewide campaign to stop the toll road and protect the park.¹³

A. The Resource: The California State Park at San Onofre State Beach

Encompassing 3,000 acres of scenic canyons and over three miles of sandy coastline near the border between Orange County and San Diego County, San Onofre State Beach is one of the most popular and beloved parks in California’s state park system. Created in 1971 by President Richard Nixon with the support of Governor Ronald Reagan,¹⁴ San Onofre is the fourth most visited state park in California,¹⁵ receiving over 2.5 million visitors a year.¹⁶ At the time of San Onofre’s dedication, State Parks Director William Penn Mott Jr. announced that “this beach and the backup land represents [sic] the finest beach in one contiguous stretch in the United States.”¹⁷

In a region known for high-end development, San Onofre provides rare affordable recreational opportunities, essential wildlife habitat, and one of the premier surfing beaches in the world. The San Mateo Campground offers

11. See, e.g., Timothy Egan, *Sprawl-Weary Los Angeles Builds Up and In*, N.Y. TIMES, Mar. 10, 2002, at A1 (“Look up the word sprawl in the dictionary, the joke goes, and there is the City of Angels and the dirty halo of dispiriting words it contributed to the urban lexicon: smog, suburban wasteland, Blade Runner.”); see also *Census 2000 Urbanized Area and Urban Cluster Information*, U.S. CENSUS BUREAU, http://www.census.gov/geo/www/ua/ua_natl_100302.txt (last visited Aug. 12, 2011) (citing the U.S. Bureau of Census Data on Urbanized Areas’ ranking of the Los Angeles metropolitan region as the sixth largest urbanized area in the nation ranked by square miles of sprawl).

12. The Save San Onofre Coalition comprises the following twelve organizations: Audubon California, California Coastal Protection Network, California State Parks Foundation, Defenders of Wildlife, Endangered Habitats League, Laguna Greenbelt, Inc., Natural Resources Defense Council, Orange County Coastkeeper, Sea and Sage Audubon Society, Sierra Club, Surfrider Foundation, and WILD Coast/COSTASALVAjE. In addition, the Coalition has been supported by numerous other diverse groups, from American Rivers to the California League of Conservation Voters to the Juaneño Band of Mission Indians Acjachemen Nation to the Service Employees International Union State Council. See, e.g., Comment Letter from Save San Onofre Coalition to NOAA Office of Gen. Counsel, U.S. Dep’t of Commerce, regarding Opposition to TCA’s Appeal Pursuant to the Coastal Zone Management Act (May 28, 2008) (on file with author).

13. “This project makes no sense, economically, environmentally, spiritually, morally, legally, and it ought to be abandoned,” Reynolds said. “So make no mistake, this is a project we intend to stop. We’re drawing a line in the sand around San Onofre, because if we can’t save this state park, if we can’t prevent the TCA from paving over this coastal gem, then it’s only a matter of time before a project just like it comes to a state park near you.” Peter Nicholas & David Reyes, *State Sues to Block Toll Road in Park*, L.A. TIMES, March 24, 2006, at B3.

14. SAN ONOFRE FOUNDATION, <http://www.sanofoundation.org/site> (last visited Aug. 12, 2011).

15. *Quick Facts: Parks By the Numbers*, CALIFORNIA STATE PARKS (Dec. 7, 2009), available at <http://www.parks.ca.gov/pages/23509/files/ParksbyNumbers12-7-09.pdf>.

16. Mike Anton, *A Modest Proposal for San Onofre*, L.A. TIMES, July 5, 2008, at A1.

17. William Penn Mott Jr., Statement to the Press Concerning San Onofre, Apr. 1, 1971 (on file with author).

working-class families from all over Southern California low-cost, year-round camping facilities with ready access to the beach.¹⁸ The inland portion of the park serves as prime habitat for wildlife, including eleven species that are federally listed as endangered or threatened, such as the Pacific pocket mouse and coastal California gnatcatcher.¹⁹ And San Onofre is home to the world-class Trestles surfing beach, which has famously been called California's "Yosemite of surfing."²⁰

Trestles Beach was first discovered by pioneering local surfers in the late 1930s,²¹ and it is now recognized as having played a major role in the evolution of surfing as a sport.²² Trestles has attracted some of the world's most famous surfers, including the world's top ranked surfers like Kelly Slater,²³ who first won a surfing competition there in 1990.²⁴ Eligible for numerous historical designations,²⁵ Trestles is the only beach in the continental United States where the Association of Surfing Professionals' World Championship Tour holds a competition,²⁶ and it hosts numerous other professional and amateur surfing competitions throughout the year.²⁷

B. *The Threat: The Foothill-South Toll Road*

In the early 1980s, a major threat to San Onofre emerged that would persist

18. *San Onofre State Beach*, CALIFORNIA STATE PARKS, http://www.parks.ca.gov/?page_id=647 (last visited Aug. 12, 2011).

19. TRANSPORTATION CORRIDOR AGENCIES & U.S. DEPARTMENT OF TRANSPORTATION, SOUTH ORANGE COUNTY TRANSPORTATION INFRASTRUCTURE IMPROVEMENT PROJECT ("SOCTIIP") FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT ("SEIR") (Dec. 2005), § 4.12-3.

20. Mike Anton, *Offramp Ahead for Paradise?*, L.A. TIMES, Sept. 16, 2006, at A1.

21. Cal Porter, *Surf City*, LOCAL BEACH BLOG: CAL PORTER'S THEN & NOW, http://www.localbeachhotels.com/default.php?page=blog_view&var1=ViewCat&var2=1&var3=7 (last visited Aug. 12, 2011).

22. "It was [at San Onofre State Surfing Beach] that 'beach boys' like Hobie Alter, Dewey Weber and Dale Velzy helped shape the sport and culture of California surfing for generations to come." *San Onofre State Beach*, SANDIEGO.ORG, http://www.sandiego.org/article_set/Visitors/5/27 (last visited Aug. 12, 2011).

23. *Kelly Slater Claims Hurley Pro at Trestles, Takes ASP Title Race Lead in Process*, ASSOCIATION OF SURFING PROFESSIONALS, <http://www.aspworldtour.com/2010/09/18/kelly-slater-claims-hurley-pro-at-trestles-takes-asp-title-race-lead-in-process/> (last visited Aug. 12, 2011).

24. Fred Swegles, *It's on at Lower Trestles*, ORANGE COUNTY REGISTER (Apr. 23, 2008), <http://www.ocregister.com/news/surfers-161710-clemente-round.html>.

25. Trestles is potentially eligible for nomination as a State Historic District, as a California State Point of Historic Interest (on the California Register of Historic Resources), and to the National Register of Historic Places. Cal. Coastal Comm'n, Resolution to Support Designation of World Surfing Reserves, Jan. 13, 2010, <http://documents.coastal.ca.gov/reports/2010/1/Th32a-1-2010.pdf>.

26. *ASP World Tour Schedule*, ASS'N OF SURFING PROFESSIONALS, <http://www.aspworldtour.com/schedule/asp-world-tour-schedule/> (last visited Aug. 12, 2011).

27. See, e.g., NATIONAL SCHOLASTIC SURFING ASSOCIATION (NSSA), <http://www.nssa.org/newsmanager/templates/nssaarticle.aspx?articleid=633&zoneid=8> (last visited Aug. 12, 2011) (showing Trestles Beach hosting the 2009 NSSA national championships).

for the next three decades—and indeed remains today. In 1981, the Transportation Corridor Agencies of Orange County (TCA) proposed the Foothill-South Toll Road,²⁸ billing it as a solution to congestion on Interstate 5, the principal coastal transportation artery from Orange County to the Mexican border. The plan called for a six-lane highway to run for sixteen miles through largely undeveloped lands—lands previously set aside for open space, recreational, and preservation purposes, including the park at San Onofre as well as the adjacent Donna O’Neill Land Conservancy to the northeast.²⁹

Although designated the “Green Alternative” by the TCA,³⁰ the Foothill-South’s projected environmental impacts on San Onofre and the region’s coastal ecosystem are staggering, beginning with the very concept of siting a major highway—a classic example of a significant point source for water and air pollution—in the heart of one of the only remaining undeveloped coastal watersheds along the southern California coast.³¹ The right-of-way chosen for the road would split the state park from top to bottom and force over sixty percent of the park to close, including the San Mateo Campground, according to the California Department of Parks and Recreation.³² The road would destroy critical habitat for endangered species within the park and the surrounding San Mateo Creek watershed.³³ It would cause irreparable damage to sites considered sacred to the Acjachemen (Juaneño) people, including a village that is used for ceremonies and reburials and is eligible for listing on the National Register of Historic Places.³⁴ Opponents also fear that construction runoff could threaten water quality and the legendary surf break at Trestles Beach.³⁵

The agency behind the Foothill-South, the TCA, was created as a joint powers agency by the California legislature in 1986. Its sole purpose is to plan,

28. Final SEIR at 1-1 to 1-2, 1-15.

29. Final SEIR at 4.1-3 to 4.1-4.

30. See, e.g., Press Release, Transportation Corridor Agencies, Toll Agency Board Hears 100 Speakers About Proposed Foothill-South Project (Jan. 12, 2005), https://www.thetollroads.com/newsroom/pressreleases/archive/200601/pr_200601_speakers.php.

31. “The San Mateo Creek (SMC) watershed covers approximately 139 square miles of relatively undeveloped terrain. The majority of the SMC watershed’s drainage area lies within western Riverside and northwestern San Diego Counties, with approximately twenty percent within the boundary of southeastern Orange County . . . San Mateo Creek is one of the last undammed streams in southern California.” *San Mateo Creek Watershed Profile*, SAN MATEO CREEK CONSERVANCY, <http://sanmateocc.org/files/sanmateocreekwatershedprofile.pdf> (last visited Aug. 12, 2011).

32. CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, MITIGATION ASSESSMENT OF FTC-SOUTH IMPACTS ON SAN ONOFRE STATE BEACH 5 (Aug. 1997) (“*Parks Dept. Mitigation Assessment*”); Comment Letter from California Department of Parks and Recreation to TCA at 5 (January 10, 2006) (“*Parks Dept. Comment Letter*”) (on file with author).

33. Comment Letter from Save San Onofre Coalition to California Coastal Commission regarding Opposition to Coastal Consistency Certification 8, 27–30 (Jan. 17, 2008) (on file with author).

34. *Id.* at 33–34.

35. *Id.* at 24–26.

finance, build, and operate a toll road system in Orange County.³⁶ Led by overlapping boards of directors composed of representatives of south Orange County cities and the county itself,³⁷ the TCA carried out its single-purpose mission with some success in the 1990s, building three toll highways through inland Orange County.³⁸ One of those projects, the San Joaquin Hills Toll Road, raised significant issues under the California Environmental Quality Act (CEQA), NEPA, and ESA, and was allowed to proceed only after years of litigation, including court orders to address deficiencies in state and federal compliance.³⁹ Although low ridership has saddled the TCA with financial problems in recent years and has called into question the underlying rationale for, and economic feasibility of, building the Foothill-South,⁴⁰ the agency has nevertheless adhered steadfastly to its narrow purpose, which, according to some, is more about building toll roads than addressing traffic congestion.⁴¹

C. The Response: Administrative Advocacy, Citizen Action, and Litigation

As with the San Joaquin Hills Toll Road to the northwest, the significant impacts of the Foothill-South Toll Road on the coastal ecosystem have posed substantial legal issues under state and federal law.⁴² But in contrast to the San Joaquin Hills project, the Foothill-South presents a critical, perhaps dispositive difference: The harm to, and threatened closure of, most of San Onofre and the San Mateo campground, along with the potential threat to coastal water quality and the surf break at Trestles, have implicated a clear statewide interest—that is, protection of California’s state park system—and brought together a powerful, determined, and perhaps unprecedented coalition of conservation and other groups to oppose the project.

This broad-based coalition, called the Save San Onofre Coalition, includes coastal defenders, local and national environmentalists, state parks advocates,

36. Final SEIR at 1-1.

37. *About TCA—2010 Boards of Directors*, THE TOLL ROADS, https://www.thetollroads.com/aboutus/leadership/leadership_overview.php (last visited Nov. 4, 2011).

38. Final SEIR at 1-1.

39. *See, e.g.*, *Natural Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 57 F.3d 1077 (9th Cir. 1995); *Laguna Greenbelt v. United States Dep’t of Transp.*, 42 F.3d 517 (9th Cir. 1994).

40. *See, e.g.*, *Opinion, For Whom the Road Tolls*, L.A. TIMES (October 17, 2008, 2:28 PM), <http://opinion.latimes.com/opinionla/2008/10/road-toll-footh.html> (“The worst performer by far is the San Joaquin Hills Transportation Corridor, or Route 73, which has never met expectations. Ridership last year was half the predicted level, and the numbers are sliding downward.”); R. Scott Moxley, *Highway Robbery-Toll Roads*, OC WKLY, Jan. 20, 2000, <http://www.ocweekly.com/content/printVersion/35040> (“The TCA has yet to meet even one of its financial or ridership objectives since it opened in 1996. For example, the agency’s 1999 revenue estimates were off by a whopping 420 percent. Instead of receiving \$81.5 million, it took in roughly \$20 million, an amount drastically insufficient to repay private bondholders.”).

41. Bobby Shriver & Joel Reynolds, *Opinion, O.C.’s Road Test*, L.A. TIMES, Mar. 10, 2009, at A25.

42. *See infra* notes 53–61 and accompanying text.

wildlife conservationists, and surfers,⁴³ from numerous organizations actively opposed to the project, representing millions of members and activists.⁴⁴ For many of these groups, opposition to the toll road began decades ago, when the project first began to advance from the drawing board to formal permit applications. In 2005, these individual efforts began to merge, first with the filing of joint litigation challenging regulatory approvals and eventually with the formation of an organized, coordinated coalition.⁴⁵ And because of a specific interest in the campaign among a number of funders who decided to coordinate their funding activities, the Coalition has brought together a wide variety of complementary resources, including legal and scientific expertise, communication networks, polling, grassroots organizing capability, and a capacity to raise funds through the combined efforts of the individual groups.⁴⁶

The result has been a formidable, strategic campaign that is both diverse and coordinated—a campaign that has focused on enforcing existing environmental laws through advocacy before administrative agencies and in the courts, lobbying elected officials on key policies, raising public awareness of the project, and generating concerted citizen action in support of San Onofre. And thus far these efforts have been successful: At the time of publication, construction of the road has been blocked by the California Coastal Commission and the U.S. Department of Commerce,⁴⁷ although the TCA has recently proposed a plan to circumvent those agencies' decisions by building the road in segments.⁴⁸

1. Framing the Issues

An important task for the Coalition at the outset was to identify the key issues and frame them in a compelling way for a range of audiences, including agencies, the courts, the media, and the public. Central to this framing, no matter the audience, was the extensive, incontrovertible harm the Foothill-South would inflict on a popular state park. Public opinion survey results demonstrated that people overwhelmingly disapproved of the idea of running a road through a state park.⁴⁹ Consistent with this research, and relying where possible on the State Parks

43. See *supra* note 12.

44. See *Who We Are*, NATURAL RESOURCES DEFENSE COUNCIL, http://www.nrdc.org/about/who_we_are.asp (last visited Oct. 9, 2011) (comprising 1.3 million members and activists); *About*, SIERRA CLUB, <http://www.sierraclub.org/welcome/> (last visited Oct. 9, 2011) (comprising 1.4 million members and activists); *About Us*, SURFRIDER FOUNDATION, <http://www.surfrider.org/pages/about-us> (last visited Oct. 9, 2011) (comprising 50,000 members).

45. Beginning in 2006, for example, and continuing throughout the campaign, the Coalition's members have coordinated through weekly conference calls to discuss ongoing activities, share updates, and consider future strategic options. A joint website was also created for communications purposes.

46. See *infra* note 95 and accompanying text.

47. See *infra* notes 100–04 and accompanying text.

48. See *infra* notes 108–09 and accompanying text.

49. Gig Conaughton, *Parks Panel Survey Says Voters Oppose Toll Road*, N. COUNTY TIMES, Oct.

Foundation as the public face,⁵⁰ the Coalition developed and relayed a central, although by no means exclusive,⁵¹ message about the unique impact of this toll road project, both on the state park at San Onofre and on the state park system as a whole, citing (1) the fact that the road would destroy sixty percent of a state park that, each year, serves an estimated 2.5 million visitors; and (2) the corollary that if such severe harm could be done to San Onofre, it could be done to any of our state parks. Reduced to a sound bite, the message was direct and to the point: “This is not just a toll road *through* a state park, it is a toll road *instead* of a state park.”⁵²

2. *Enforcing Existing Laws: Litigation*

An essential strategic component of the Coalition’s campaign was its capacity and determination to enforce state and federal environmental laws. To date, the Coalition (or a subset of its members) has filed two lawsuits challenging approvals for the Toll Road, alleging violations of CEQA and ESA. In the state court CEQA suit, the Coalition challenged the TCA’s approval of the Toll Road on the ground that the TCA’s environmental impact report (EIR) was inadequate.⁵³ The Coalition claimed, among other things, that the TCA had failed to identify or adequately analyze several significant impacts of and alternatives to the Toll Road and improperly assumed that significant impacts of the project on biological and recreational resources would be eliminated or substantially reduced by mitigation measures that were not specifically identified or developed.⁵⁴ After extensive skirmishing over venue⁵⁵ and a lengthy stay following the Coastal Commission’s

3, 2007, http://www.nctimes.com/news/local/article_05c57867-46ba-58ca-876d-efbb56ab9bc4. html (“A survey released Tuesday by a state parks foundation said voters wouldn’t support the idea of building toll roads through parks, including an \$875 million Orange County proposal that would cut close to a popular San Diego County surfing spot.”).

50. See, e.g., Elizabeth Goldstein, *Pave Over Paradise?*, SAN FRANCISCO CHRONICLE, Apr. 3, 2006, http://articles.sfgate.com/2006-04-03/opinion/17292363_1_san-onofre-state-beach-state-parks-foothill-transportation-corridor-authority.

51. Another key focus for communications has been traffic—the need to address it and the fact that the Toll Road would not. From the outset, the Coalition has never disputed that the problem of traffic congestion in the region is real and demands effective measures to reduce it. See Philip K. Ireland, *State Files Suit over Toll Road Through Parkland*, N. COUNTY TIMES, Mar. 24, 2006, http://www.nctimes.com/news/local/article_803fc56f-de40-563f-b796-1a4307a99b3b.html.

52. See, e.g., Christine Kehoe, *Sacrificing Parklands for More Roads*, SAN DIEGO UNION-TRIB., June 6, 2007, http://www.signonsandiego.com/uniontrib/20070606/news_lz1e6kehoe.html (emphasis added); *Federal Government Rejects Trestles Toll Road*, 10NEWS, Dec. 18, 2008, <http://www.10news.com/news/18309730/detail.html> (emphasis added) (quoting Joel Reynolds).

53. See Cal. St. Parks Found. v. Super. Ct., 150 Cal. App. 4th 826, 831 (2007).

54. *Id.*

55. The Coalition and the TCA disagreed as to which venue was proper for the litigation. Relying on the fact that a portion of the toll road—including the right-of-way through the state park—was located in San Diego County, the Coalition chose to file there. However, the TCA opposed the choice of venue and filed a motion to transfer the case to Orange County, citing its own base of operations there. The Coalition argued that California Code of Civil Procedure section 393(b)

rejection of the project and the TCA's subsequent appeal to the U.S. Secretary of Commerce,⁵⁶ this lawsuit—and a companion lawsuit filed by the California Attorney General on behalf of the California Parks and Recreation Commission⁵⁷—have been dismissed without prejudice.⁵⁸

In a separate federal lawsuit under ESA, the Coalition challenged federal wildlife agencies' conclusions that the Toll Road was not likely to jeopardize the continued existence of several endangered and threatened species listed under the federal ESA.⁵⁹ The lawsuit claimed that the agencies, the U.S. Fish and Wildlife Service and National Marine Fisheries Service, ignored or understated the Toll Road's threatened impacts on seven listed species, rather than relying on the best available science as required by law.⁶⁰ Because of the Coastal Commission and Commerce decisions blocking the project from proceeding, this lawsuit, too, has

applied, stating suits challenging actions taken by public officials may be filed in the county where some or all of the cause of action arises. The TCA contended that section 393(b) only applied to personal rights or property, and that therefore section 395, which required the action to be filed in the county where one or more of the defendants resided, was controlling. The trial court agreed with the TCA and ordered venue to be transferred. When the Coalition appealed to the Fourth Appellate District, that decision was reversed. *Cal. St. Parks Found. v. Super. Ct.*, 150 Cal. App. 4th 826, 831–32, 833–46 (2007).

56. In May 2008, at the court's request, the parties involved in the Coalition's lawsuit agreed to stay the litigation pending the Secretary of Commerce's decision in the TCA's appeal of the Coastal Commission's rejection of the project. Stipulation and Order Re: Stay of Litigation, California State Parks Foundation v. Foothill/Eastern Transportation Corridor Agency, No. GIN051194 and GIN051371 (Cal. Super. Ct., filed May 19, 2008). When the Secretary of Commerce upheld the Coastal Commission's decision in December 2008, the TCA requested and the court, with some reservations, granted an additional ninety-day stay to the litigation. The TCA informed the court that because the project could not continue after the Secretary's decision, it had been directed by its board to reach out to proponents and opponents to explore other options, and that no final decision had been made as to whether TCA would challenge the Secretary's decision. The court extended the stay in May 2009, October 2009, and March 2010. *See, e.g.*, Order Granting Respondents' Request to Extend Stay of Litigation to Sept. 10, 2010, California State Parks Foundation v. Foothill/Eastern Transportation Corridor Agency, No. GIN051194 and GIN051371 (Cal. Super. Ct., Mar. 24, 2010); Proposed Order Granting Defendants' Request to Extend Stay of Litigation to September 10, 2010, Native American Heritage Commission v. Foothill/Eastern Transportation Corridor Agency, No. GIN051194 (Cal. Super. Ct., filed Mar. 12, 2010).

57. Ireland, *supra* note 51.

58. In January 2011, in an effort to conserve the parties' and court's resources pending the outcome of ongoing settlement discussions, the Coalition agreed to dismiss the case without prejudice, but only under the condition that the court retain jurisdiction to set aside the dismissal and resume litigation in the event TCA ever attempts to begin construction of the toll road in reliance on the environmental documents the Coalition objected to in this case. *See* Stipulated Order Approving Interim Settlement With Tolling Agreement and Dismissal Without Prejudice, and Retaining the Court's Jurisdiction to Set Aside Dismissal and Enforce Interim Settlement, California St. Parks Found. v. Foothill/Eastern Transportation Corridor Agency, No. GIN051194 and No. GIN051371 (Cal. Super. Ct., filed Jan. 12, 2011).

59. *Compl., Save San Onofre Coalition v. Gutierrez*, No. 08 Civ. 1470 (S.D. Cal. Aug. 13, 2008).

60. *Id.* at 3–5.

been dismissed without prejudice.⁶¹

Litigation has long been recognized as a key strategy for protecting the rights of subordinated groups, providing leverage that those groups can then seek to exploit to effect positive change.⁶² Indeed, environmental advocates have learned from the example of civil rights and antipoverty activists, who have used lawsuits to promote legislative reform, discourage future wrongdoing, and mobilize community participation.⁶³ In this case, the court challenges initiated by the Coalition and others to local and federal regulatory approvals—even though they were never litigated to a decision on the merits—created leverage that, in concert with the subsequent Coastal Commission and Commerce decisions rejecting the project,⁶⁴ have fundamentally changed the regulatory landscape, compelling the TCA eventually to enter into settlement discussions with the Coalition on potential alternatives to the Foothill-South's San Onofre alignment. But this result was largely the product of the Coalition's successful administrative advocacy, combined with effective lobbying and citizen action efforts. The litigation and the Coalition's credible commitment to pursue it as long as required have unquestionably been an essential element of the advocacy equation, but the Coalition used that tool strategically, in tandem with other tactics, as described below.

3. *Applying Political Pressure: Lobbying*

Another early and important element in the Coalition's campaign strategy was a focus on legislative lobbying to counter prior statutory changes secured by the TCA. Using its influence in a Republican-dominated Congress, the agency

61. After the Secretary of Commerce's December 2008 decision to sustain the Coastal Commission's objection to the toll road, both parties jointly requested a six-month stay of the litigation. Parties' Joint Status Report and Request for an Additional Six-Month Stay, at 2, *Save San Onofre Coalition v. Wolff*, No. 08 Civ. 1470 (S.D. Cal. Mar. 9, 2009). During that six-month period, TCA consulted with the Coalition and other stakeholders "in an effort to discuss alternatives to, or modifications of, the F7C-South project." *Save San Onofre Coalition v. Wolff*, No. 08 Civ. 1470 (S.D. Cal. Mar. 9, 2009); Parties' Joint Status Report and Request for an Additional Six-Month Stay at 3, *Save San Onofre Coalition v. Locke*, No. 08 Civ. 1470 (S.D. Cal. Sept. 9, 2009). The court extended the stay for six months in September 2009 and again in March 2010 to allow TCA to continue to meet with impacted parties "to explore environment, engineering and other issues concerning alternative alignments of the Foothill-South Project." See Order at 4, *Save San Onofre Coalition v. Locke*, No. 08 Civ. 1470 (S.D. Cal. Sept. 9, 2009); Corrected Joint Status Report and Request for Six-Month Extension of Stay to September 2010 at 2, *Save San Onofre Coalition v. Locke*, No. 08 Civ. 1470 (S.D. Cal. Mar. 10, 2010); Order, *Save San Onofre Coalition v. Locke*, No. 08 Civ. 1470 (S.D. Cal. Mar. 16, 2010). In November 2010, in an effort to conserve the parties' and court's resources pending the outcome of ongoing settlement discussions, the Coalition agreed to dismiss the case without prejudice. See Order Granting Joint Motion to Dismiss Action Without Prejudice, *Save San Onofre Coalition v. Locke*, No. 08 Civ. 1470 (S.D. Cal. Nov. 10, 2010).

62. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 606 (2009).

63. *Id.* at 611.

64. See *supra* notes 53–61 and accompanying text.

successfully promoted a series of special federal exemptions for the Toll Road from both federal and California laws—laws designed to protect parklands and sensitive coastal areas. In 2001, for example, the TCA obtained a rider⁶⁵ on a military appropriations bill to preempt state law requirements. The rider modified an easement the Navy had previously given the TCA to build the Toll Road through a portion of Camp Pendleton by adding key language that allowed the TCA to “construct, operate, and maintain” the Toll Road “*notwithstanding any provision of State law to the contrary.*”⁶⁶ The TCA’s intent through this provision was to nullify provisions of state law that could subject the project to review by independent state agencies, including in particular the California Coastal Commission under the Coastal Act.

The TCA also obtained an exemption⁶⁷ for the agency from section 4(f) of the Department of Transportation Act, which prohibits federal transportation agencies from using publicly owned parks, recreational areas, wildlife and waterfowl refuges, or historical sites for their projects unless (1) there is “no feasible and prudent alternative” and (2) the action includes “all possible planning” to minimize harm to the land.⁶⁸ Congress put this safeguard in place to ensure that parklands are used for roads only as a last resort and that, if they are used, the agency does everything in its power to reduce the project’s impact.⁶⁹ The courts have consistently upheld section 4(f) as critical to ensuring that federal transportation projects are carried out in a way that will guarantee full protection of the environment, including public parks.⁷⁰

The Coalition decided not to wait to find out whether the TCA’s interpretation of these provisions would withstand judicial scrutiny. Instead, it embarked on an affirmative legislative strategy, in what had become a Democratic-controlled Congress, to undo the most damaging of the special exemptions. To that end, the Coalition persuaded Rep. Susan Davis (D-San Diego) to introduce through the 2007 Defense Appropriations bill,⁷¹ with the help of Rep. Loretta

65. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 2867, 115 Stat. 1012, 1334 (2001).

66. *Id.* (amending Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 2851(a), 112 Stat. 1920, 2219 (1998)) (emphasis added).

67. See National Defense Authorization, Fiscal Year 2001, Pub. L. No. 106-398, § 2881, 114 Stat. 1654A-438 (2000).

68. 49 U.S.C. § 303(c)(1), (2) (2006).

69. See 23 C.F.R. § 774.17 (defining “all possible planning” to require all reasonable measures to minimize harm or mitigate for adverse impacts and effects, which, with regard to public parks, include design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways).

70. See, e.g., *La Raza Unida of S. Alameda Cnty v. Volpe*, 488 F.2d 559, 562 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

71. The amendment passed as part of the Defense Authorization Act for Fiscal Year 2008. H.R. 1585, 110th Cong. (2008).

Sanchez (D-Orange County), an amendment to repeal the 2001 rider that the TCA had hoped would exempt the project from California Coastal Commission jurisdiction. After approval by the House Armed Services Committee, the full House and, with the help of Sen. Barbara Boxer (D-CA), the House-Senate Conference Committee, the special exemption was repealed. As appears below, this legislative action was a critical step in the Coalition's strategy to defeat the Toll Road.⁷²

4. *Influencing the Regulatory Process: Administrative Advocacy*

Under its enabling statutes, the TCA is the local agency charged with review and approval of its own projects.⁷³ So in 2006, ignoring extensive substantive comments from a large number of project opponents,⁷⁴ the agency, to no one's surprise, approved its own toll road and was promptly sued by NRDC and other environmental organizations, as well as by the California Recreation and Parks Commission, represented by then-California Attorney General Bill Lockyer.⁷⁵

At the federal level, the Coalition focused its attention on the EPA, the U.S. Army Corps of Engineers, and the so-called South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Collaborative, a grouping of federal, state, and regional agencies convened by the TCA in order to control, and organize support from, any agencies that might have a regulatory role to play in review of the Toll Road project.⁷⁶ In addition, the Coalition targeted, and

72. The Coalition's lobbying was not always so successful. Most notably, despite extensive efforts to persuade the Governor to oppose or at least stay neutral on the Toll Road, Governor Schwarzenegger (and with him, his Secretary of Resources, Mike Chrisman) came down strongly in favor of it in 2008. *See, e.g.*, Joel R. Reynolds, Opinion, *Put to the Road Test*, L.A. TIMES, Feb. 18, 2006, at B17; Letter from Arnold Schwarzenegger, Governor of California, to Patrick Kruer, Chairman of the California Coastal Commission (Jan. 15, 2008) (on file with author). One important consequence of the Governor's decision was the limitation it imposed on the ability of the state Department of Parks and Recreation and its Director Ruth Coleman, long staunch defenders of San Onofre, to play a public role in the Toll Road matter—a fact noted by the Coalition during the important California Coastal Commission hearing. *See, e.g.*, Joel Reynolds, Testimony Provided at California Coastal Commission Hearing, CAL-SPAN (Feb. 6, 2008), <http://www.cal-span.org/cgi-bin/archive.php?owner=CCC&date=2008-02-06> (last visited Oct. 13, 2011); *see also* discussion of CCC hearing *infra* notes 98–100 and accompanying text.

73. *See* CAL. GOV'T CODE §§ 6500–36 (2010).

74. *See, e.g.*, SIERRA CLUB ET AL., COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT/SUPPLEMENTAL ENVIRONMENTAL IMPACT REPORT AND CLEAN WATER ACT SECTION 404 PERMIT APPLICATION FOR THE SOUTH ORANGE COUNTY TRANSPORTATION INFRASTRUCTURE IMPROVEMENT PROJECT (2004).

75. *See supra* notes 53–61 and accompanying text.

76. The TCA at one point overstated the positions of the Collaborative's member agencies, hoping to advance its Toll Road project. For example, during its appeal of the Coastal Commission's decision to block the project (*see* discussion *infra* notes 104–06 and accompanying text), the TCA misrepresented to the Secretary of Commerce the positions of the EPA, the Army Corps of Engineers, and the U.S. Fish and Wildlife Service, falsely claiming that those agencies and others with jurisdiction over the project had found the Toll Road to be the "least environmentally damaging practicable alternative." Appellants' Principal Brief of Appeal Under the Coastal Zone Management

generated congressional opposition to, the TCA's application to the Federal Highway Administration (FHWA) in 2008 for a \$1.1 billion loan under the agency's Transportation Infrastructure Finance and Innovation Act (TIFIA) program.⁷⁷

At the state level, the California Parks and Recreation Commission was an early defender of San Onofre. Led by its Chair Bobby Shriver⁷⁸ and Vice Chair

Act [Corrected] at 2–3, *Foothill/Eastern Transportation Corridor Agency v. Cal. Coastal Comm'n*, CC-018-07 (Mar. 18, 2008), available at [http://www.ogc.doc.gov/CZMA.nsf/CBF0957E97E2FE0C8525742C006E2D89/\\$File/Corrected_TCA_Brief.pdf?OpenElement](http://www.ogc.doc.gov/CZMA.nsf/CBF0957E97E2FE0C8525742C006E2D89/$File/Corrected_TCA_Brief.pdf?OpenElement). In response, the ACOE sent a letter to the TCA characterizing its assertions as “false” and noting that “the Corps holds the opinion there are other practicable alternatives available to TCA that would achieve the overall project purpose.” Letter from Col. Thomas Magness, U.S. Army Corps of Eng'rs, to Thomas Street, Nat'l Oceanic & Atmospheric Admin. 5 (Apr. 7, 2008) (on file with author). The EPA followed suit in a letter to the Secretary of Commerce explaining that its own preliminary view of the Toll Road alternative had been based on the information available to the agency four years earlier, and that it would need to evaluate the practicability of other possible alternatives in light of significant new information that had come to light since that time. Letter from Wayne Nastri, Region IX Administrator, U.S. EPA, to Thomas Street, Nat'l Oceanic & Atmospheric Admin. (May 28, 2008) (on file with author). Finally, the FWS similarly informed the Secretary of Commerce that the agency had not endorsed (and was not responsible for endorsing) the TCA's proposed Toll Road route, and, in fact, the Final Biological Opinion issued by FWS urged other federal agencies and the TCA to consider other alternatives due to the Toll Road's serious adverse impacts on species. Letter from Jim A. Bartel, Fish & Wildlife Serv., U.S. Dep't of Interior, to Thomas Street, Nat'l Oceanic & Atmospheric Admin. (May 28, 2008) (on file with author); FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, BIOLOGICAL OPINION: PROPOSED TOLL ROAD CORRIDOR (ALIGNMENT 7 CORRIDOR-FAR EAST CROSSOVER MODIFIED) INITIAL ALTERNATIVE FOR THE SOUTH ORANGE COUNTY TRANSPORTATION INFRASTRUCTURE IMPROVEMENT PROJECT (2008) (on file with author).

77. The TCA applied for the \$1.1 billion TIFIA loan to refinance its outstanding debt, which had arisen at least in part from the poor performance of toll roads the agency already had built. U.S. Dep't of Transp., Fed. Highway Admin., TIFIA Letters of Interest and Applications, http://www.fhwa.dot.gov/ipd/tifia/letters_interest_applications/letters_submitted_jun2009.htm (last visited Aug. 14, 2011). The intended purpose of TIFIA, however, is to finance the construction of *new* roadway improvements—not to shore up the deteriorating finances of roads already in existence. 23 U.S.C. § 601(a)(1) (2010) (defining “eligible project costs” under the TIFIA statute as limited to the cost of constructing and financing transportation facilities); *see also* U.S. Dep't of Transp., Fed. Highway Admin., TIFIA Defined, <http://www.fhwa.dot.gov/ipd/tifia/defined/index.htm> (last visited Aug. 12, 2011) (explaining that the role of TIFIA is particularly important during the “initial ‘ramp-up’ year after construction”). The Coalition brought this to the attention of Senator Barbara Boxer, a member of the Senate's Commerce, Science, and Transportation Committee—who then wrote a letter to the FHWA opposing the loan. Letter from Sen. Barbara Boxer to Mary E. Peters, Sec'y of Transp., and Mark Sullivan, TIFIA Joint Program Office, U.S. Dep't of Transp. (Oct. 7, 2008) (on file with author). As of October 2011, the TCA's TIFIA loan application is still pending and has not been approved. *Compare* Previous TIFIA Letters of Interest Submitted as of June 8, 2009, TIFIA, U.S. Dep't of Transp., http://www.fhwa.dot.gov/ipd/tifia/letters_interest_applications/letters_submitted_jun2009.htm (listing TCA's 2008 application) (last visited Oct. 17, 2011), *with* Projects & Project Profiles, TIFIA, U.S. Dep't of Transp., http://www.fhwa.dot.gov/ipd/tifia/projects_project_profiles/tifia_portfolio.htm (not including TCA's loan request as an active project) (last visited Oct. 17, 2011).

78. *See, e.g.*, Bobby Shriver & Joel Reynolds, *They'd Pave over Reagan's Park*, L.A. TIMES, May 8, 2005, at M3; Bobby Shriver & Joel Reynolds, *Opinion, O.C.'s Road Test*, L.A. TIMES, Mar. 10, 2009, at A25.

Clint Eastwood,⁷⁹ the Commission scheduled a hearing in October 2006 in San Clemente, attended by an estimated 1,000 people overwhelmingly opposed to the project. The Commission then unanimously approved a resolution calling on the Governor to defend the park and remained throughout the years of the campaign a staunch advocate for its protection. Because it is an independent advisory Commission, it had no direct regulatory authority over the toll road project.

The dispositive chapter in the Foothill-South Toll Road's permitting process, however, originated in the project's proximity to the coast, triggering additional regulatory processes under the California Coastal Act and federal Coastal Zone Management Act (CZMA). These statutes added a layer of administrative agency review that the TCA had attempted, through federal legislative action in 2001, to avoid. And it was this additional regulatory oversight that eventually would gain traction for the Coalition.

Under the CZMA, the California Coastal Commission had jurisdiction to review the Foothill-South Toll Road.⁸⁰ The CZMA requires that "any applicant for a Federal license or permit . . . affecting any land or water use or natural resource of the coastal zone of that state" certify that the proposed activity complies with the enforceable policies of the state's approved program—here, California's Coastal Management Program, which incorporates certain policies from the California Coastal Act—and that the activity will be conducted in a manner consistent with that program.⁸¹ The applicant must submit this certification to the state's reviewing agency—here, the Coastal Commission⁸²—and has the burden to "demonstrate that the activity will be consistent with the enforceable policies of the management program."⁸³ The Commission must then determine whether the applicant has met its burden and must lodge a proper objection if it has not.⁸⁴

Because the Coastal Commission had the power under this statutory scheme to block the project, the Save San Onofre Coalition devoted considerable attention and resources to the Commission's consistency review of the Toll Road when the TCA sought Commission concurrence in 2007. The Coalition and its members submitted technical comment letters, legal briefs, and extensive

79. Eastwood agreed to film a brief public service announcement defending the Park, which NRDC then released via its website and other web outlets. Clint Eastwood on Saving San Onofre, NATURAL RESOURCES DEFENSE COUNCIL, <http://oceans.nrdc.org/surfers/video> (last visited Aug. 12, 2011).

80. 16 U.S.C. § 1456(c)(3)(A) (2006).

81. *Id.*, CAL. PUB. RES. CODE §§ 30008, 30330.

82. 16 U.S.C. § 1456(c)(1)(C) (2006); *see also* 16 U.S.C. § 1455(d)(6) (2006); 15 C.F.R. § 930.11(o) (2010).

83. 15 C.F.R. § 930.58(a)(3) (2010); *see also id.* § 930.57(a) (requiring an applicant to provide certification that the project "complies with and will be conducted in a manner consistent with the management program"); *id.* § 930.58(a)(1)(ii) (detailing disclosure requirements of an applicant).

84. *Id.* § 930.63.

testimony at the Commission's hearing in February 2008, arguing that a determination of consistency should be denied because the project would violate numerous Coastal Act provisions and policies, including those relating to protection of environmentally sensitive habitat areas (ESHAs), recreational and cultural resources, wetlands, biological resources, and water quality.⁸⁵

Enhancing the Coalition's efforts was the fact that the groups within the Coalition brought different strengths and expertise: National environmental groups like the Natural Resources Defense Council⁸⁶ and Defenders of Wildlife⁸⁷ contributed legal, policy, and communications expertise, while regional science-based organizations like Audubon California,⁸⁸ Laguna Greenbelt,⁸⁹ and the Endangered Habitats League⁹⁰ offered technical and scientific expertise. The California State Parks Foundation⁹¹ and California Coastal Protection Network⁹² brought specialized expertise on state parks and the protection of coastal resources, respectively. And the Sierra Club⁹³ and Surfrider Foundation⁹⁴ supplied, among other things, vast activist networks and expertise in grassroots organizing. Finally, the Coalition was able to augment its in-house resources with an array of consultants on critical aspects of the campaign, from state and federal political lobbying to communications to Coastal Commission process, through coordinated financial support from a core group of actively engaged funders pulled together by the Resources Law Group, a Sacramento-based law firm that designs and implements programs to conserve natural resources.⁹⁵

5. Raising Public Awareness: Grassroots Organizing

The Coalition benefited enormously from its member groups' expertise in grassroots organizing. Led by the Sierra Club's Friends of the Foothills Task Force and Surfrider, the Coalition and its members sent out periodic "action alerts" and e-mail blasts to members and activists, generating letters to elected officials and

85. Comment Letter from Save San Onofre Coalition to California Coastal Commission regarding Opposition to Coastal Consistency Certification (Jan. 17, 2008) (on file with author).

86. NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org> (last visited Aug. 12, 2011).

87. DEFENDERS OF WILDLIFE, <http://www.defenders.org> (last visited Aug. 12, 2011).

88. AUDUBON CALIFORNIA, <http://www.ca.audubon.org> (last visited Aug. 12, 2011).

89. LAGUNA GREENBELT, <http://www.lagunagreenbelt.org> (last visited Aug. 12, 2011).

90. ENDANGERED HABITATS LEAGUE, <http://www.ehleague.org> (last visited Aug. 12, 2011).

91. CALIFORNIA STATE PARKS FOUNDATION, <http://www.calparks.org> (last visited Aug. 12, 2011).

92. CALIFORNIA COASTAL PROTECTION NETWORK, <http://www.coastaladvocates.com/> (last visited Aug. 12, 2011).

93. SIERRA CLUB, <http://www.sierraclub.org> (last visited Aug. 12, 2011).

94. SURFRIDER FOUNDATION, <http://www.surfrider.org> (last visited Aug. 12, 2011).

95. Among the Coalition's consultants were Phil Giarrizzo Campaigns, Forward Observer, Sonnenschein Nath & Rosenthal LLP (now SNR Denton), Cerrell Associates, Susan Jordan, and a host of scientific experts. The consortium of principal funders included the Marisla Foundation, the Annenberg Foundation, and WildSpaces Foundation.

agencies and, through intensified outreach in the run-up to important administrative hearings, attendance and testimony in public meetings or other proceedings. The Coalition also sought media coverage to drive interest in the issue and attract supporters, using tools such as op-eds,⁹⁶ letters to the editor, editorials from media outlets like the *Los Angeles Times* (which editorialized repeatedly against the project), press releases, and “paid” media such as newspaper and radio advertisements.⁹⁷ The result of these efforts was extraordinary: an estimated 1,000 people attended a weeknight hearing of the state Recreation and Parks Commission in San Clemente in October 2006, more than 3,500 people turned out for the Coastal Commission hearing at the Del Mar Fairgrounds in February 2008,⁹⁸ and more than 6,000 people attended the U.S. Department of Commerce hearing in September 2008⁹⁹—the vast majority of these attendees project opponents.¹⁰⁰ For each administrative agency, these hearings were the largest in their history.

D. The Result: State and Federal Agencies Reject the Toll Road

After a fourteen-hour hearing on February 6, 2008, the Coastal Commission, by an 8-to-2 vote, determined that the proposed Toll Road violated the California Coastal Act.¹⁰¹ During the hearing, the Commission’s Executive Director, Peter Douglas, in support of the Commission staff’s 250-page report, observed that

96. See, e.g., Goldstein, *supra* note 50; Shriver & Reynolds, *supra* note 41, at A25; Reynolds, *supra* note 72.

97. One creative example of this important communications effort was the Coalition’s success in generating a wave of news stories when, in March 2007, Governor Schwarzenegger, in apparent reaction to their active opposition to the Toll Road, refused to reappoint Bobby Shriver and Clint Eastwood, respectively the Chair and Vice-Chair of the California Recreation and Parks Commission. What might otherwise have been an anonymous and little-noticed exercise of the Governor’s appointment prerogative became an international news story over a span of weeks as the media broadcast the Governor’s “firing” of his own brother-in-law Bobby Shriver and, even more important, the real-life confrontation between “The Terminator” and “Dirty Harry.” See, e.g., *Wrongly Terminated*, L.A. TIMES, Mar. 24, 2008, at A14; Ewen MacAskill, *Eastwood Plays Down Row over Schwarzenegger Termination*, GUARDIAN, Mar. 26, 2008, <http://www.guardian.co.uk/world/2008/mar/26/usa>; Michael Rothfeld, *Actor Takes Removal from Board in Stride*, L.A. TIMES, Mar. 26, 2008, at B1.

98. David Reyes & Dan Weikel, *Panel Rejects Beach Toll Road*, L.A. TIMES, Feb. 7, 2008, at A1.

99. Susannah Rosenblatt & Mike Anton, *Local Opinions on Toll Road Are Heated*, L.A. TIMES, Sept. 23, 2008, at B3.

100. See, e.g., Angelica Martinez & Jose Luis Jimenez, *Coastal Commission Rejects Toll Road Through San Onofre State Beach*, SAN DIEGO UNION-TRIB., Feb. 6, 2008, <http://legacy.signonsandiego.com/news/northcounty/20080206-2352-bn06voteroad.html> (“When the public was allowed to speak after 7 p.m., nearly 200 people registered their opposition to the project, while about two dozen voiced support”); Alex Wilson, *Trestles Toll Road Saga: Thousands Attend Federal Inquiry in Del Mar*, SURFER MAG, Sept. 22, 2008, <http://surfermag.com/features/onlineexclusives/trestles-toll-road-hearing-coastal-commission-del-mar-fairgrounds> (“The [Commerce] hearing’s structure also allowed an even representation of argument for and against the road, despite the fact that the majority of those in attendance today were in opposition to the proposed extension. (One public speaker estimated the ratio in the crowd at about 3 to 1.)”).

101. Reyes & Weikel, *supra* note 98, at A1.

“[s]ince passage of the California Coastal Act in 1976, I know of no other coastal development project so demonstrably inconsistent with the law,”¹⁰² and that the Toll Road was “precisely the kind of project the Coastal Act was intended to prevent.”¹⁰³ For its part, the Coalition presented a carefully planned, comprehensive group presentation addressing all of the key issues before the Commission, including compelling testimony from the Commission’s former counsel regarding the pivotal balancing of competing policies under the Coastal Act. Despite intense behind-the-scenes lobbying of the Governor’s own commissioners by his top staff to support the project, the Commission voted decisively against it.

The TCA promptly appealed the decision to the U.S. Secretary of Commerce,¹⁰⁴ claiming that the Coastal Commission had no jurisdiction over the project because it was not located in a “Coastal Zone”; the project was “an important component of the approved Southern California Regional Transportation Plans and California’s federal Clean Air Act Implementation Plan . . . critically necessary to the relief of existing and future congestion on Interstate-5”; and the project was necessary in the “interest of national security.”¹⁰⁵ On December 18, 2008, after another round of briefing, comment letters, and hearing testimony at the Del Mar Fairgrounds on September 22, 2008, the Secretary, in the waning weeks of the Bush Administration, affirmed the Coastal Commission’s objections to the Toll Road:

The Commission’s objection to the Project is sustained. For the reasons set forth above, the record establishes that the project is not consistent with the objectives of the CZMA. California has identified an available and reasonable alternative that would be consistent with California’s Program. The record also does not establish that the Project is necessary in the interest of national security. Given this decision, California’s objection to the Project operates as a bar under the CZMA to Federal agencies issuing licenses or permits necessary for the construction and operation of the Project.¹⁰⁶

Faced with nowhere to go but federal court to challenge the Bush Administration’s affirmance of the Coastal Commission, the TCA elected at last to undertake a series of stakeholder meetings to consider whether an alternate,

102. Jonathan Volzke, *Road Kill?*, SAN CLEMENTE TIMES, Feb. 13, 2008, http://sanclementetimes.com/view/full_story/6696300/article-road-kill-.

103. Gillian Flaccus, *Coast Panel Rejects Plan for Toll Road Cut Through Beach Park*, SAN FRANCISCO CHRONICLE, Feb. 8, 2008, at B-12.

104. *See* 16 U.S.C. § 1456(c)(3)(A) (2006).

105. TCA Brief at 1–4, U.S. Dep’t of Commerce, Mar. 18, 2008, [http://www.ogc.doc.gov/czma.nsf/CBF0957E97E2FE0C8525742C006E2D89/\\$file/corrected_tca_brief.pdf?OpenElement](http://www.ogc.doc.gov/czma.nsf/CBF0957E97E2FE0C8525742C006E2D89/$file/corrected_tca_brief.pdf?OpenElement).

106. U.S. Dep’t of Commerce, Decision and Findings in the Consistency Appeal of the FTCA from an Objection by the California Coastal Commission, Dec. 18, 2008, [http://www.ogc.doc.gov/czma.nsf/80C046C6489B95BA852575230077B0D2/\\$File/tca_decision.pdf?OpenElement](http://www.ogc.doc.gov/czma.nsf/80C046C6489B95BA852575230077B0D2/$File/tca_decision.pdf?OpenElement).

nonpark alignment might be found.¹⁰⁷ After three years of effort, the TCA in the end proposed instead a plan to circumvent the Coastal Commission and Commerce decisions by building the Toll Road in segments. In October 2011, the TCA's board authorized its staff to analyze the environmental impacts and determine the financial viability of building the first four-mile segment of the road, beginning at the northern end of the route and leaving for future determination the path of an alignment connecting this initial segment to Interstate 5.¹⁰⁸ As this Article goes to press, the Save San Onofre Coalition has announced its unwavering opposition to the TCA's latest proposal, characterizing it as an illegal and ill-conceived attempt to revive a project that has been soundly rejected by both state and federal agencies.¹⁰⁹

II. TEJON RANCH: NEGOTIATING FOR CALIFORNIA'S HOLY GRAIL OF CONSERVATION

The Tejon Ranch is anything but anonymous. In fact, because of its location along Interstate 5 at the southern end of the San Joaquin Valley, it is a property known to millions who, as they drive along this spinal cord of transportation in California, have seen the prominent Ranch signs or the freeway exit for Fort Tejon State Historic Park and have enjoyed the colorful wildflowers that each spring carpet the hillsides along the western edge of the Ranch.

But few people have ever seen more of the property than that. As a private landholding, the Ranch has been closed to the public except for the small minority of Ranch employees, contractors, occasional researchers, and pay-per-visit hunters. What this means is that the vast majority of the Ranch property is an unknown, a mystery, and a relatively untouched expanse of natural resources unlike anything anywhere else in California.

This doesn't mean that Tejon Ranch has been off the radar. In fact, precisely because most of the 270,000-acre Ranch property has been hidden from public access, and because of the property's unique location at the junction of significant, diverse natural ecosystems, its preservation has become a coveted goal of conservationists for decades—called “the Holy Grail of conservation in

107. 241 *Completion Project*, TOLL ROADS, https://www.thetollroads.com/home/241_completion.htm (last visited Aug. 14, 2011) (“An exhaustive stakeholder outreach program began in January 2009 and is ongoing. Meetings have been held with more than 125 organizations and individuals, including opponent groups, such as the Save San Onofre Coalition.”).

108. Chris Boucly, *Transit Agency Approves Steps Toward 241 Extension*, ORANGE COUNTY REG., Oct. 13, 2011, <http://www.ocregister.com/news/toll-321921-board-coastal.html>.

109. See, e.g., Ed Joyce, *Zombie Road: Controversial San Onofre Toll Stretch Revised*, KPBS, Oct. 13, 2011, <http://www.kpbs.org/news/2011/oct/13/agency-revisits-controversial-toll-road-proposal/> (quoting Elizabeth Goldstein, who stated on behalf of the Coalition that “[b]uilding this 4-mile segment is an irresponsible and fiscally unsound attempt by the TCA to pressure federal and state officials to ultimately approve a route that would destroy San Onofre State Beach and that has already been forcefully rejected. Even the Bush administration, under pressure from all the lobbyists money can buy, refused to endorse the toll road through San Onofre”).

California.”¹¹⁰ Over the years, efforts have been made to reach out to leadership at the Tejon Ranch Company to solicit an agreement that would allow access, enable scientific research, and even provide for the preservation of sections of the Ranch. Over the years, these efforts have failed for one reason or another despite the interest of all stakeholders—including the Ranch Company—in certainty about the future of the property and the resources that it contains.

With the announcement by the Company a decade ago of plans for significant development of portions of the property, and with the prospect of litigation that such plans would generate from conservationists and neighboring community residents, the interest in some sort of resolution intensified. In 2006, the stage was set for a structured negotiation process that, over a two-year period, would lead to one of the most significant conservation agreements in California history.¹¹¹

A. The Resource: Tejon Ranch

Located in the Tehachapi Mountains along the “Grapevine” section of Interstate 5 between Los Angeles and Bakersfield, the 270,000-acre Tejon Ranch is the largest contiguous property under single, private ownership in California¹¹² and a hotspot of biological diversity that is unmatched anywhere else in the state.¹¹³ Eight times the size of San Francisco, Tejon Ranch boasts a variety of landscapes ranging from native grasslands and pine forests to oak and Joshua tree woodlands, and it provides vital habitat for dozens of rare plant and animal species, including critical foraging habitat for the California condor.¹¹⁴ These important natural resource values stem in part from Tejon Ranch’s unique

110. Felicity Barringer, *Major Deal Preserves Ranch Land in California*, N.Y. TIMES, May 9, 2008, at A17 (quoting Joel Reynolds).

111. See Sen. Dianne Feinstein, Press Release, Senator Feinstein Announces Intention to Introduce Measure to Protect Former Catellus Lands Through a Monument Designation, Mar. 18, 2009, available at http://feinstein.senate.gov/public/index.cfm?fuseaction=newsroom.press_releases&contentrecord_id=1b2bfd79-5056-8059-769b-efa99ad34933®ion_id=&Issue_id=. The landmark Catellus-Wildlands Conservancy conservation agreement, which Sen. Dianne Feinstein championed in the late 1990s and early 2000s and which protected over 600,000 acres of privately held property in the eastern Mojave Desert, involved more land than the Tejon agreement in terms of acreage. However, the lands protected under the Catellus agreement comprised an assortment of fragmented, “checkerboarded” parcels, as compared to the contiguous and unfragmented Tejon Ranch property. *Id.*

112. Tejon Ranch Conservation and Land Use Agreement, at 1 [hereinafter *Agreement*], available at <http://www.sec.gov/Archives/edgar/data/96869/000119312508138009/dex1028.htm> (last visited Oct. 17, 2011); see also Agreement, Executive Summary, http://tejonranchconservancy.org/images/uploads/rwa_exec.pdf.

113. Conservation Biology Institute, *Conservation Significance of Tejon Ranch* (Aug. 2003) [hereinafter *CBI Report*], available at <http://www.savetejonranch.org/doclibrary/20030930-tejon-rpt1.pdf>.

114. *Agreement*, supra note 112 at 1; Jon Gertner, *Playing SimCity for Real*, N.Y. TIMES: KEY MAG., Spring 2007 at 78; Edward Humes, *Where the Wild Things Are. Still.*, SIERRA MAG., Jan./Feb. 2010, <http://www.sierraclub.org/sierra/201001/tejon.aspx>; *CBI Report*, supra note 113 at v.

location at the confluence of four major ecological regions—the Sierra Nevada, Mojave Desert, Coastal Range, and San Joaquin Valley,¹¹⁵ and the Ranch's critical role as a habitat and migration corridor between Northern and Southern California.¹¹⁶

Tejon Ranch has maintained its natural landscape and biological values through the years by restricting public access to the Ranch and limiting Ranch activities to relatively low-impact uses. Established in the mid-1800s by explorer and early California statesman General Edward Fitzgerald Beale, Tejon Ranch passed through the hands of numerous subsequent owners, including former *Los Angeles Times* owner Harry Chandler, before passing to the investment group that controls the Ranch today.¹¹⁷ Throughout that time, uses on Tejon Ranch were limited to activities like grazing, hunting, light agriculture and, in more recent times, small-scale cement manufacturing and oil production.¹¹⁸ By keeping out roads and other forms of urbanization, the Ranch has been able to maintain intact, healthy watersheds and streams, which are all too rare in southern California.¹¹⁹

Its sheer size, singularly important location, unfragmented landscapes, and incomparable natural resource values have made Tejon Ranch one of the most coveted properties in California for conservationists—a “once-in-a-lifetime conservation opportunity” and “the keystone of Southern California’s natural legacy.”¹²⁰

B. *The Threat: Proposed Development*

In the late 1990s, Tejon Ranch’s owner, the Tejon Ranch Company (TRC, Ranch Company or Company), embarked on an ambitious development plan for three new urban centers—a business park, a luxury mountain resort, and a large master-planned “new town”-style development—in the western and southwestern areas of the Ranch.¹²¹ The business park, a 1,400-acre commercial and industrial center called Tejon Industrial Complex (TIC), was intended to take advantage of the Ranch’s location along Interstate 5, the main traffic corridor between Los Angeles and San Francisco, by providing warehousing space for distribution centers and servicing the approximately 50,000 to 60,000 vehicles that travel daily

115. *Agreement*, *supra* note 112, at 2.

116. *CBI Report*, *supra* note 113, at v.

117. Humes, *supra* note 114; Louis Sahagun, *Homes, Homes on the Range*, L.A. TIMES, May 8, 2008, at A1.

118. Humes, *supra* note 114.

119. *CBI Report*, *supra* note 113, at vi.

120. Sahagun, *supra* note 117; *Tejon Ranch Agreement Conserves California’s Natural Heritage*, ENV’T L NEWS SERV. (May 9, 2008), <http://www.ens-newswire.com/ens/may2008/2008-05-09-01.asp>.

121. Jesus Sanchez, *IKEA to Set Up Distribution Center at Tejon Ranch Project*, L.A. TIMES, May 3, 2000, at C2; Barry Stavro, *Tejon Ranch in No Hurry to Develop Land*, L.A. TIMES, Jan. 29, 1991, at A9; *About Us*, TEJON RANCH, http://www.tejonranch.com/about/about_us.asp (last visited Aug. 14, 2011).

through the Tejon Pass.¹²² The proposed mountain resort community, Tejon Mountain Village (TMV), would include over 3,000 luxury homes, two new golf courses, and new resort-style amenities like shopping centers and restaurants.¹²³ The largest proposed development, the Centennial project, would include over 26,000 new homes, along with business parks, shopping, recreation, hospitals, schools and public services (police, fire, and ambulance) to accommodate the influx of residents.¹²⁴

Environmental groups and others recognized the environmental risks of development on this scale and responded immediately, challenging the first of the sweeping development plans that threatened to increase traffic and air pollution and harm the condor and other imperiled species.¹²⁵ When Kern County approved TIC in 2003, environmental groups—led by the Center for Biological Diversity and including the Center on Race, Poverty, and the Environment, the Sierra Club, and the Kern Audubon Society—filed a lawsuit challenging the project under CEQA and other laws.¹²⁶

C. The Approach: Structured Negotiation

In late 2001, faced with the prospect of protracted litigation over the three proposed developments, TRC invited Joel Reynolds, NRDC Senior Attorney and Director of its Urban Program, to join a small, informal Environmental Advisory Group (EAG)¹²⁷ to advise on, without waiving any rights to oppose or challenge, two of the three planned development projects on Tejon Ranch—TMV and Centennial. While the intended purpose of the EAG was to improve the environmental sustainability of those projects, it immediately became clear, and

122. Sanchez, *supra* note 121; *About Us*, TEJON RANCH, http://www.tejonranch.com/about/about_us.asp (last visited Aug. 14, 2011); *Tejon Ranch Company*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/tejon-ranch-company-company-history.html> (last visited Aug. 14, 2011); see also Cal. Dep't of Transp., Traffic Data Branch, 1998 Annual Average Daily Traffic, <http://www.caltrans.ca.gov/hq/traffops/saferest/trafdata/1998all/1998aadt.xls> (reporting annual average daily traffic counts of 52,000 to 62,000 vehicles).

123. *The Plan*, TEJON MOUNTAIN VILLAGE, <http://www.tejonmountainvillage.com/content/vision/the-plan.php> (last visited Aug. 14, 2011).

124. Centennial Plans Overview, CENTENNIAL CA, http://www.centennialca.com/cp_overview.html (last visited Aug. 14, 2011).

125. Sahagun, *supra* note 117.

126. In October 2003, a Kern County Superior Court judge vacated the County's decision to approve the project, finding that the County's EIR had failed to adequately disclose and analyze the project's air quality impacts on public health and the environment. *Ctr. for Biological Diversity v. County of Kern*, No. F050685, 2007 WL 1032268, at *1 (Cal. Ct. App. Apr. 6, 2007). TRC made modifications to the project, including efforts to reduce TIC's anticipated adverse impacts to air quality, and obtained the County's approval of the modified project in November 2005, which the court then endorsed at both the trial and appellate court levels. *Id.* at *2.

127. Other members of the EAG included Carlyle Hall, land use attorney and partner at Akin Gump; Esther Feldman, President, Feldman & Associates (now Executive Director, Community Conservancy International); and, later, Victoria Sork, UCLA Professor and Dean of the Division of Life Sciences.

the EAG advised, that consideration of the proposed developments in isolation from the full 270,000-acre Ranch property was problematic. Moreover, the EAG strongly suggested to the Company that dedication of significant acreage on the Ranch to conservation would be a significant step forward both for conservation and ultimately for the Company's hoped-for development of lands outside the dedicated areas.¹²⁸

Meanwhile, in 2003 and 2004, David Myers and the Wildlands Conservancy, assisted by the Conservation Biology Institute, developed a specific proposal for conservation on the Ranch that was unsuccessfully proposed to the Company through various channels. That proposal contemplated conservation of an estimated 245,000 acres of the Ranch property and included a map depicting identified development and conservation areas, with significant adjustments in the proposed footprints for the Centennial and Tejon Mountain Village projects.¹²⁹

In 2005, responding in part to this input, Tejon Ranch CEO Bob Stine began discussions with members of the TRC board regarding how best to proceed in advancing the company's development plans, focusing specifically on the issue of whether the larger Ranch holdings—beyond the acreage of the three planned projects—should be on the table for discussion.¹³⁰ In May 2006, having answered that fundamental question in the affirmative, Tejon formed a partnership with DMB Associates, a Scottsdale, Arizona-based development company whose Chief Operating Officer, Eneas Kane, had a recent history of success in working with environmental advocacy groups to resolve complex development disputes without litigation.¹³¹ Kane endorsed the Company's decision to consider broader discussions and, together with Stine, crafted a new approach to negotiations on the future of Tejon Ranch—an approach that would involve (1) deferring development applications for six months to allow (2) a limited but dedicated period of structured, confidential negotiation with key senior environmental stakeholders (3) with the entire 270,000-acre Ranch property on the table and (4)

128. In May 2003, the Ranch announced, in collaboration with the Trust for Public Land, a proposal to dedicate 100,000 acres of the Ranch to conservation. Press Release, The Trust for Public Land, 100,000 Acre Tejon Preserve Unveiled (CA) (May 24, 2005), <http://www.tpl.org/news/press-releases/100000-acre-tejon-preserve-unveiled.html> (last visited Aug. 14, 2011).

129. Edward Humes, *The Last Frontier*, L.A. MAG., June 2009, <http://www.lamag.com/features/story.aspx?id=1412037>.

130. Interview by Joel Reynolds with Gary Hunt, Senior Advisor to the Ranch partners (July 15, 2010).

131. *Tejon Ranch Company—DMB Associates Finalize Partnership*, WORLD WIRE, May 23, 2006, <http://www.world-wire.com/news/0523060001.html>. Two recent examples of successful negotiation in which Kane had played a key role were the Rancho Mission Viejo project in southern Orange County (2005) and the Martis Camp development in Placer County (2006). See, e.g., DMB Assocs., *Tejon Ranch: Sharing in a Legacy of Conservation*, http://www.rcsaltworks.com/pdfs/DMB_Conservation_Tejon_Ranch.pdf (last visited Aug. 14, 2011); DMB Assocs., *Martis Camp: Conservation and Legacy Planning*, http://www.rcsaltworks.com/pdfs/DMB_Conservation_Martis_Camp.pdf (last visited Aug. 14, 2011).

the direct personal involvement of both Stine and Kane and their development partners, including Senior Advisor Gary Hunt, longtime executive at the Irvine Company and now a partner with the consulting firm California Strategies, LLC.¹³² Kane called Joel Reynolds in early fall 2006 to propose the approach, leaving to the environmental representatives the choice of which environmental organizations, consultants, or individuals to include. Soon thereafter, discussions began at NRDC's offices in Santa Monica.¹³³

1. Develop Pertinent Information

At the outset, it was clear to all participants that the negotiation could not begin, as others may have in the past, at the finish line—that is, with proposals for numbers of acres to be conserved or developed. Instead, the parties recognized the need for measured steps through a managed process, beginning with a shared assessment of key factual questions that could guide development of the respective parties' settlement goals. For that reason, once the ground rules for the negotiation were determined (eventually memorialized in a Memorandum of Understanding), the next step was to agree on a structure for gathering and considering the universe of information that would be relied upon (or disputed) in the negotiations.

Two principal factual areas of focus were identified, to be addressed sequentially: first, a consensus on the biological resources of the Ranch and their location to the extent that information could be obtained, either from public sources or the Ranch's own surveys; and second, a ranking by the Ranch of areas on the property according to their development potential, even as to areas whose development would not be contemplated for decades in the future. To develop the first category of information, consultants from both sides were delegated the responsibility of compiling, categorizing, and synthesizing the best scientific information and then presenting their conclusions, including areas of differing

132. Telephone conversation between Joel Reynolds and Eneas Kane, Chief Operating Officer to DMB Associates (Sept. 2006).

133. In addition to Reynolds and staff attorney James Birkelund from NRDC, environmental participants throughout some or all of the negotiation included senior representatives from Audubon California (Graham Chisholm), Endangered Habitats League (Dan Silver), Planning and Conservation League (Terrell Watt and Gary Patton), Sierra Club (Bill Corcoran and Jim Dodson), and the Center for Biological Diversity (Peter Galvin, Adam Keats, and Ileene Anderson). The groups, in turn, engaged experienced environmental, planning, and land use attorneys and consultants, including the San Francisco-based Shute, Mihaly & Weinberger law firm (Richard Taylor and Bill White), Resource Opportunity Group (David Myerson), Resources Law Group (Julie Turrini, Mary Scoonover), Conservation Biology Institute (Dr. Michael White), and the California Wildlands Project (Dr. Kristeen Penrod). Development participants included, among others, TRC (CEO Bob Stine and Senior Vice President of Natural Resources and Stewardship Kathy Perkinson), DMB Associates, Inc. (COO Eneas Kane and CEO Drew Brown), Gary Hunt, Senior Advisor to the Ranch partners, and San Francisco-based law firms Coblenz, Patch, Duffy & Bass LLP (Harry O'Brien and Matthew Bove) and Holland & Knight LLP (Jennifer Hernandez).

views, to the full negotiating group. Development of the second category of information was the province of the Ranch and its partners, using principles or criteria typically relied upon in the industry for identification of development prospects.¹³⁴ Both categories of information were then mapped, using color coding to differentiate between areas of low, moderate, and high importance.

2. Identify Geographic Areas of Dispute

These maps were critical in focusing the discussion on areas of actual dispute. Areas of no overlap between biological significance and development potential were easily eliminated from discussion, while areas of overlap of moderate to high biological significance and moderate to high development potential remained on the table. In other words, if the resource groups identified a parcel of land as a top conservation priority, but the developers did not regard that parcel as important from a development perspective (or vice versa), then there was no dispute to be negotiated; conversely, areas of overlap needed to be negotiated. This exercise reduced considerably the amount of land in dispute, while allowing the parties to build a working relationship before wading into the more complex aspects of the negotiation.

3. Identify and Address Disputed Issues

Once the lands in dispute had been determined, the parties' positions on an overall deal began to take shape—and numerous issues to be resolved emerged. As disagreements multiplied, the high stakes for each party served as a magnet essential to maintaining the commitment of all sides to a negotiated solution. For the Ranch, the short-term developments—TMV and Centennial—were the economic engine that might enable an agreement over the entire Ranch property. For the Resource Groups, the possibility of conserving enormous, unfragmented areas of the Ranch was the inducement to consider an agreement not to oppose some amount of development. On both sides the motivation was strong enough to stay at the table. When the initial six-month negotiation period expired, the parties agreed to extend it.

With regard to the planned short-term developments, which were an early topic of discussion, the primary issues revolved around reductions sought by the

134. While the specific principles and criteria used for Tejon were confidential among the negotiators, they included such things, for example, as access to infrastructure, slope, access to potable water, land use restrictions, and proximity to population centers. *See, e.g., Inventory of Land Suitable for Residential Development*, CAL. DEP'T OF HOUSING AND CMTY. DEV., http://www.hcd.ca.gov/hpd/housing_element2/SIA_land.php (last visited Aug. 14, 2011); NAT'L CTR. FOR SMART GROWTH RESEARCH AND ED., UNIV. OF MD., ESTIMATING RESIDENTIAL DEVELOPMENT CAPACITY: A GUIDEBOOK FOR ANALYSIS AND IMPLEMENTATION IN MARYLAND 9–15 (Aug. 2005), available at <http://www.dnr.state.md.us/watersheds/pubs/planninguserguide/tools/Tool10DevelopmentCapacityAnalysis.pdf>.

Resource Groups in scale and footprints of the developments, including in critical habitat of the iconic California condor.¹³⁵ With regard to future development areas—a total 62,000 acres in five locations on the Ranch¹³⁶—the Resource Groups initially requested that they be dedicated for conservation, along with approximately 178,000 acres of other dedicated lands. When the Ranch refused, the Groups agreed to consider the possibility of state acquisition of these future development areas, using funding from voter-approved state bond acts,¹³⁷ in an amount determined by state appraisers. This introduced difficult issues of valuation—for example, how they should be appraised, who should appraise them, and what an acceptable price would be. The Ranch argued that because it is a publicly traded corporation it could not legally agree, consistent with fiduciary obligations to its shareholders, to sell for a price determined by someone else, least of all by the state—the intended purchaser. For the Resource Groups, a purchase price based on a state appraisal was essential because, under California law, a state appraisal is a legal precondition to use of state bond funds.¹³⁸ And in order to ensure priority by state acquisition agencies, the Ranch demanded a limited option period during which the acquisition must occur. Both the term of that option and the consequences of failure to fund the acquisition before it expired—that is, whether to extend it and for how long or, if not extended and the Ranch someday elected to develop the property, whether the Resource Groups would be deemed to have waived their right to contest it—had to be determined.

But effective conservation cannot be achieved just by stopping development. To manage and restore the conserved lands, the Resource Groups proposed that an independent conservancy be created and funded, initially by the Ranch but eventually through transfer fees from the sale of housing units. While the concept of the conservancy and the funding sources made sense to both sides, the amount of funding and the number of years required were contested issues, as was the

135. Under the ESA, the term “critical habitat” for an endangered or threatened species means (1) areas occupied by the species at the time of its listing under the ESA that exhibit physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and (2) any areas not occupied by the species at the time of listing that the Secretary of Interior or Commerce finds are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A)(i)–(ii) (2006).

136. The five future development areas (*i.e.*, specific areas targeted for acquisition by the Resource Groups) include Bi-Centennial (approximately 11,000 acres), Michener Ranch (approximately 1,600 acres), Old Headquarters (approximately 26,700 acres), Tri-Centennial (approximately 7,200 acres), and White Wolf (approximately 15,500 acres). *See* TEJON RANCH CONSERVANCY, CONSERVATION AND LAND USE PLAN 7, *available at* http://tejonconservancy.org/images/uploads/rwa_exec.pdf.

137. *See* Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002, CAL. WATER CODE §§ 79500–79590 (Proposition 50); Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006, CAL. PUB. RES. CODE §§ 75001–75130 (Proposition 84).

138. *See* CAL. PUB. RES. CODE §§ 5096.511–.512 (2010); *see also* CAL. FISH & GAME CODE § 1348.2 (2010).

composition of the conservancy's board.¹³⁹ But far more difficult issues were the conservation standard to be applied in managing the conserved lands and the degree of the Conservancy's autonomy in developing a Ranch-Wide Management Plan to guide future Ranch operations. And the permissible scope of existing Ranch operations—for example, grazing, mining, oil development, hunting, and farming—was a matter of intense importance to the Ranch since the Resource Groups had no prospect of enough near-term funding to buy out those uses. Their impacts, including particularly their impact and that of any new development on water resources, were especially challenging, and disagreement over a provision to prevent the depletion of water resources needed to sustain conservation values defied resolution until the last possible moment.

One area of relative consensus was the commitment of all parties to public access, including a significant new state park on the Ranch, realignment of the Pacific Crest Trail from the desert floor to the highlands of the Ranch, docent-led tours through idyllic Bear Trap Canyon in the heart of the Ranch, and a multifaceted public access program to be devised by the Conservancy. In contrast to the approach taken several years earlier by negotiators of a conservation agreement on the Hearst Ranch along California's central coast where public access was allowed on only 2,000 of 82,000 total acres,¹⁴⁰ the Tejon negotiators agreed that one of the necessary outcomes of an agreement was a guarantee that the public, explicitly including underserved populations, could use and enjoy the natural resources of the conserved lands at Tejon. Even before a final deal had been reached, discussions with the California Department of Parks and Recreation had already begun, with a preliminary concept proposed by state parks staff for a 49,000-acre state park at Tejon.

But the long list of these and other issues to be resolved, even at a conceptual level, remained daunting. As a self-imposed deadline of May 8, 2008, approached and the negotiations appeared to stall, the negotiators moved into a three-day "lock-down" from April 7 to 9, 2008, at the Shutters Hotel in Santa Monica for concentrated negotiations from early morning to late at night to determine once and for all whether an agreement could be reached. A checklist of outstanding issues was created and solutions were hammered out one by one, until a fifteen-page agreement-in-principle on all but a few remaining issues was reached. Because time ran out, so, too, did the parties' intention to address disagreements regarding the design and sustainability of the proposed short-term developments—for example, how their impacts might be reduced—and ultimately it was understood that the agreement would focus solely on conservation, with

139. The Ranch and Resource Groups eventually agreed on a conservancy board of twelve members, with four each allocated to the Ranch and to the Resource Groups, respectively, and four independent members selected by consensus. *Agreement*, *supra* note 112, Ex. K-2, at 3.

140. See Joel R. Reynolds & Susan Smartt, Commentary, *Hearst Deal Needs Full Disclosure*, L.A. TIMES, Apr. 18, 2004, at M5.

design issues left for resolution in the permitting processes. With this decision evaporated any hope on the Ranch's part that at least some of the Resource Groups would be willing to endorse the short-term developments, and the agreement ultimately required only that they "not oppose" the projects—notably, a requirement inapplicable to the legal rights of anyone not a signatory to the deal.¹⁴¹

D. The Result: Tejon Ranch Conservation and Land Use Agreement

Neither litigation nor administrative advocacy was required to achieve an agreement at Tejon Ranch, but they were not irrelevant. In fact, the prospect of both, with the cost, delay, and uncertainty that would accompany them, was one of the driving forces behind the negotiation from the outset. Political lobbying, too, played a significant role: as the likelihood of reaching a successful outcome increased, and because the assistance of state agencies in implementation became central to the agreement as it evolved, the parties agreed that it was essential to brief key state officials and to gauge their level of support for the deal. Without that assurance, the agreement could not have been completed. Particularly helpful in this regard was the Ranch Company's senior advisor, Gary Hunt, whose longstanding relationship with key Agency Secretaries and Governor Schwarzenegger was instrumental both in getting direct access and in securing their commitments of support.

Ultimately, the negotiations lasted about two years, with the last issues being resolved literally within forty-eight hours of the final deadline. Five of the original six Resource Groups that participated in the negotiations¹⁴² and TRC and DMB Associates entered into the Tejon Ranch Conservation and Land Use Agreement (Agreement), which, with a conceptual agreement reached, was announced on May 8, 2008, at a ceremony at Tejon Ranch attended and strongly endorsed by a host of state officials, including Governor Schwarzenegger. According to the Governor, "[t]he success of environmental organizations and Tejon Ranch Co. in reaching this historic agreement to protect a California treasure illustrates something that I have stressed since taking office—we can protect California's environment at the same time we pump up our economy."¹⁴³

141. *Agreement, supra* note 112, at 70–73 (§10).

142. The five signatory Resource Groups are NRDC, Audubon California, Endangered Habitats League, Planning and Conservation League, and Sierra Club. After participating in the first year of negotiations, the Center for Biological Diversity elected to withdraw and ultimately decided not to sign the agreement.

143. See Press Release: Historic Agreement to Protect 240,000 Acres at Tejon Ranch (May 8, 2008), http://www.tejonranch.com/news/company_news.asp?article=75#. Tejon Ranch CEO Bob Stine said the Agreement "brings me the kind of gratification that exceeds any small success I've had in my development career." Historic Agreement Reached for Tejon Ranch, KGET TV (May 8, 2008), [http://www.kget.com/news/local/story/Historic-agreement-reached-for-Tejon-Ranch/tZcmqckrP0q2u8J\]seQVdw.csp](http://www.kget.com/news/local/story/Historic-agreement-reached-for-Tejon-Ranch/tZcmqckrP0q2u8J]seQVdw.csp).

The crowning achievement of the final Agreement, which the parties signed on June 17, 2008 and eventually took the form of an 83-page agreement accompanied by 181 pages of exhibits,¹⁴⁴ is the protection in perpetuity of 240,000 acres, or almost ninety percent of the Ranch.¹⁴⁵ Approximately 178,000 acres will be permanently protected by TRC through a combination of dedicated conservation easements (145,000 acres) and designated project open space (33,000 acres),¹⁴⁶ and, to protect an additional 62,000 acres from development, the Resource Groups acquired an option, over an approximate three-year period, to purchase conservation easements at a price determined by a state-approved, fair-market-value appraisal.¹⁴⁷ In November 2010, with the assistance of a \$15.8 million grant from the California Wildlife Conservation Board, the Resource Groups exercised their option to purchase conservation easements on the 62,000 acres.¹⁴⁸

Another landmark provision of the Agreement is the creation and funding of the non-profit, independent Tejon Ranch Conservancy, which will oversee stewardship and public access on the conserved lands.¹⁴⁹ The mission of the Conservancy, which recently completed its third year of operation, is to preserve, enhance, and restore the native biodiversity and ecosystem values of the Ranch and Tehachapi Range for the benefit of California's future generations.¹⁵⁰ The Conservancy will monitor the easements and work with TRC to oversee all the conserved lands, promoting long-term, science-based stewardship of the Ranch, as well as providing for public enjoyment through educational programs and public access.¹⁵¹ Advances from TRC¹⁵² and transfer fees from future home sales ensure that the Conservancy will have the financial resources to exercise independently its rights and obligations under the Agreement.¹⁵³

144. The final language was not completed until a month after the June 2008 signing ceremony. It took weeks of intense additional negotiations among lawyers on both sides over every line of the eighty-three-page agreement and the accompanying fifty-five-page easement.

145. *Agreement*, *supra* note 112, at 1 (Recital A).

146. *Id.* at 46–48 (§5), Ex. E (dedicated conservation easements); *see also* Tejon Ranch Conservation and Land Use Agreement, Executive Summary, http://tejonconservancy.org/images/uploads/rwa_exec.pdf (last visited Aug. 15, 2011).

147. *Agreement*, *supra* note 112, at 52 (§6.7(a)).

148. *See* Julie Cart, Blog, *Conservation Easements Purchased for Massive Tejon Ranch Tract*, L.A. TIMES (Nov. 18, 2010), <http://latimesblogs.latimes.com/greenspace/2010/11/conservation-easements-purchased-for-massive-tejon-ranch-tract.html> (“The Conservation Board’s grant will be used by the Tejon Ranch Conservancy, which was created to manage the newly protected lands, to buy easements on five parcels that include Joshua tree woodlands, oak woodlands, Mojave Desert grasslands, riparian woodlands and San Joaquin Valley grasslands.”).

149. *Agreement*, *supra* note 112, at 2 (Recital C); *id.* at 20–23 (§2.1).

150. *Id.* at 20 (§2.1(a)).

151. *Id.*

152. The Agreement provides Conservancy funding of \$800,000 per year for up to fourteen years. *See id.* at 20–27 (§2).

153. *Id.* at 2 (Recital C). The Conservancy began operations in July 2008 and got to work immediately. In its first year, the Conservancy formed a board of directors (selected pursuant to the

To ensure that the public will be able to use and enjoy the conserved lands, the Agreement guarantees significant public access to the Ranch, pursuant to a public access plan to be developed and implemented by the Conservancy.¹⁵⁴ Public access will include realignment of thirty-seven miles of the historic Pacific Crest Trail on approximately 10,000 acres through the heart of the Ranch, as well as limited tours to majestic, oak-studded Bear Trap Canyon.¹⁵⁵ Under the Agreement, the Conservancy, the Resource Groups, and TRC also agreed to work cooperatively with state officials to create a major new state park on the Ranch that will potentially encompass nearly 50,000 acres.¹⁵⁶

In exchange for the conservation benefits achieved by the Agreement, the Resource Groups are obligated to refrain from opposing entitlements, approvals, and agency applications for the proposed development projects and for other permitted uses.¹⁵⁷ The Agreement, however, does not in fact authorize development of the Ranch. For any development project TRC decides to pursue on the 30,000 acres not subject to conservation under the Agreement, TRC will be required to obtain necessary approvals, including the completion of all environmental review documents and permitting processes to develop the Centennial, TMV, and TIC projects in compliance with applicable laws, regulations, and standards. The Agreement does not abrogate any agency approval or any aspect of the entitlement processes, nor does it deprive the public of rights of participation and hearing to the extent prescribed by law.

Though not without controversy, the Tejon Agreement has been hailed as one of the most important conservation outcomes in California history.¹⁵⁸ Representatives connected to the Resource Groups have referred to it as

Agreement by TRC and the Resource Groups), recruited an Executive Director (Tom Maloney) and Conservation Science Director (Dr. Michael White), retained a General Counsel (Gibson, Dunn & Crutcher), launched research studies (working with the Donald Bren Graduate School of Environmental Science and Management at the University of California, Santa Barbara) and “citizen science” programs (using volunteers to help document the birds, plants and reptiles of the Ranch), and initiated a public access program that included a first-ever series of hikes and educational outings that are open to the public. *Conservancy Completes Its First Year*, TEJON RANCH CONSERVANCY (July 8, 2009), <http://tejonranchconservancy.org/news/detail/tejon-ranch-conservancy-completes-first-year>.

154. *Agreement*, *supra* note 112, at 41 (§3.11(a)).

155. *Id.* at 42 (§3.11(c)), 44 (§4.1).

156. *Id.* at 45 (§4.2).

157. *Id.* at 70–73 (§10).

158. *See, e.g.*, Editorial, *Saving Tejon Ranch*, N.Y. TIMES, May 13, 2008, at A20 (“[T]o set aside this much land so close to Los Angeles, where development has gone unchecked for the past half-century, is remarkable.”); Noaki Schwartz, *California Developer to Preserve 240,000 Acres of Wilderness*, ASSOC. PRESS, May 8, 2008 (“The deal would result in the largest parcel of land designated for conservation in California history.”). In May 2009, California Lawyer Magazine recognized the Agreement by bestowing a 2009 California Lawyer of the Year Award on Joel Reynolds, Gary Patton, Julie Turrini, Mary Scoonover, William White, and Richard Taylor for their work on behalf of the Resource Groups, and Matthew Bove, Harry O’Brien, and Jennifer Hernandez for their work on behalf of TRC. *See* 2009 CLAY Awards, CALIFORNIA LAWYER, Mar. 2009, <http://www.callawyer.com/story.cfm?eid=899950&evaid=1>.

“conservation on a staggering scale,”¹⁵⁹ a “once-in-a-lifetime conservation opportunity,”¹⁶⁰ and “the ecological equivalent of the Louisiana Purchase.”¹⁶¹ Although some critics have taken issue with the Resource Groups’ decision not to oppose major development on the ten percent of the Ranch on which development may be allowed,¹⁶² it seems unlikely that the traditional approach to land use dispute resolution—that is, serial project-specific administrative advocacy and protracted litigation over decades—could have achieved the level of conservation success that, in a small fraction of the time, the Tejon negotiation was able to secure, both in terms of contiguous, unfragmented wild lands preserved and conservation infrastructure and resources created or committed to manage it.¹⁶³ Whether this alternative approach can serve as a model¹⁶⁴ for future land use disputes is an important question whose answer remains to be seen.

III. SUBMARINES, SONAR, AND THE DEATH OF WHALES: CITIZEN ENFORCEMENT IN *WINTER V. NRDC*

For certain disputes, there is no substitute for litigation, and a good example of this is the fifteen-year battle over the U.S. Navy’s testing and training with high-intensity military sonar. Beginning in 1994, NRDC and a coalition of organizations (NRDC)¹⁶⁵ filed litigation challenging training activities that pose a risk to marine species and their habitat from, among other impacts, extraordinarily loud sound generated by the Navy’s use of underwater explosives and high intensity sonar.¹⁶⁶

159. Jane Braxton Little, *Shangri-La*, AUDUBON MAG., Mar.–Apr. 2010, at 64.

160. Sahagun, *supra* note 117.

161. Humes, *supra* note 114.

162. Louis Sahagun, *Pact Splits Environmentalists*, L.A. TIMES, July 7, 2008, at B1.

163. See, e.g., Graham Chisholm and Joel Reynolds, *Tejon Ranch as a Model*, L.A. TIMES, May 19, 2008, at A15 (“And while a win-some-lose-some record might be OK in baseball, it’s not always good for the environment. It results in a checkerboard landscape of open space and development that does too little for the wildlife and wilderness for which we’re trying to build a future. It turns out, though, that confrontation isn’t so great for property owners either. So, recently, both sides have been willing to try a different path.”); Jane Braxton Little, *Shangri-La*, AUDUBON MAG., Mar.–Apr. 2010, at 64 (“The pioneering accord is a new approach to conservation as bold and far-reaching as the land it protects. Instead of prolonging traditional trench fighting, which promised to drag on for years, the environmental partners opted to accept inevitable development on 10 percent of the ranch to safeguard the hundreds of rare and endemic species living on the other 90 percent.”); *Tejon Ranch Agreement Conserves California’s Wild Heritage*, ENVIRONMENTAL NEWS SERVICE, May 9, 2008, <http://www.ens-newswire.com/ens/may2008/2008-05-09-01.asp> (““This ranch could have become contested terrain and I’m really pleased to say that this agreement really shows a different way,” Chisholm said.”).

164. Chisholm & Reynolds, *supra* note 163.

165. NRDC’s coplaintiffs in these lawsuits included the Humane Society of the United States (low-frequency sonar only), Cetacean Society International, the League for Coastal Protection, the Ocean Futures Society, prominent ocean conservationist Jean-Michel Cousteau, The International Fund for Animal Welfare (mid-frequency sonar cases only), Save the Whales (underwater explosives case only), and Heal the Bay (underwater explosives case only).

166. See generally Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training*, 32 WM. & MARY ENVTL. L.

In almost every case, NRDC's success in securing a federal court injunction was a necessary predicate to persuading the Navy to negotiate seriously over terms that would allow its essential training but subject that training to legally required environmental analysis and operational safeguards to reduce unnecessary harm to marine species, including, in particular, whales and other marine mammals. Without the courts' intervention, attempts at negotiation were repeatedly tried but, without exception, had failed. In only one case, discussed below, did the Navy refuse to negotiate meaningfully even after the issuance of a preliminary injunction, and that case ended eventually in a split decision from the U.S. Supreme Court in *Winter v. Natural Resources Defense Council*.¹⁶⁷

A. Background: Whales and Sound

Whales and other marine mammals rely on sound to communicate, hunt, feed, find mates, and migrate through the dark depths of the ocean.¹⁶⁸ Because light does not travel far below the surface of the ocean, and because sound travels five times more efficiently in water than in air,¹⁶⁹ these animals have learned to rely on sound much as humans have come to rely on sight. But as humans have increasingly introduced noise pollution into the marine environment—including oil exploration, shipping, military activities, intrusive oceanographic research, and other activities—scientists have begun to observe a range of adverse impacts on whales and other marine species, from significant behavioral changes to injuries to mass strandings and death.¹⁷⁰ According to renowned oceanographer Dr. Sylvia Earle, ocean noise pollution “is like the death of a thousand cuts” that, taken together, “is creating a totally different environment than existed even fifty years ago. That high level of noise is likely bound to have a hard, sweeping impact on

& POL'Y REV. 759 (2008); Joel R. Reynolds et al., *No Whale of a Tale: Legal Implications of Winter v. NRDC*, 36 *ECOLOGICAL L.Q.* 753 (2009).

167. *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

168. See MICHAEL JASNY ET AL., SOUNDING THE DEPTHS II: THE RISING TOLL OF SONAR, SHIPPING AND INDUSTRIAL OCEAN NOISE ON MARINE LIFE 28 (2005), available at <http://www.nrdc.org/wildlife/marine/sound/sound.pdf>.

169. *Id.* at 2. Ocean noise pollution has increased significantly in the last century. *Id.* at 5. There has been a rise in the number and scale of ships, as well as underwater oil prospecting and use of wider-ranging sonar. *Id.* Many of these sounds can be heard hundreds or even thousands of miles away. *Id.* at 3. The Scientific Committee of the International Whaling Commission reported in 2004 that ocean noise poses a significant and growing threat to populations of marine mammals. International Whaling Commission, *2004 Report of the Scientific Committee* (Cambridge, Eng.: IWC, 2004) §12.2.5.1, Annex K at § 6.4 (reprinted in *Journal of Cetacean Research & Management*, vol. 7, May, 2005), available at http://de.wdcs.org/laerm/download/IWC2004_Sci_Comm_Report.pdf (last visited Oct. 18, 2011). Scientists have recently discovered that ocean acidification, caused by the ocean absorbing an increase in anthropogenic carbon dioxide emissions, will make the oceans sixty percent noisier over the next century. Henry Fountain, *More CO2 May Create a Racket in the Seas*, N.Y. TIMES, Dec. 28, 2009, at D3; see also Letter, *Future Ocean Increasingly Transparent to Low-Frequency Sound Owing to Carbon Dioxide Emissions*, NATURE GEOSCIENCE 3, 18–22 (2010), <http://www.nature.com/ngEO/journal/v3/n1/full/ngEO719.html>.

170. JASNY ET AL., *supra* note 168, at 13, 16.

life in the sea.”¹⁷¹

Most widely publicized has been a number of documented incidents of mass strandings of marine mammals in the wake of sonar exercises, most prominently deep-diving beaked whales but also including other marine mammal species.¹⁷² Scientists began drawing the connection in the late 1980s following naval exercises and a series of atypical mass strandings of beaked whales near the Canary Islands.¹⁷³ In 1996 following NATO exercises using low- and mid-frequency active sonar, a dozen Cuvier’s beaked whales were found stranded along the west coast of Greece.¹⁷⁴ Since then dozens of other documented strandings have been correlated with sonar training exercises,¹⁷⁵ including one particularly well-studied mass mortality in March 2000 when sixteen whales of three different species were found stranded over 150 miles of shoreline along the New Providence Channel in the Bahamas after Navy ships used mid-frequency active (MFA) sonar in the area.¹⁷⁶ A joint investigation by the Navy and the National Marine Fisheries Service (NMFS) attributed hemorrhaging in and around the whales’ ears and auditory tissues to sonar exposure, likely leading to their stranding and death.¹⁷⁷ The region’s entire population of beaked whales, well-documented for decades, disappeared.¹⁷⁸

B. NRDC’s Sonar Litigation

NRDC first learned about the Navy’s use of sonar in 1995, following its successful litigation against the Navy’s application to conduct “ship shock” (underwater explosives) testing off the southern California coast.¹⁷⁹ In the summer of 1995, NRDC contacted the Secretary of the Navy with concerns about a classified system called Low Frequency Active sonar, or LFA, being tested in locations around the globe, including along the Pacific Coast of the United States. In response to NRDC’s request, the Navy committed in 1996 to undertake a programmatic Environmental Impact Statement, which was completed six years later in connection with a five-year permit from the NMFS to deploy LFA over 75

171. *Id.* at iv.

172. Reynolds, *supra* note 166, at 759, 763–70.

173. *See* M.P. Simmonds & L.F. Lopez-Jurado, *Whales and the Military*, 351 NATURE 448 (1991).

174. A. Frantzis, *Does Acoustic Testing Strand Whales?*, 392 NATURE 29 (1998).

175. JASNY ET AL., *supra* note 168, at 8.

176. DEPT OF COMMERCE & SECY OF THE NAVY JOINT INTERIM REPORT: BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15–16 MARCH 2000 at 2 (2001), available at http://www.nmfs.noaa.gov/pr/pdfs/health/stranding_bahamas2000.pdf (last visited Oct. 18, 2011).

177. *Id.* at 16.

178. *See* Natural Res. Def. Council v. Winter, 518 F.3d 658, 667 (9th Cir. 2008).

179. *See* Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training*, 32 WM. & MARY ENVTL. L. & POLY REV. 759, 775–76 (2008).

percent of the world's oceans.¹⁸⁰ NRDC promptly sued, and a preliminary injunction was issued in August 2002; following cross-motions for summary judgment, a permanent injunction was entered a year later and a settlement agreed to among the parties in October 2003 that significantly reduced the LFA operations area and allowed the Navy to deploy LFA in a limited area along the eastern seaboard of Asia, the area of its greatest strategic concern.¹⁸¹ In 2005 and 2006, NRDC followed up this litigation with two lawsuits focusing on the Navy's unregulated testing and training with mid-frequency active sonar, or "MFA," the principal submarine detection system used by the U.S. Navy and other navies today.¹⁸² In each case, the courts substantially upheld NRDC's claims, leading to negotiated agreements addressing scheduling for, environmental reviews of, and operational safeguards in sonar training, as well as, in a settlement agreed to in December 2008, the funding of \$14.75 million in specifically targeted marine mammal research.¹⁸³

C. *Winter v. NRDC: Setting the Stage*

In early 2007 the U.S. Navy sought California Coastal Commission (CCC) approval for a two-year series of fourteen sonar exercises to be conducted in Southern California (SOCAL) coastal waters, around the Channel Islands National Marine Sanctuary. In total, the exercises were expected to affect thirty species of marine mammals, including five endangered whale species, and result in an estimated 170,000 individual "takes" (defined at 16 U.S.C. § 1362(13) as "harass, hunt, capture, or kill any marine mammal or attempt to harass, hunt, capture, or kill any marine mammal") between January 2007 and January 2009.¹⁸⁴ No environmental impact statement (EIS) had been prepared.

When, in March 2007, the Navy rejected conditions proposed by the Coastal Commission,¹⁸⁵ NRDC sued the Navy and the NMFS (Navy) and, in May 2007,

180. *Natural Res. Def. Council v. Evans*, 279 F. Supp. 2d 1129, 1165–75 (N.D. Cal. 2003).

181. *Natural Res. Def. Council v. Evans*, 232 F. Supp. 2d 1003, 1054 (N.D. Cal. 2002); *Evans*, 279 F. Supp. 2d at 1192; *Natural Res. Def. Council v. Gutierrez*, No. 07 Civ. 4771, 2008 WL 360852 (N.D. Cal. Feb. 6, 2008); Stipulated Settlement Agreement Order, *Gutierrez*, No. 07 Civ. 4771, 2008 WL 360852, available at http://docs.nrdc.org/water/files/wat_08081201a.pdf.

182. *Natural Res. Def. Council v. England*, No. 05 Civ. 7513 (C.D. Cal. Oct. 19, 2005); *Natural Res. Def. Council v. Winter*, No. 06 Civ. 4131 (C.D. Cal. July 3, 2006). See also *Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1220 n.3 (C.D. Cal. 2008) (summarizing the relevant legal actions). For an additional NRDC lawsuit against the Navy's use of sonar, see *Natural Res. Def. Council v. U.S. Dep't of the Navy*, No. 01 Civ. 07781, 2002 WL 32095131 (C.D. Cal. Sept. 17, 2002).

183. *Natural Res. Def. Council v. Evans*, 232 F. Supp. 2d at 1054; *Natural Res. Def. Council v. U.S. Dep't of the Navy*, No. 94 Civ. 2337, 1994 WL 715704, at *1, *2 (C.D. Cal. May 6, 1994); Settlement Agreement, *Natural Res. Def. Council v. Winter*, No. 06 Civ. 4131 (C.D. Cal. July 7, 2006) (on file with author); Stipulated Settlement Agreement Order, *Gutierrez*, No. 07 Civ. 4771, 2008 WL 360852, available at http://docs.nrdc.org/water/files/wat_08081201a.pdf.

184. See U.S. DEP'T OF THE NAVY, FINAL JOINT TASK FORCE EXERCISES AND COMPOSITE TRAINING UNIT EXERCISES, at Table 4.3.6, Table 4.3.7 (2007) (on file with author).

185. See Letter from Mark Delaplaine, Federal Consistency Supervisor, California Coastal

requested a preliminary injunction, claiming that the Navy (1) violated NEPA by failing to prepare an EIS, (2) violated the Endangered Species Act (ESA) by failing to prepare an adequate Biological Opinion, and (3) violated the Coastal Zone Management Act (CZMA) by declining to submit a legally sufficient consistency determination to the California Coastal Commission (CCC).¹⁸⁶ Concurrently, the CCC filed suit against the Navy for its refusal to comply with the CZMA in implementing any of the CCC's twelve suggested mitigation measures in accordance with the state's Coastal Management Program.¹⁸⁷

Virtually from start to finish a year and a half later, this litigation proceeded at a relentless pace, driven by plaintiffs' efforts to enjoin the ongoing series of planned training exercises. In the first week of August, U.S. District Judge Florence Marie Cooper issued a preliminary injunction, finding that the plaintiffs had demonstrated a likelihood of success on the NEPA and CZMA claims and prohibiting the use of sonar in the southern California exercises.¹⁸⁸ The court found to "a near certainty that use of MFA sonar during the planned SOCAL exercises will cause irreparable harm to the environment."¹⁸⁹ It also found the Navy's proposed mitigation "woefully inadequate" and concluded that the balance of hardships clearly favored the public interest.¹⁹⁰ The Navy filed an immediate appeal and an emergency motion for a stay pending appeal, and its motion was granted and the appeal expedited by the Ninth Circuit Court of Appeals' motions panel on August 31, 2007.¹⁹¹ The 2-1 majority held that Judge Cooper had failed to give sufficient weight to the public's interest in an adequately trained Navy, noting pointedly that "we are currently engaged in war, in two countries The safety of the whales must be weighed, and so must the safety of our warriors. And of our country."¹⁹² But two months later, after expedited briefing and hearing, the Ninth Circuit merits panel affirmed the District Court and reinstated the injunction but remanded with instructions to "narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training

Commission, to Rear Admiral Len Hering, U.S. Dep't of the Navy (Jan. 11, 2007) (on file with author); Letter from Rear Admiral, C.J. Massey, U.S. Dep't of the Navy, to Peter Douglas, California Coastal Commission Executive Director (Feb. 12, 2007), available at <http://www.coastal.ca.gov/fedcd/sonar/navy-response-sonar-3-22-2007.pdf>; see also Press Release, California Coastal Commission, Coastal Commission Sues U.S. Navy Over Use of Undersea Sonar Activities, Mar. 22, 2007, available at <http://www.coastal.ca.gov/fedcd/sonar/pr-3-22-2007-sonar.pdf>.

186. Compl., Natural Res. Def. Council v. Winter, No. 07 Civ. 0335 (C.D. Cal. Mar. 22, 2007).

187. Compl., Cal. Coastal Comm'n v. U.S. Dep't of the Navy, No. 07 Civ. 01899 (C.D. Cal. Mar. 7, 2007), available at <http://www.coastal.ca.gov/fedcd/sonar/ccc-v-navy-2-22-2007.pdf>.

188. Natural Res. Def. Council v. Winter, 645 F. Supp. 2d 841, 847 (C.D. Cal. Aug. 7, 2007).

189. Order Denying Def.'s Motion to Dismiss or Stay and Granting in Part and Denying in Part Pl.'s Motion for a Preliminary Inj. at 19, Natural Res. Def. Council v. Winter, No. 07 Civ. 0335 (C.D. Cal. Aug. 7, 2007).

190. *Id.*

191. Natural Res. Def. Council v. Winter, 502 F.3d 859, 861-65 (9th Cir. 2007).

192. *Id.* at 863-64.

exercises.”¹⁹³

In January 2008, after a round of briefing on proposed mitigation, the District Court issued a tailored injunction imposing six specified mitigating conditions to minimize the potential harm of the sonar training on marine species.¹⁹⁴ These measures included a twelve-nautical-mile coastal buffer zone and an exclusion zone in the high abundance Catalina Basin, a two-kilometer sonar shut-down zone around the sonar vessel when marine mammals are found to be present, and a power-down requirement in the event of significant surface-ducting, a water temperature condition that reduces attenuation of the sonar signal.¹⁹⁵

This time the Navy not only appealed and sought an emergency stay in the Ninth Circuit, but simultaneously sought from the Executive Branch (1) a CZMA Presidential waiver and (2) a finding of “emergency circumstances” by the White House Council on Environmental Quality (CEQ) justifying “alternative arrangements” as a substitute for compliance with NEPA’s EIS requirement. President Bush granted the CZMA waiver, relying on a never before used provision that allows exemption if the activity is found to be “in the paramount interest of the United States.”¹⁹⁶ Based on an *ex parte* presentation of evidence by the Navy, CEQ found “emergency circumstances” and purported to authorize the Navy to continue its training exercises without complying with the court-ordered injunctive mitigation measures.¹⁹⁷ The Navy then presented both actions to the Ninth Circuit, which promptly remanded the entire matter to the District Court for consideration, including the potential constitutional confrontation between the Judicial and Executive branches, invited by the Navy’s reliance on the Executive Branch waivers.¹⁹⁸

On February 4, 2008, the District Court rejected the Navy’s claims once again, including its waiver defense.¹⁹⁹ When the Navy filed an emergency (and, by its own characterization, purportedly time-limited) appeal and motion for a stay, the court of appeals immediately rejected the Navy’s attempt to limit its time for review, but *sua sponte* expedited the full appeal and committed to issue a decision by early March. After hearing on February 27, the Ninth Circuit issued a forty-five-page decision affirming in all respects the District Court’s decisions²⁰⁰ and rejecting the Navy’s request to vacate the District Court’s injunctions since, in the

193. Natural Res. Def. Council v. Winter, 508 F.3d 885, 887 (9th Cir. 2007).

194. Natural Res. Def. Council v. Winter, 530 F. Supp. 2d 1110, 1119–21 (C.D. Cal. 2008).

195. *Id.*

196. 16 U.S.C. § 1456 (c)(1)(B) (2006); Natural Res. Def. Council v. Winter, 518 F.3d 658, 661(9th Cir. 2008).

197. 40 C.F.R. § 1506.11 (2010).

198. Natural Res. Def. Council v. Winter, 513 F.3d 920, 922 (9th Cir. 2008).

199. Natural Res. Def. Council v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008).

200. *Winter*, 518 F.3d at 697–98, 703.

court's view, no emergency conditions existed to justify CEQ's action.²⁰¹ However, pending filing by the Navy of a Petition for a Writ of Certiorari in the U.S. Supreme Court, the Ninth Circuit issued a partial temporary stay of two of the six conditions of the injunction.²⁰²

D. Winter v. NRDC: Supreme Court

Throughout the litigation, the plaintiffs were represented by a team of lawyers from NRDC and the Los Angeles-based law firm of Irell and Manella.²⁰³ When, in June 2008, the U.S. Supreme Court granted the Navy's application for review,²⁰⁴ this team was expanded to include Supreme Court litigation specialists and others at the Irell firm who could take a fresh look at the case and help to re-frame the legal issues in order to maximize the likelihood of success in opposing the Navy's latest appeal. In addition, plaintiffs' counsel immediately began the process of identifying potential *amici curiae* and their counsel to address specific issues in greater depth than would otherwise be possible in plaintiffs' brief on the merits.²⁰⁵ Finally, Irell Senior Litigation Partner Richard Kendall, who would argue the case, scheduled a series of moot courts with the assistance of law faculty at UCLA, Harvard, and Georgetown.²⁰⁶ As NRDC's briefing in the Supreme Court evolved, its argument focused more on the rule of law—is the Navy bound to comply with the law, including an order of the district court?—and less on the Navy's environmental noncompliance. By this shift, NRDC sought to persuade a majority of the Court (and Justice Anthony Kennedy as the likely swing vote) that Judge Cooper had properly done her job both in finding that the law had been violated and, through a careful balancing of the equities, in crafting a remedy to address the violation.

As is clear from the Court's various opinions, and as has previously been written,²⁰⁷ the success of this strategy was mixed. The Court reached neither the merits of the claimed legal violations,²⁰⁸ the constitutional or statutory merit of the

201. *Id.* at 680–81.

202. *Id.* at 663, 703.

203. The CCC was represented by the California Attorney General but did not actively pursue its separate lawsuit.

204. *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

205. Amicus briefs in support of plaintiffs were prepared by Akin Gump attorneys Edward Lazarus and Michael Small (separation of powers issues), Paul Hastings attorneys Peter Weiner and Stephen Kinnaird (states' rights issues), Meyer Glitzenstein & Crystal partner Eric Glitzenstein (environmental issues), and Winston & Strawn partners Michael Bhargava and Peter Perkowski (science issues).

206. These faculty members included Richard Lazarus, Justice William J. Brennan, Jr. Professor of Law and Faculty Director of the Supreme Court Institute at the Georgetown University Law Center, and Jody Freeman, founding Director of the Harvard Law School Environmental Law Program.

207. Reynolds et al., *supra* note 166, at 764–70.

208. Indeed, the Navy acknowledged its NEPA obligation and reaffirmed its scheduled preparation of an EIS for future sonar exercises in SOCAL. Brief for the Petitioners at 11, Natural

Navy's Executive Branch waiver defenses, nor any of the potentially sweeping arguments proposed by the Navy with respect to standing, irreparable harm, and the specific environmental statutes at issue. Of the six injunctive conditions imposed by the District Court, four were left untouched by the Court while two were vacated. Indeed, because the Court didn't hear the case until October 2008 and its decision was not issued until November—just two months prior to the conclusion of the two-year series of training exercises that gave rise to the case—all but one of the training exercises were actually conducted subject to the full injunction (or slight variations of it) despite the Navy's repeated claims at every level of the courts that its training was seriously threatened.

The focus of the Court's five-member majority's opinion was narrow and closely tied to the majority's own view of the facts of the case.²⁰⁹ First, the Court found the lower courts had improperly balanced the public's interests by failing to give adequate weight to national security.²¹⁰ Justice Roberts' majority opinion echoed the Ninth Circuit motions panel's August 2007 statement that "[w]e are currently engaged in war, in two countries."²¹¹ The Court majority determined that the "lower courts failed properly to defer to senior officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises,"²¹² and it stressed the need for the Navy to conduct unhampered, realistic training exercises.²¹³ At the same time, however, Justice Roberts made clear that the balance will not always weigh in favor of national security, stating that "military interests do not always trump other considerations, and we have not held that they do."²¹⁴

Second, the Court held that the two challenged mitigation provisions of the preliminary injunction posed a credible threat to national security.²¹⁵ This holding, too, is likely to have only narrow application since the vast majority of NEPA-based injunction requests do not concern national security. Additionally, the Court reaffirmed the principle of judicial discretion in determining whether injunctive relief is appropriate in a given case, and it suggested that more concrete evidence of environmental harm than had been offered in this case may allow a court to uphold an injunction against the military.²¹⁶ Notably, Justice Roberts mentioned

Res. Def. Council v. Winter, 555 U.S. 7 (2008).

209. In the holding with seemingly broadest potential application, the Court majority rejected the Ninth Circuit's "possibility" of irreparable harm preliminary injunction standard, instead finding there must be a demonstration of a "likelihood" of irreparable harm. See *Winter*, 555 U.S. at 21–22. But this holding is unlikely to alter the standard in the Ninth Circuit, because it already requires a "significant threat of irreparable injury." See Reynolds et al., *supra* note 166, at 763.

210. *Winter*, 555 U.S. at 26.

211. Natural Res. Def. Council v. Winter, 502 F.3d 859, 863 (9th Cir. 2007).

212. *Winter*, 555 U.S. at 27.

213. *Id.* at 28.

214. *Id.* at 26.

215. *Id.* at 32–33.

216. *Id.*

repeatedly the undisputed finding that in forty years of sonar training off the Southern California coast there had been no marine mortality definitively caused by sonar exposure.²¹⁷

Finally, instead of assessing the trial court's findings through the traditional appellate review standard—that is, whether the trial judge's findings of fact were “clearly erroneous”—the Court majority in effect imposed its own reading of the facts and, in so doing, may have weakened the precedential impact of its decision on future cases in which factual circumstances inevitably differ. Time will tell. Be that as it may, there can be no doubt that the *Winter* decision was narrow in its holding, fact-based in its focus, and limited even in its application to the single exercise remaining to be conducted. Given the Navy's unsuccessful invitations in the case for far-reaching constitutional and statutory rulings by the Roberts Court, the impact of the decision is likely to be less definitive than either the Navy, in seeking review, had hoped or the plaintiffs, in opposing it, had feared.²¹⁸

CONCLUSION

In addressing complex environmental policy choices, no single advocacy strategy will make sense in every case, nor are the strategies discussed above mutually exclusive. As these case studies illustrate, they each have a role to play in a thoughtful, effective campaign, even though the emphasis given to a particular strategy will vary according to circumstances. And whatever the strategy, our experience has been that working in coalitions in a coordinated manner in pursuit of common goals can substantially enhance the likelihood of success.

It is nevertheless possible to make some concluding observations about the

217. See, e.g., *id.* at 366 (“The Navy disputes that claim, noting that MFA sonar training in SOCAL waters has been conducted for 40 years without a single documented sonar-related injury to any marine mammal.”); *id.* at 370 (“The Court of Appeals upheld a preliminary injunction imposing restrictions on the Navy's sonar training, even though that court acknowledged that ‘the record contains no evidence that marine mammals have been harmed’ by the Navy's exercises.”) (quoting *Natural Res. Def. Council v. Winter*, 518 F.3d 658, 667 (9th Cir. 2008)); *id.* at 371 (“The Navy emphasizes that it has used MFA sonar during training exercises in SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal.”); *id.* at 375 (“On the facts of this case, the Navy contends that plaintiffs' alleged injuries are too speculative to give rise to irreparable injury, given that ever since the Navy's training program began 40 years ago, there has been no documented case of sonar-related injury to marine mammals in SOCAL.”); *id.* at 381 (“This is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal.”); *id.* at 383 (“It notes that, despite 40 years of naval exercises off the southern California coast, no injured marine mammal has ever been found.”).

218. Advocacy over the Navy's environmental compliance and planning in its training with high intensity sonar continues. See, e.g., *Compl., Defenders of Wildlife v. U.S. Navy*, No. 10 Civ. 00014 (S.D. Ga. Jan. 28, 2010); *Plaintiffs' Motion for Summary Judgment and Memorandum in Support, Defenders of Wildlife v. U.S. Navy*, No. 10 Civ. 00014 (S.D. Ga. Jan. 28, 2010); *Compl., Intertribal Sinkyone Wilderness Council v. Nat'l Marine Fisheries Serv.*, No. 12 Civ. 0420 (N.D. Cal. Jan. 26, 2012); see also Jean-Michel Cousteau & Joel R. Reynolds, *Smarten Up Naval Sonar to Save the Whales*, CHRISTIAN SCI. MONITOR, Apr. 2, 2009, <http://www.csmonitor.com/Commentary/Opinion/2009/0402/p09s02-coop.html>.

relative “pros and cons” of the three general strategies considered in this Article.

A. Litigation

As over a decade of sonar litigation against the U.S. Navy makes clear, litigation is an enormously useful, often essential tactic in motivating an adversary to listen to reason—or at least to obey the law. The right of citizens to access the courts to enforce the law and compel significant change even from the most powerful interests remains one of the great cornerstones of our democracy. It has been at the heart of the modern environmental movement’s progress since the National Environmental Policy Act was enacted in 1969. In any campaign, the value of an ability to litigate cannot be overstated.

But litigation is sometimes a blunt and frequently a reactive instrument that can lead even a prevailing plaintiff to “win the battle and lose the war.” It is time-consuming and resource intensive, with enormous pressures, and nowhere is this more obvious than when, as in the *Winter v. NRDC* case, emergency relief is required to address the problem at the heart of the litigation.

And, as most experienced environmental litigators have learned, litigation can be a roll of the dice even with a strong case, particularly when, as with many environmental policy decisions, the outcome may be affected by the ideological perspective of the judge or judges. *Winter* bears this out, as the outcome at various stages—for example, between the motions and merits panels in the Ninth Circuit—changed dramatically depending on which judge or panel was assigned to hear it. Because environmental policy decisions are ultimately political (and not just scientific or economic) judgments, litigation is most effective when it can be used not just to enforce the law but as part of an overall campaign to affect the political equation.

B. Administrative Advocacy/Citizen Action

The doctrine of administrative exhaustion dictates that administrative advocacy is a prerequisite to litigation, and the purpose of this rule is to ensure that an agency has the opportunity before litigation is filed to consider an argument and, if warranted, alter its decision. In some cases, however—for example when an agency is “captured” by the very stakeholder they are charged to regulate—administrative advocacy can be a lesson in futility. In the case of the Orange County Transportation Corridor Agencies—an agency with the power and the inclination to approve its own toll road projects—the process can seem costly and pointless except as a mandatory step in the march to the courthouse.

On the other hand, where an agency with an environmental mission is committed to enforce the law—as was the California Coastal Commission in its review of the Foothill-South Toll Road—it is possible to prevail at the administrative level. But even in the case of that uniquely destructive project, its rejection was achieved only as a result of careful planning, focused advocacy,

effective organization, adequate funding, and an issue of sufficient interest to the media and the public to get involved. All of this was brought to bear on the Coastal Commission in its review of the toll road, and the successful outcome was a direct product of that concerted effort.

C. Negotiation

If you can get there with leverage, a highly motivated negotiation may be the best of all possible worlds. Perhaps most important, it enables the parties themselves, as the stakeholders most affected, to develop a solution tailored to address the underlying problem. And it allows them to do so early, in an affirmative way, without waiting to react to an administrative or judicial decision already issued or being implemented. This was an important factor in the Tejon Ranch negotiation.

Also important to that process was the direct engagement of the necessary decision-makers from both sides, present at the table or readily accessible, with a strong motivation to be there and a realistic but not unlimited time frame in which to negotiate. An atmosphere and ground rules conducive to a free and effective exchange of information are critical, as is a controlled environment in which confidentiality can be maintained for as long as is required. Where issues are complex and solutions not readily apparent, the parties need a capacity and willingness to recognize the legitimate interests of the other stakeholders in order to increase the likelihood that their own goals will be achieved.

Finally, while it may be tempting to “begin at the end of the road”—to confront the most intractable issues first—it is almost always more productive in complex disputes to begin with small steps, addressing some of the lesser issues at the outset and leaving the significant problems to a point of relatively greater momentum in the negotiation. This deliberate ordering of the discussions was very much at the heart of the Tejon process and ultimately proved essential to its success.