2009

Strip-Mining and Grassroots Resistance in Appalachia: Community Lawyering for Environmental Justice

Dean Rivkin

The University of Tennessee, Knoxville
College of Law
Legal Studies Research Paper Series
Paper No. 85

New York Law School
Clinical Research Institute
Research Paper Series No. 09/10 #7

Strip Mining and Grassroot Resistance in Appalachia:

By Dean Hill Rivkin
University of Tennessee College of Law
and
Chris Irwin, United Mountain Defense
and
Anne Passino

Electronic copy available at: http://ssrn.com/abstract=1478549

Strip-Mining and Grassroots Resistance in Appalachia:

Community Lawyering for Environmental Justice

Dean Hill Rivkin*

Chris Irwin**

Anne Passino***

ABSTRACT

Environmental justice campaigns have been a dynamic feature of public interest lawyering for over four decades. These community lawyers, sensitive to the democratic imperatives of their grassroots clients, employ a viscous blend of legal and nonlegal strategies to achieve their clients' aims. This article is the story of an environmental justice campaign, still being waged, in the Appalachian mountains of east Tennessee. The campaign seeks to halt the destructive practice of mountaintop removal strip-mining for coal through the deployment of traditional litigation and more unconventional extrajudicial strategies, both of which are designed to build the voices and power of the groups and communities opposed to mountaintop removal. This case study places this "local" struggle in the context of emerging new public interest lawyering.

* College of Law Distinguished Professor, University of Tennessee College of Law. A.B. Hamilton College (1968); J.D. Vanderbilt Law School (1971). This piece is dedicated to the late Luke Cole, the path-breaking late Director of the Center on Race, Poverty, and the Environment. Professor Rivkin was of counsel in the first Zeb Mountain case, which is discussed below, *infra* note 30. We acknowledge the indispensable research and technical assistance of Patricia Graves and Eliot Kerner, 3Ls at the University of Tennessee College of Law.

** Attorney, Knoxville, TN. B.A. University of Tennessee (1994); J.D. University of Tennessee College of Law (2006).

*** Attorney, Ritchie, Dillard, & Davies, Knoxville, TN. B.A. University of Virginia (2003); J.D. University of Tennessee College of Law (2008).

I. INTRODUCTION

> Now all of the issues of environmental racism and environmental justice don't just deal with people of color. We are just as much concerned with inequities in Appalachia, for example, where the whites are basically dumped on because of lack of economic and political clout and lack of having a voice to say "no" and that's environmental injustice.
>
> — Dr. Robert Bullard[1]

For well over a century, central Appalachia has been an environmental justice and energy sacrifice zone. Technological developments in strip-mining for coal have destroyed the fabric of many Appalachian communities and wreaked incalculable damages on the environment. Although coal continues to play an important role in our national energy policy, the use of coal has grown more controversial in recent years and its proponents have found themselves increasingly on the defensive.[2] Within this context, communities are engaged in intensive struggles to halt the damages caused by mountaintop removal strip-mining, the literal leveling of mountains.

One such struggle is taking place at Zeb Mountain in ~~N~~northeast Tennessee. It is a grassroots campaign that has relied heavily on direct action protests, aggressive education, organizing and media work. There has also been an accompanying legal component. This paper will focus on the multi-faceted struggle at Zeb Mountain and evaluate the strategies of resistance in the context of an overall movement whose determined mission is to advocate for just and

[1] Interview by Errol Schweizer with Robert D. Bullard, Ph.D., Director, Environmental Justice Research Center & Edmund Asa Ware Professor of Sociology, Clark Atlanta University (July 1999), http://www.ejnet.org/ej/.

[2] Matthew Brown, *Coal Plants Checked by Enviro Campaigns, Costs*, USA TODAY (Mar. 6, 2009), available at http://www.usatoday.com/news/nation/states/nevada/2009-03-06-1045198583_x.htm?loc=interstitialskip (describing the growing trend of abandonment or postponement of coal projects across the nation). As an example of the level of organization by environmental groups, the Sierra Club provides a list of proposed coal plants across the nation and urges viewers to contact local activists who are opposing these projects. Sierra Club Plant List, http://www.sierraclub.org/environmentallaw/coal/plantlist.asp.

Electronic copy available at: http://ssrn.com/abstract=1478549

equitable energy and environmental policies and practices for people and communities in the Appalachian Mountains.

In his sweeping article, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coal Fields*, Patrick C. McGinley, a seasoned public interest coalfield litigator and scholar, surveys the marred historical landscape of strip-mining conflicts in West Virginia. His article focuses on mountaintop removal, the latest technological development in strip-mining, and its immense effects on communities and the environment in West Virginia. He cites efforts by coal interests in West Virginia to circumvent the governing environmental law[3] and to institute a policy of extermination of communities and homes near mining sites,[4] a policy, he says, that wants "to let natural selection play out."[5] McGinley bemoans "[t]he paucity of attention given by historians and legal scholars to the legal regime that

[3] Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENVTL. L. 21, 65-67 (2004) ("Approximate original contour, or AOC, is the heart of the federal strip mining law. But among many West Virginia regulators it's becoming a joke. The [Charleston] Gazette reported that the AOC waiver rules were 'routinely skirted by dozens of huge mountain-top removal strip-mines.' After coal companies blasted and ripped apart mountain ridge tops to reach multiple coal seams, state regulators allowed them to avoid the expense of restoring the land to AOC.").

[4] Prof. McGinley writes that:

> The very existence of some former coal camps presents an obstacle to corporate plans . . . [that] [s]uch communities are quite literally 'targeted' for elimination. . . . Equally well documented is the approach of many coal companies to communities where elimination is not achievable - they simply carry on mining-related activities as if their coalfield neighbors do not exist. Thus, the corporate expectation, or at least the hope, is that communities will suffer in silence the infringements of private property rights that would never be tolerated in the upscale suburbs where most politicians, regulators, and coal company managers live.
>
> When homeowners . . . got fed up with the conditions created by mining operations, some would approach the company asking to be bought out. . . . [Tlhe company required sellers to sign a five-page 'Option to Purchase' agreement. . . . In return for the sale of a home and surrounding property, families were required to promise to leave them homeplaces - former coal camps in hollows that had been home to some for generations. . . . Sellers also had to agree to give up their right to speak out against strip mining and take back prior protests.

Id. at 76-77, 96-97. *See also infra* note 17.

[5] *Id*. at 105.

provided the framework for economic development in the 'billion dollar coalfield,"'[6] and urges a more sustained "scholarly discussion of environmental, economic, and social justice in a region that for a century has given much more to the nation than its citizens have received in return."[7] This article responds in part to McGinley's call.[8]

A. Environmental Justice in Appalachia

Environmental Justice (EJ) is "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[9] Resource-rich regions throughout the world suffer from a seeming paradox: rarely do their inhabitants benefit from demand for their natural resources.[10] Indeed, the opposite is true. The extraction of

[6] *Id*. at 24.

[7] *Id. See also* Bryan C. Banks, *High Above the Environmental Decimation and Economic Domination of Eastern Kentucky, King Coal Remains Firmly Seated in Its Gilded Throne*, 13 BUFF. ENVT'L L.J. 125 (2006).

[8] The article, as a modest case study, also aspires to join the "new wave" of public interest scholarship analyzed by Scott L. Cummings & Ingrid V. Eagly in *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1292 (2006) (reviewing JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005)).

[9] United States Environmental Protection Agency; Environmental Justice Home Page, *available at* http://www.epa.gov/compliance/environmental justice/index.html (last visited June 30, 2009).

[10] Many commentators have described this paradox in the context of Appalachia. *See, e.g.*, CHAD MONTRIE, TO SAVE THE LAND AND PEOPLE: A HISTORY OF OPPOSITION TO SURFACE COAL MINING IN APPALACHIA 16 (UNC Press 2003) (noting the "paradox" in the prevalence of poverty in a resource-rich region such as Appalachia); ERIK REECE, LOST MOUNTAIN: A YEAR IN THE VANISHING WILDERNESS 5 (Riverhead Books 2006) (describing how Appalachia has "the richest ecosystem in North America" but also contains "some of the poorest people in the United States"). In 2000, the Appalachian Region had a poverty rate of 110.2% that of the United States as a whole. Appalachian Regional Commission, "Poverty Rates in Appalachia, 2000," *available at* http://www.arc.gov. For areas in Appalachia that are mined, there are even higher poverty rates compared to the national average. LOST MOUNTAIN at 52 (describing how the most heavily mined areas in Appalachia are also the most impoverished). With new technology, citizens can become cartographers; some have mapped the correlations between surface mining and census categories using Google Earth technology. *See* http://www.flickr.com/photos/nationalmemorial forthemountains/284917453lidset-721575943038355051 (mapping unemployment rates in Appalachia and the sites of surface mining operations); http://www.flickr.com/photos/nationalmemorialforthemounins/284917378lidset-72

natural resources has invariably left a legacy of destruction and repression. The political economy of this stark disparity is beyond the scope of this paper, but evidence of the disparity in Appalachia is clear.[11] While a handful of corporations and individuals have become rich in exploiting Appalachia's abundant resources, especially its coal, the region remains economically deprived, environmentally damaged, and politically oppressed. As strip-mining technology has advanced, larger swaths of land are vulnerable to massive disturbance. The latest technology, fueled by the deployment of mammoth machines, shaves off mountaintops to recover coal from seams that could not be reached in the past.[12]

The economy of coal has also spurred the development of new, more remote seams. With cyclical prices often ranging up to $60 per ton, mining that was economically infeasible in the past has become profitable—a misleading term, because it ignores many costs that have never been rightly calculated.[13] Proponents of coal continue to argue that it is a cheap form of energy,

---

1575943038355051 (poverty rates and surface mining); and http://www.flickr.com/photos/nationalmemoriaIforthe mountains/2849 1743 5/in/set-72 157594303 83 55051 (surface mining and population change).

[11] *See generally* Wendy B. Davis, *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 AM. U. L. REV. 905 (2002) (noting the economic inequality and arguing, inter alia, for reparations for Appalachian communities which have suffered from exploitation at the hands of coal companies). The Appalachian people have long been discounted by the political establishment, which perhaps provides false justification for the neglect of Appalachian interests. *See, e.g.*, PENNY LOEB, MOVING MOUNTAINS: HOW ONE WOMAN AND HER COMMUNITY WON JUSTICE FROM BIG COAL 12 (University of Kentucky Press 2007) (noting how the Appalachian people were "typecast[t]" by writers in the 1960s, such as Jack E. Weller and Harry M. Caudill, who "questioned whether the people of Appalachia are capable of working together for the betterment of themselves"); Montrie, *supra* note 10, at 12-13 (noting how outside commentators have conventionally portrayed the Appalachian people as being "backward" and insisted upon the "otherness" of Appalachian culture).

[12] Erik Reece vividly describes how these mountains have literally been "[s]calped." Reece, *supra* note 10, at 31.

[13] *See* McGinley, *supra* note 3, at 47 ("[M]ost of the enterprises of the Industrial Age created significant adverse externalities. For example, effluent from steel and chemical manufacturing poisoned thousands of miles of the nation's streams and air pollution from the same plants clouded urban skies. . . . It was not until the mid-1960's that people in the United States began to appreciate the extent to which industrialization had externalized costs to their own communities."); Reece, *supra* note 10, at 62 ("The reality of our modern economy is that we attach no monetary penalty to throughputs, the toxic by-products and environmental damage that result from industrial manufacturing [. . .] In other words, market prices must reflect social and environmental costs. To have an economy based solely on the short-term growth of our gross domestic product follows a dangerous and absurd logic – that we can have infinite growth based on the use of finite resources.").

yet they ignore the many externalities that must be considered in any honest accounting of coal, such as pervasive health conditions that result from coal pollution.[14]

The federal agency that regulates strip-mining under the federal Surface Mining Control and Reclamation Act (SMCRA) is the Office of Surface Mining (OSM) in the U.S. Department of the Interior.[15] OSM acknowledges that, "[t]o the extent that low income populations are prevalent in the coalfields, the impacts of mountaintop mining are felt disproportionately by these environmental justice populations. The most notable impacts to be felt by coalfield residents are the operational disturbances, particularly blasting."[16]

---

[14] Proponents of coal continue to ignore these externalities, much to the chagrin of coal's opponents, *Compare* Nicholas Dawidoff, *The Civil Heretic*, N.Y. TIMES MAGAZINE (Mar. 25, 2009) (describing physicist Freeman Dyson's skepticism concerning the extent of climate change and then stating that "Dyson has great affection for coal and for one big reason: It is so inexpensive that most of the world can afford it. 'There's a lot of truth to the statement that Greens are people who never had to worry about their grocery bills,' he says.") *with* Loeb, *supra* note 11, at 256-57 (describing how "[t]he true cost of coal" must factor in the associated air pollution and contamination) *and* AYERS ET AL., APPALACHIAN COALFIELD DELEGATION POSITION PAPER ON SUSTAINABLE ENERGY 10 (United Nations Commission on Sustainable Development 15th Session, 2007) (hereinafter "COALFIELD DELEGATION POSITION PAPER"), *available at* http://www.ohvec.org/issues/mountaintop_removal/articles/2007_05_09_CSD.pdf (describing how the health costs associated with coal power are "externalized" in the form of premature death, respiratory hospital admissions, cardiovascular hospital admissions, chronic bronchitis, asthma, and lost productivity). *See also infra* notes 16 and 28 for a discussion of the immediate health impacts on nearby residents, and *infra* note 43 for a discussion of the harm to local economies.

[15] Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1238 (2007) (establishing the Office of Surface Mining Reclamation and Enforcement to carry out the duties of the Act). One of the findings made by Congress when it passed SMCRA was the following:

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

30 U.S.C. § 1201(c) (2007).

[16] Mountaintop Mining Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement [PEIS] *available at* http://www.epa.gov/region3/mtntop/eis.htm; *see also* Mountaintop Mining Valley Fills in Appalachia Final Programmatic Environmental Impact Statement (October 2005), *available at* http://www.epa.gov/region3/mtntop/pdf/mtm-vf_fpeis_summary.pdf (last visited December 10, 2007). Each mine blast is ten times as strong as the bomb that Timothy McVeigh detonated in Oklahoma City, and thousands of such blasts are set off every day in Appalachia. COALFIELD DELEGATION POSITION PAPER, *supra* note 14, at 9. Beyond the blasting, nearby communities suffer from a variety of other "impacts." *See, e.g.*, Loeb, *supra* note 11, at 9 (describing the mine-

Claiming that the current regulatory process provides ample opportunity for coalfield residents to "participate" in the permitting process, and asserting that only through site-specific analysis can the grounded implications of mountaintop mining be discerned for environmental purposes, OSM pretermitted any meaningful discussion of the significance of the pervasive harms associated with mountaintop removal.[17] This crabbed view of environmental justice was a consistent theme of the energy and environmental policies of the Bush administration from 2001-2009.

Under Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations," federal agencies are under a mandate to scrutinize their actions to determine if such actions will disproportionately affect environmental justice communities.[18] In the strip-mining context, in addition to OSM, agencies such as the Army Corps of Engineers,[19] the U.S. Environmental Protection Agency (EPA), and the Fish and Wildlife Service (FWS) play important federal roles in the regulation of strip-mining. SMCRA, a cooperative federalism statute, allows states to choose whether to create a state agency to

---

related dust, noise, and well damage in Pie, West Virginia); Reece, *supra* note 10, at 25 (noting the 50% increase in childhood asthma in Kentucky since 2000); COALFIELD DELEGATION POSITION PAPER, *supra* note 14, at 10 (describing the deadly dam break at a coal-waste storage facility near Buffalo Creek in West Virginia in 1972). *See also infra* note 28 for further discussion of immediate dangers to local communities. *See also* Hannah C. Halbert, *From Picket Line to Courtroom: The Changing Forum for Regional Resistance, Environmental Reform and Policy Change in Appalachia*, 25 HAMLINE J. PUB. L. & POL'Y 375 (2004) (the mountaintop removal PEIS generated effective organizing and advocacy in a high-profile administrative setting).

[17] OSM's indifference is particularly disturbing in light of the evidence that coal companies have undertaken a conscious strategy to depopulate mining communities. *See* McGinley, *supra* note 3, at 79-81 (describing how Massey Energy used its nearby mining operation to create unlivable conditions in the community of Marfork Hollow, West Virginia, in order to incentivize residents to accept buyouts). *See also supra* note 4.

[18] Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994) (directing federal agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations"). In Appalachia, the relevant communities are largely low-income, though pockets of communities of color also exist throughout the region.

[19] The Army Corps of Engineers is obligated to conduct an environmental justice analysis in its issuance of dredge and fill permits under section 404 of the Clean Water Act. 33 U.S.C. § 1344 (2007).

implement and enforce the federal statute or whether to have OSM directly oversee the state's compliance with federal statutory mandates.[20]

Except for Tennessee, central Appalachian coalfield states have opted to create state agencies to enforce SMCRA. This is referred to as achieving primacy. When states achieve primacy, OSM delegates strip-mining permitting authority to the state agency.[21] When a state chooses to achieve primacy, it must apply both federal and state laws in its oversight of strip-mining. As will be discussed, although this architecture for controlling the adverse impact of strip-mining has existed for decades, enforcing the miasma of applicable laws has been a major problem.

B. The Role of Law and Lawyers in Environmental Justice Struggles in Appalachia

For half a century, public interest lawyers have played prominent roles in representing Appalachian communities in strip-mining cases. In the 1960's, lawyers represented several indigenous mountain groups and statewide environmental and civil liberties organizations in a pioneering challenge to Kentucky's broad form mineral deed.[22] This deed, which was used by mining companies to strip-mine for coal despite the destructive effects on the surface rights of property owners, was a pervasive instrument of environmental injustice. This legal effort failed,

[20] *See* SMCRA, 30 U.S.C. § 1253 (2007).

[21] In Tennessee, the Department of Environment and Conservation Division (TDEC) and its Surface Mining Section and Historical Commission are responsible for preventing illegal coal mining (i.e., lacking an OSM permit). TENN. CODE ANN. §§ 59-8-201 to -421 (West 2009). In addition, the Wildlife Resources Agency, the Division of Natural Heritage and the Water Pollution Control Surface Mining Section must also comply with the federal rules and regulations.

[22] For a description of this legal fight against the broad form deed, *see* Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467, 483-89 (1999).

but challenges to the practice continued, and a constitutional amendment in 1988 finally abrogated the deed.[23]

In recent years, as recounted by Professor McGinley, strategic cases have been brought challenging several aspects of the interpretation and enforcement of laws allegedly designed to prevent the harms caused by mountaintop removal strip-mining.[24] With the new prominence that coal assumed in the Bush Administration's energy policy,[25] there was a headlong rush to mine in Appalachia. The consequences for the land and the people are barely understood. The role of law and lawyers is likewise difficult to define.

This paper will elaborate on a more self-conscious, community-based role for lawyers and the use of litigation in the modern-day conditions of the coalfields. The strategic interplay of lawyers, their clients, and the anti-strip-mining activist groups will be illuminated by a case study of a campaign to halt, or at least to minimize the harm of, the strip-mining operation at Zeb Mountain. This paper will stress the circumscribed role of law in waging such campaigns and

[23] *See, e.g.,* U.S. v. Stearns Coal and Lumber Co., 816 F.2d 279 (6th Cir. 1987), *cert. denied* 484 U.S. 953 (1987) (holding that grantor which reserved mineral rights in a deed of surface land to the United States did not have right to strip mine coal within national forest under common law of Kentucky). More formal protections were finally provided in Kentucky's Constitution. *See* KY. CONST. § 19(2) ("[I]n the absence of clear and convincing evidence to the contrary, [it shall be held] that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed."); Ward v. Harding, 860 S.W.2d 280 (Ky. 1993) (holding that amendment to Kentucky Constitution requiring broad form mineral deeds to be construed to permit coal extraction only by known methods in area at time instruments were executed did not violate contract clause of the United States Constitution and that amendment was not "taking" of private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments).

[24] The tenacious legal work of lawyers in challenging the legality of mountaintop removal is chronicled in Mark Baller & Leor Joseph Pantilat, Comment, *Defenders of Appalachia: The Campaign to Eliminate Mountaintop Removal Coal mining and the Role of Public Justice*, 37 ENVTL L. 629 (2007).

[25] *See Reliable, Affordable & Environmentally Sound Energy for America's Future*, REPORT OF THE NATIONAL ENERGY POLICY GROUP at xiii (May 2001) ("One aspect of the present [energy] crisis is an increased dependence, not only on foreign oil, but on a narrow range of energy options. . . . Currently, the U.S. has enough coal to last for another 250 years. Yet very few coal-powered electric plants are now under construction. Research into clean coal technologies may increase the attractiveness of coal as a source for new generation plants.") *available at* http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.

the essential coordination that is required when lawyers are asked to use litigation to support the goals, strategies, and tactics of grassroots and activist groups. Coordinated legal actions have a distinctive role in environmental justice campaigns. They create space for organizing and education, highlight inequities, and often mobilize people. The Zeb Mountain controversy is a microcosm of the tensions, opportunities, defeats, and lessons inherent in a new form of democratic lawyering that has emerged from the environmental justice movement.[26]

C. The Legal Landscape

SMCRA created a program for regulating the abuses of strip-mining that depends on federal and state cooperation. It was immediately challenged by the coal industry as beyond the Commerce Clause power of Congress. In *Hodel v. Virginia Surface Mining and Reclamation Association*,[27] however, the Supreme Court upheld the Act as properly within Congress' power. Despite this victory, coalfield citizens' groups have had to use litigation to prevent OSM from weakening the force of SMCRA by adopting regulations with unjustifiably loose language. The resultant holdings have provided the grassroots groups some voice in the implementation of the law and regulations. But, on the ground, in the quotidian administration of SMCRA and its state counterparts, the pro-industry tilt of the regulators and their political bosses has been difficult to curb through law. Law has often served as a last ditch cry for help.

As mining technology has outstripped the capacity and will of OSM and state regulators, the environmental and social abuses have intensified. Mountaintop removal and valley fills

[26] *See* Asciano Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006).

[27] 452 U.S. 264 (1981).

imperil the lives of area residents and communities.[28] The environmental impact of dumping tons of mineral spoil into valleys and leveling large mountains is incalculable. The cumulative effects on watercourses, aquatic species, and terrestrial plants and animals have also never been fully assessed.

In Tennessee, where OSM directly oversees the SMCRA permitting and enforcement program, a coalition of organizations[29] turned to lawyers for strategic help in their campaign to halt mountaintop removal practices. Unlike West Virginia and Kentucky, mountaintop removal had not been used in Tennessee prior to 2002. Following extensive consultations about the viable legal claims and the demands that litigation would place on the staff resources of the groups that elected to sue, a lawsuit was filed against OSM in September 2003.[30] The suit charged the agency with failing to comply with the Nationa1 Environmental Policy Act (NEPA)[31] when it issued a permit to Robert Clear Coal Company[32] to strip-mine Zeb Mountain. The plaintiffs first sought a preliminary injunction to halt the mining and asked the District Court

[28] In addition to long term health effects associated with poor air quality, residents near mining sites are also faced with the risk of imminent physical danger. *E.g.*, *Boulder Crushes Three-Year-Old* THE MOUNTAIN DEFENDER, Summer 2005, at 1 (reporting the death of a child who was crushed by a half ton boulder that was dislodged when a strip-mine operator was working on an unpermitted haul road at 2:00 a.m.). *See also supra* note 14.

[29] Organizations active in Tennessee included the Sierra Club, Save Our Cumberland Mountains (SOCM), United Mountain Defense, Mountain Justice Summer, Three Rivers Earth First!, and Katuah Earth First! Other similarly-oriented organizations include Appalachian Voices (AV), Ohio Valley Environmental Coalition (OVEC), Coal River Mountain Watch (CRMW), Keepers of the Mountains Foundation, Christians for the Mountains, Kentuckians for the Commonwealth (KFTC), and Lexington Environmental Action Project (LEAP).

[30] Save Our Cumberland Mountains v. Norton, 297 F. Supp. 2d 1042 (E.D. Tenn. 2003). The same plaintiffs filed a similar action in the Eastern District of Tennessee alleging, among other claims, a NEPA violation with respect to OSM's approval of an application for a revision of the same permit. Tennessee Clean Water Network v. Kempthorne, 2007 WL 2220414 (E.D. Tenn. 2007). SOCM, the paradigm of a grassroots group concerned about its use of limited resources, was sensitive from the outset about the time and effort that litigation would take.

[31] Unlike other environmental statutory schemes, NEPA is very general and provides little direct guidance. Instead, the Act's meaning is informed by reference to interpreting cases and C.E.Q. regulations. 42 U.S.C. §§ 4321-4370f (2007); 40 C.F.R. §§ 1500-1508 (2007).

[32] After this litigation was brought against OSM, Robert Clear Coal sold the mine to National Coal Corporation.

to revoke the company's permit. The court dismissed the plaintiffs' action, holding that the organizations were not likely to succeed on the merits of their claim because OSM's Environmental Assessment (EA) was not arbitrarily and capriciously prepared. This ruling was affirmed on appeal, although the Court of Appeals excoriated OSM for limiting the alternatives--to either granting the permit or denying it—that were considered in the preparation of the EA.[33]

These cases brought needed attention to the cause and were imbued with common sense. How could a mining operation as substantial as the one at issue not require a full-blown environmental impact statement? If an operation of this magnitude were conducted in an urban area, surely a NEPA EIS would be required. But in central Appalachia, pure law has rarely carried the day against the coal industry. To be effective, lawyers had to reinvent themselves and assume new, creative roles. The next section describes this work.

II. ZEB MOUNTAIN, TENNESSEE: A CASE STUDY OF MULTI-FACETED ADVOCACY

> I am the gigantic cyclops of National Coal Corporation. Fear me! Hide in your homes and cower at my might as I destroy every bit of Tennessee's gorgeous mountains. With TVA and the Bush Administration on my side, no one will be able to stop me! BWAHAHAHAHA! Wait! But what's this? The people are beginning to take a stand. They're raising awareness and rallying in the streets demanding that these beautiful mountains be preserved. Noooooo!
>
> — Earth First! Comics

This section is a tactical analysis of the influence of the environmental justice movement on the grassroots component of the campaign to dismantle mountaintop removal mining. It identifies the climate of the campaign and the specific member groups of the Tennessee

[33] *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006).

coalition. The purpose of this analysis is to show the interaction between environmental justice ideas, the campaign against the Zeb Mountain strip-mine, and public interest lawyering.

In the Appalachians, landforms named as single mountains are often long ridge lines which may encompass multiple peaks and continue for many miles. Zeb Mountain is a series of three peaks, and the strip-mine operation known as the Zeb Mountain Removal Coal Mining Operation is in the process of removing those three peaks. In Tennessee, this is called "cross ridge mining," a term that more accurately describes mountain removal projects in the Cumberland Plateau and elsewhere in Appalachia than the colloquially accepted mountain "top" removal.[34]

Initially, the Zeb Mountain strip-mine was owned by Robert Clear Coal (RCC). After an extended non-violent grassroots campaign and subsequent to litigation brought by grassroots groups against OSM, Robert Clear Coal sold the mine to the National Coal Company (NCC), a Florida-based coal company headquartered in Knoxville, Tennessee.[35] Subsequently, NCC subcontracted the mine back to RCC.

This section will describe the methods and tactics employed in the Zeb Mountain campaign led by Mountain Justice Summer (MJS), a coalition of autonomous groups fighting strip mining in West Virginia, Tennessee, Virginia, and Kentucky. Several lawyers, including a co-author of this article, were instrumental in the creation of MJS. The MJS Coalition met

[34] The terminology used to describe large scale strip-mining operations varies. In Tennessee, the regulatory agencies do not use the term "mountaintop removal" because, instead of using the "valley fill method," it is called "hollow fill" and the mountain is supposed to be returned to its approximate original contour. Environmental organizations often use the term "mountain range removal." This labeling discourse reflects a concerted effort to minimize the actual harm that flows from these operations.

[35] Tennessee Clean Water Network v. Kempthorne, No. 3:05-CV-214, 2007 WL 2220414, at *2 (E.D. Tenn. July 27, 2007). National Coal Corporation is a wholly-owned subsidiary of National Coal Corp. According to National Coal Corp.'s webpage, the company "engages principally in the business of mining coal by locating, leasing, assessing, permitting, and developing coal properties in the Central Appalachian region of the United States. The Company owns or leases more than 115,500 acres of coal and other mineral rights in Alabama and Southeastern Tennessee." National Coal Corporation, Background Information, available at http://www.nationalcoal.com/documents/NCOC%20Background%20Sheet%20Final%20no%20KY.pdf.

monthly to exchange tactics and ideas. The Tennessee members of MJS were United Mountain Defense (UMD) and Three Rivers Earth First! Together, these groups devised a variety of tactics to resist the Zeb Mountain strip-mine, including listening projects, water testing, aerial photography, media outreach, direct action, hearings, and protests. In response to these actions, the coal companies were not passive opponents: a "SLAPP suit" (Strategic Lawsuit Against Public Participation) was filed against some of the mountaintop removal opponents, and private security guards were hired to monitor the public hearings and videotape those who chose to voice opposition to the mine.[36]

A. Listening Projects

> A Listening Project . . . is a revolutionary way of being. . . . Projects can help empower people and bring about positive change. What is most revolutionary, however, is that at the center of our work, there is the simple act of listening. We listen fully and with open hearts, even to those with differing or opposing beliefs.[37]
>
> — Herb Walters

A "listening project" involves going door-to-door in a community to listen to the concerns and questions of residents about a particular issue. In the Zeb Mountain campaign, volunteers went to neighboring coal communities to listen to those who live near the mine sites and hear blasting detonations across their valleys. After UMD, MJS, and Earth First! volunteers underwent training in active listening, they went to every house that they could locate in Elk Valley. The training material for conducting a listening project suggests that a listening team should consist of no more than two people and that each team must have at least one female

[36] Temporary Restraining Order, Nat'l Coal Corp. v. Irwin, No. 162391-3 (Knox County Chancery Court) (2004) (hereinafter "Irwin TRO").

[37] Herb Walters is the founder of Rural Southern Voices for Peace (RSVP) and the Listening Project.

member,[38] presumably to lessen the interrogation-like atmosphere that might otherwise attach to the interview. Relatedly, interviewers are instructed to listen during the conversation with residents and to record the results later.[39] In this way, interviewees will hopefully feel less inhibited. To build trust and lessen inhibitions, interviewers are counseled to inform interviewees that confidentiality is respected unless specific permission is given.[40]

During UMD's first listening project, when volunteers approached houses downstream and downhill from Zeb Mountain's mines, they asked open questions about the mine and listened to the ideas of Elk Valley residents. The methodology of listening projects is directly tied to the theory of environmental justice, which the EPA defines as the "involvement of all people."[41] By soliciting the opinions of those people directly impacted by the mining operations, the listening project ensured that the movement's tactics and strategies were EJ-based and would not impose an outsider's agenda on the local coal communities.[42] Moreover, UMD explained in the listening project training materials that:

---

[38] Handout entitled "Listening Project for Mountain Justice Summer" (on file with author).

[39] *Id.*

[40] *Id.*

[41] United States Environmental Protection Agency; Environmental Justice Home Page, *available at* http://www.epa.gov/compliance/environmental justice/index.html.

[42] This approach is a response to the criticism that public interest organizations and their lawyers tend to overwhelm clients and subordinate client interests to the larger goals of the social movement. This criticism arises from the fact that public interest lawyers, unlike lawyers in the traditional mold, are personally invested in the movement along with their clients. *See* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998); *infra* note 81. In response to such criticism, some activists began to stress "a new kind of resistance strategy, in which clients reversed the traditional power dynamic and led lawyers in advocacy efforts" based on the theory that "poor people could transform communities and entrenched legal systems through their assertions of power against bureaucrats and lawyers." Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1905-06 (2007). This desire for popular leadership and community input has been reiterated over and over in the anti-mining movements of Appalachia. *See, e.g.*, Loeb, *supra* note 11, at 132 (*quoting* Connie White of SOCM: "We don't just care about winning issues; we care more about helping people get stronger. In the long run, that is how you win issues and make real changes . . . Back in the old days, we thought that getting a strip-mine permit denied or getting a tougher reclamation bill passed in Nashville was why we existed. Now we understand that our real success is measured by how many members participated [. . .] and

> Our hope is that even if people do not support our goals, they will be less hostile to the campaign because of positive interactions with campaign members. Regardless of where people stand, they will be more inclined to talk about the issue with their friends and neighbors as a result of the interview.[43]

In addition to informing the overarching goals of the campaign, the listening project was used to find out specifically what residents wanted to know and then to respond to those questions with answers. To do this, UMD published THE TENNESSEE MOUNTAIN DEFENDER (THE DEFENDER), a newspaper in which the campaign organizers printed answers to the most common questions. These questions often related to an erroneous belief that coal strengthens the Appalachian economy.[44] In addition to answering questions and attempting to disprove myths about the benefits of coal to local economies, the knowledge and input gained from the listening projects

---

whether they feel empowered by their participation."); Montrie, *supra* note 10, at 74 (describing how the Appalachian Group to Save the Land and People was formed by a group of local farmers and former deep miners who focused on how nearby mining projects violated property rights). *See also infra* note 86.

[43] Handout, *supra* note 40.

[44] *Myth/Fact*, THE DEFENDER (Summer 2005).

"Myth: Mountain top mining provides jobs. Fact: As more coal is extracted in mountaintop removal strip mining, the number of coal mine workers decreases. Although coal production rose 32% between 1987 and 1997, mining jobs dropped 29% during the same period due to increased blasting and mechanization."

"Myth: Mountain top mining improves local economies. Fact: The top 15 coal producing counties in West Virginia (where mountaintop removal mining has been in practice the longest) suffer from some of the worst poverty levels in the nation, even though they produce 15% of the nation's coal."

As THE DEFENDER illustrates, most evidence strongly suggests that mining has weakened Appalachian economies, particularly by stifling the development of other industries and ultimately reducing employment. *See, e.g.*, Montrie, *supra* note 10, at 26-35 (describing how mine operators in mid-century Ohio often abandoned mines and defaulted on taxes, angering locals whose land had once been suitable for farming and resulting in a movement that advocated farming as a better use of the land in terms of "productivity" and "community stability"); Reece, *supra* note 10, at 35-36, 45 (describing reclamation as an "Orwellian slipknot" and noting that "[t]he idea that this land is prime real estate is one of the industry's most popular arguments and one of its weakest [. . .] [T]he coal industry has created the ultimate supply-side economy, where it's hard to tell the difference between 'real estate' and abandoned land."); McGinley, *supra* note 3, at 69-70 (describing how mine operators at Bullpush Mountain in West Virginia promised development on the site as early as 1970, yet 20 years later the leveled mountain was still barren "pasture"); COALFIELD DELEGATION POSITION PAPER, *supra* note 14, at 14 (2007) ("Mountaintop removal is a mining technique designed, from the very start, to take the labor force out of the mining operation [. . .] [I]n the early 1950s there were between 125,000 and 145,000 miners employed in West Virginia; in 2004 there were just over 16,000. During that time, coal production has increased."). For an analysis that questions whether strip-mining creates viable jobs, see http://www.mountainjusticesummer.org/econ/ (last visited August 27, 2009).

shaped the comments filed at permitting hearings, guided the content of protests, and confirmed the need to test the local water supply. THE DEFENDER was disseminated at campaign events and remains a primary tool for community education.

Planned with care and executed with sensitivity, listening projects make friends and build credibility. A key component is not to make any promises, implied or otherwise, or tentative predictions about future actions or events. Such promises or predictions could easily undermine the trust that flows from well-designed listening projects.

The Zeb Mountain campaign relied on volunteers, many of whom were proverbial "outsiders" from other states.[45] The listening projects were integral in the generation of a comfort level for these often novice campaigners. Face-to-face talks with people affected by the strip-mining operation helped dispel negative stereotypes that may have been held by the volunteers about mountain people. The project was imbued with two-way politeness. Friendships were made. These relationships aided the organizing work that accompanied the other resistance strategies.

B. The Tennessee Mountain Defender

Ten thousand copies of the first issue of THE DEFENDER were printed. As mentioned in the previous section, the data sheets collected from the listening projects were used to determine THE DEFENDER's content. Most pages included a "MYTH/FACT" section in which UMD sought to provide answers to common questions as an antidote to misinformation. For example, in response to the "myth" that mountain top mining has no long term impact, THE DEFENDER supplied the following data:

[45] The volunteers were advised to dress neatly, a small but important aspect of these personal encounters.

> More than 7 percent of Appalachian forests have been cut down and more than 1,200 miles of streams have been buried between 1985 and 2001. According to the federal government's scientific analysis, mountain top mining, if it continues unabated, will cause a projected loss of more than 1.4 million acres by the end of the next decade - an area the size of Delaware - severely impacting fish, wildlife, bird species, and neighboring communities. Many fishing, hunting, camping, wild-crafting and kayaking opportunities would be lost.[46]

In addition to exposing inaccurate "myths" in direct response to questions that came from the listening projects, THE DEFENDER was hand-delivered to every house visited during the listening projects. UMD also distributed the paper to neighboring towns and cities, and to members of the Tennessee General Assembly.

The publication of THE DEFENDER, based as it was on local questions and knowledge, was viewed as a definitive source of information and data about the Zeb Mountain operation and mountaintop removal in general. Over time, local residents would comment on information that was included even in the first copy of THE DEFENDER. The publication was disseminated widely, placed in mailboxes and on porches. Several of the writers for the publication became known in the community for their articles. This visibility heightened the credibility of the campaign and "spread the word" in areas that did not possess many technological assets. The lasting, partisan power of the written word was demonstrated by publication of the THE DEFENDER.

C. Water Testing Project

Another way in which UMD and Three Rivers Earth First! volunteers continued to collect and disseminate information was by using GPS coordinates to gather water samples from

[46] THE MOUNTAIN DEFENDER at 3 (Summer 2005) (*citing* Union of Concerned Scientists, *Leveling a Mountain of Research on Mountaintop Removal Strip Mining*, http://www.ucsusa.org/scientific_integrity/abuses_of_science/mountaintop-removal-mining.html).

the streams surrounding Zeb Mountain. In order to get as many water quality samples as possible, volunteers rushed from creek to creek. At each location, volunteers wrote down the GPS coordinates on a data sheet, entered field observations, and took high resolution digital pictures of the stream. Samples were each tested for pH, phosphorus, nitrates, and other substances, and the data was uploaded to UMD's webpage[47] to be available to all interested parties, including OSM officials. It is hard to overestimate the value of the data: this sort of "ground-truthing" can rebut an agency's assertion that a permitted activity has no harmful impact. Why would the agencies trust this data? The response of the organizations conducting the testing was: "don't trust our data; go in and test behind us." This too built credibility.

D. Aerial Photography

The GPS coordinates of the sites where water samples were collected and the locations of potential hazards learned about from the listening projects were used as reference points for the aerial observation of mining on Zeb Mountain. Southwings, a non-profit whose mission is to "provide[] skilled pilots and aerial education to enhance conservation efforts across the Southeast,"[48] flew over the Zeb Mountain strip-mine and photographed the ridges and surrounding watershed. In addition to enabling UMD and Three Rivers Earth First! to track the evolution of the project in general, UMD was able to determine whether the mine exceeded project boundaries by taking the mine's GPS coordinates (reported on the mining permit) and, using microscope software to examine the high resolution photographs, comparing the photographs with where the mine was to where it was supposed to be.

[47] http://umdfieldwork.blogspot.com/.

[48] http://www.southwings.org/page.php?14.

UMD uploaded the photographs to its website, making them available to the public, lawyers, and agency personnel. UMD used the photographs as evidence at public hearings and as attachments to agency notice-and-comment rulemaking position statements. In addition, the photographs were printed in THE DEFENDER and shown to community members during listening projects.

E. Direct Action

Direct action tactics against the Zeb Mountain strip-mine included press releases, blockades, banner hangs, and protests. Direct action at Zeb Mountain served to continue a tradition of resistance that has been present, in various forms and in various degrees of extremity, in past Appalachian protest movements.[49] Lawyers and law students played a key role in assisting activists in post-action arrest situations. The message and content of the direct action tactics were shaped by both the listening projects and the data collected from the field work.

On October 3, 2004, for example, a handful of opponents to the Zeb Mountain mine gathered near the offices of National Coal Corporation.[50] Sometime later, NCC filed a Strategic Lawsuit Against Public Participation (SLAPP).[51] SLAPP suits, which are "civil court action[s] which allege[] that injury has been caused by the efforts of nongovernment individuals

[49] *See, e.g.*, Montrie, *supra* note 10, at 62 ("Much of [The Appalachian Group to Save the Land and People's] activism [in the 1960s and 1970s] involved circulating petitions, writing open letters and publishing personal accounts, passing resolutions, and initiating lawsuits. But strip mining opponents soon discovered that these methods were inadequate for their purpose. Drawing on another American tradition of protest, mountain residents began to rely increasingly on direct action, such as physically blocking bulldozers, sniping at strip-miners, and dynamiting equipment."); Reece, *supra* note 10, at 62 (describing the "Bloody Harlan County" of the 1930s, when the attempt at union organization and protest by miners led to the use of intimidation tactics by mining companies).

[50] Irwin TRO, *supra* note 36.

[51] *Id.*

organizations to influence government action on . . . issue[s] of public interest or concern," are intended to distract attention from the real issues at play.[52] In its request for a temporary restraining order (TRO) against the five activists, NCC alleged that the activists:

> did encroach on and trespass on certain real property owned and rented by the Petitioner . . . [and] did perform in such a way as to cause . . . Petitioner to feel threatened for their respective safety. Specifically, said individual Respondents . . . did march, yell, scream, wave banners and bludgeons, and otherwise move and act in a menacing manner toward people who came on or about the premises for permissible reasons.[53]

A co-author of this piece, Christopher Irwin, was one of the respondents alleged to have threatened the National Coal Corporation with "bludgeons." According to Irwin, this particular protest was neither the group's most conspicuous nor its most successful: no informational pamphlets were distributed during the short time in which the protestors stood on the wrong street corner. Although National Coal's lawyer failed to present sufficient evidence to obtain a TRO, National Coal pursued the suit for nearly two years. Meanwhile, those sympathetic to the protestors' message and to the right of citizens to voice their concerns used direct action techniques to make their opposition known to the company, the court, and the public. The press was alerted to demonstrations where, for example, citizens gathered in front of the courthouse gagged and bound, in protest of National Coal's attempts to use the judicial system to prevent activists from expressing their first amendment rights. Throughout the SLAPP suit proceedings, a local criminal defense attorney represented the activists *pro bono*, and law students provided free research time. The activists refused to settle under any terms; National Coal eventually dropped the suit.

---

[52] Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 SEATTLE J. SOC. JUST. 727, 759-60 n.210 (2008) (*citing* SHARON BEDER, GLOBAL SPIN: THE CORPORATE ASSAULT ON ENVIRONMENTALISM 71 (2002)).

[53] Irwin TRO, *supra* note 36.

The next year, in June 2005, MJS and Earth First! organized a protest at National Coal Corporation's annual shareholder's meeting which was taking place inside a Knoxville hotel.[54] Approximately thirty activists dressed in "critter costumes" gathered outside the hotel. When they entered the hotel and approached the meeting room, they were met by a Knox County Sheriff's Deputy who was guarding the door. What happened next was the central issue in the criminal trial of three of the activists, because the deputy claimed that he was struck by the bullhorn of a Katuah Earth First! member.

The three protestors who were arrested were initially charged with four felonies and one misdemeanor, but the charges were later changed to five misdemeanors and one felony. As it turned out, the Sheriff's Deputy was also a member of the Homeland Security Division; perhaps because of this, the activists were labeled "eco-terrorists." The defense attorney successfully moved to prohibit the mention of "eco-terrorism" during the trial, and, in response to the politicization of the charges and tenor of the trial, defense counsel used a counter-rhetoric strategy in which he referred to the Knox County Sheriff's Office as "paid thugs" for their NCC "corporate overlord." In the end, the three activists were found not guilty on all but two misdemeanor charges: disorderly conduct and interfering with a meeting.

The direct action campaign had salutary ramifications beyond the media attention that it drew. The high-visibility of the direct action strategies and the arrests helped to educate unlikely constituencies that formatively shape community opinion. Educating the police, other lawyers, judges, clerks, bonding company employees (and even those incarcerated in the jail) about the strip-mining abuses perpetrated by NCC broadened the base of individuals sympathetic to the campaign. Courthouses are huge sinks of community information, and the Zeb Mountain direct

[54] The following is a first-hand account by co-author Chris Irwin.

action participants campaign relentlessly used the legal process—from the moment of the arrests and all the way through—to discuss the inequities of mining in mountain communities. In free hours, the participants would talk to any one who would listen—and people did—to explain the bases of the underlying grievances. By building sympathy for the cause, law enforcement officers became friendly and more understanding at future direct action events. Following arrests, participants were often released on their own recognizance, over the surprise of courthouse clerks. The police knew that the participants would appear in court at the designated time; such appearances were part of a larger strategy that made it unlikely that those arrested would be viewed as "typical" criminals.

The direct action strategies, and the media attention that they received, also created a climate among members of the affected communities that eased long-standing fears about the retaliatory power and peremptory dominance of a major coal company. Watching the court proceedings and seeing the arrested protestors go toe-to-toe with the company in court and in the media strengthened the will of people in the communities to speak out, to attend rallies, and to participate in hearings. Several facades of community quiescence pealed away.

F. Hearings

Part of UMD's strategy involved demanding permits for every stage in the mining permit process.[55] At each public hearing to discuss the merits of the Zeb Mountain mining permits, the public expressed its opposition to the mine. Perhaps because opposition to the permits was the

[55] According to its website, UMD accounts the following among its accomplishments: "Persuaded TDEC to require that mining companies obtain Aquatic Resources Alteration Permits (ARAP) prior to altering mountain headwater streams (ephemeral, intermittent and perennial). . . . Persuaded TDEC and the Army Corps of Engineers to require that mining companies obtain section 404 permits for the alternation of headwaters." *Available at* http://www.unitedmountaindefense.org/bioUMD.php#Accomplishments.

dominant public sentiment, TDEC changed the hearing procedure to one that activists referred to as the "Catholic confessional" model. The new method of conducting the "public" hearing consisted of TDEC making a list of those members of the public who wanted to speak, then bringing each person separately to speak to a single TDEC employee or stenographer. This nearly tripled the time it took to conduct a traditional hearing. In past hearings, the public observed the proceedings and each speaker had the opportunity to hear others' comments, thereby avoiding a large measure of redundancy among the comments. By comparison, in the "catholic confessional" model that was used in the Zeb Mountain permitting process, no one knew what other comments had been made, and so each person who testified felt the need to make every point to the TDEC representative to ensure that every pertinent comment was in the record. Unfortunately, this sometimes meant that, due to the agency's time constraints, repetition and extension of comments prevented all those who wanted to speak from being heard.[56] Another flaw of the confessional model arose from the fact that the media was barred from the room in which testimony occurred. Consequently, the media was unable to report on critical comments made by citizens. This created the impression that the opposition to the permit was not as extensive or solidified as it was, while also allowing the agencies to ignore certain questions without fear of publicity.

In response, UMD began bringing tape recorders to the hearings and conducting mini-public hearings before the official agency hearings were to begin. All sides of the debate were invited to comment, but speakers were asked to limit comments to two minutes. This enabled all interested organizations and individuals to be heard at the public hearing.

[56] Although public input is a key part of many environmental laws, attempts to subvert it are common. *See* Loeb, *supra* note 11, at 24 (describing how coal companies do the least possible to fulfill their legal requirement to publicize the comment period for a new permit). Residents are thus kept ignorant of their ability to affect permitting, unless efforts are made to inform them of particular opportunities. *See* McGinley, *supra* note 3, at 66-67, 72 (describing how, although 75% of mines in West Virginia were in violation of Approximate Original Contour (AOC) exemption requirements, the public was largely unaware of this issue until a "media exposé" was published).

In the meantime, National Coal began sending their private security guards to observe, photograph, and videotape the public hearings. The presence of large men dressed in black who shook agency officials' hands before the hearing was a successful intimidation tactic. The intimidation was somewhat mitigated, however, when activists "outed" the private security guards.

Perhaps because interested citizens faced agency and company hostility, public hearings gained significance beyond the official purpose: they became the fora for new alliances to be made and existing alliances to be reinforced. Interested parties in the Zeb Mountain mine could meet and shake hands, even if during the hearings individuals were separated and sequestered. Eventually, under a barrage of criticism, TDEC returned to an open testimony public hearing format and citizens once again testified in front of other citizens.

G. The NCC Corporate Campaign

In August 2009, UMD also launched a corporate campaign against NCC. UMD volunteers bought stock in the company[57] and sought to exercise their rights as stockholders to inspect the company's books,[58] communicate with other stockholders, participate in annual meetings, file complaints with the Securities and Exchange Commission against the company, and submit stockholder resolutions. This campaign was called "Love and Hug National Coal." Coinciding with this campaign, the financial condition of NCC declined.[59] There is no definitive

[57] On August 18, 2009, the NCC stock sold for $.74 a share.

[58] For a vivid depiction of an effort by UMD volunteers to exercise this right, *see* http://www.youtube.com/watch?v=Kcu5dl8lPQ.

[59] In August 2009, National Coal Corp. had to cut its executive salaries by ten percent. *See* http://www.knoxnews.com/news/2009/aug/17/national-coal-corp-cuts-executive-salaries-10-perc/. Additionally, one of National Coal Corp.'s subsidiaries is in dire straits. National Coal Corp. currently possesses two wholly owned subsidiaries:

proof that the campaign was the cause of this decline – existing market conditions were not favorable for coal. But, at the least, the campaign likely shook investor confidence in the company.

H. Interaction Among Tactics and the Aggregate Effects of a Multi-Pronged Approach

> When we try to pick out anything by itself, we find it hitched to everything else in the universe.
>
> — John Muir

The environmental justice movement focuses on connections between environmental risks, disenfranchised populations, and discrimination. Similarly, the success of an environmental justice based campaign depends on making tactical connections among organizations working for a common cause. In the campaign to prevent the mining of Zeb Mountain, environmental and political activists used myriad strategies to bring their cause to the attention of OSM and TDEC agency officials. These were the officials who would ultimately decide whether National Coal was granted a permit to strip-mine Zeb Mountain and whether it would be required to return Zeb Mountain to its approximate original contour after mining terminated.[60]

National Coal Corporation, which runs mining operations in Tennessee, and National Coal of Alabama, which runs mining operations in Alabama. "National Coal Corp. Tennessee Operations Unaffected as Alabama Subsidiary Defaults on $60 Million Loan," New York Times Businesswire, July 20, 2009, *available at* http://markets.on.nytimes.com/research/stocks/news. In July 2009, National Coal of Alabama defaulted on a $60 million credit agreement into which it had entered with various lenders. *Id.* Because none of these creditors had liens or encumbrances on National Coal Corp. assets, this default is not expected to affect operations in Tennessee. *Id.* Although coal sales in Tennessee have been lower than expected, Tennessee has not experienced the sort of dramatic decrease in demand that has occurred in Alabama. *Id.*

[60] *See* SMCRA, 30 U.S.C. § 1265(b)(3), (c)(3)(A) (2007) (requiring reclamation operations that return the land to its "approximate original contour," except that a variance may be granted where the new contour will "constitute an equal or better economic or public use . . . ."). With the advent of the Obama administration, OSM has become more receptive to citizen involvement. UDM has presented to OSM a five-point plan for improving the permitting process. These measures are: (1) more robust public hearings; (2) preparation of environmental impact statements for proposed large-scale mining operations; (3) active solicitation and meaningful use of data provided by citizen

One of the goals of the anti-mining campaign was to alert agencies to the aggregate effect of strip-mining in Tennessee and to protest "segmentation" of the permitting process. Segmentation occurs when coal seams along long ridges are broken into multiple projects, each with supposedly "minor" impacts. Activists simply wanted regulators to acknowledge that the cumulative harm from these multiple permits is anything but minor; the harms are synergistic and should be considered at the landscape level.

In this vein, it is helpful to examine the aggregate effect of the campaign's tactics. For example, when United Mountain Defense began its public opposition to strip mining, its complaints were dismissed as generic and agency officials condescended to tell them they lacked credibility.[61] To overcome the credibility gap, UMD began to gather information. First, they used the Freedom of Information Act (FOIA)[62] to gain access to OSM's mining data. OSM waived the fees for the answers to the FOIA requests,[63] and UMD received copies of Environmental Assessments[64] for surface mines in Claiborne County, all Cumulative Hydrological Impact Assessments (CHIAs)[65] for surface mines in Claiborne County, all water quality and monitoring data for mines in Claiborne County, and all violations issued for the

---

organizations; (4) a review of all current permits; and (5) higher reclamation bonds and more substantial public input into the process of returning bonds to companies following the cessation of the operation.

[61] PAN APPALACHIAN DEFENDER 6 (Fall 2006).

[62] Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (2007).

[63] 43 C.F.R. § 2.19(b) (2007) (authority of agency to waive fees).

[64] An Environmental Assessment (EA) consists of the following: (1) a description of the proposed action, (2) explanation of the need for the proposed action, (3) decision alternatives, (4) description of the existing environment, (5) topography, geology, and soils, (6) vegetation, land use, and esthetics, (7) hydrology, (8) fish and wildlife resources, (9) threatened or endangered species, (10) cultural and historical resources, (11) air quality & socioeconomics, (12) wetlands, flood plains, and wild and scenic rivers, (13) environmental impacts, (14) summary, (15) persons and agencies contacted in the preparation of the EA, (16) preparer, (17) references. Save our Cumberland Mountains v. Kempthorne 453 F.3d 334, 337 (6th Cir. 2006).

[65] 30 C.F.R. § 784.14(f) (2007).

Claiborne County mines.[66] Due to the massive amount of documentation required for permitting, UMD agreed to withdraw its FOIA requests in exchange for direct access to the information.[67]

In addition to learning about violations committed by the mining companies,[68] a more basic source of information was obtained: the location of the mines. UMD translated the locations of the mines from the OSM permits into GPS coordinates. With the GPS coordinates, UMD could (1) monitor the mines from the air to see whether the companies were exceeding the bounds of their permits, (2) collect coordinates for unidentified mines and landslides, and (3) monitor the mines from the ground by noting the precise locations of water samples taken relative to each mine. The field data were then incorporated into the comments that UMD submitted to agencies when companies sought new permits or extensions of old permits. The data did more than lend intangible credibility to UMD; it also strengthened the activists' legal position.

"Chevron deference" is the standard by which courts will review an agency's interpretation of their mandates from the legislature.[69] This is an extremely deferential standard. Nevertheless, a court will overturn agency decisions that are "arbitrary and capricious."[70] When comments are based on speculation, an agency usually does not worry much about court review

[66] Other reports included in response to the FOIA request included: (I) National Pollutant Discharge Elimination System (NPDES) Discharge Monitoring Report, (2) OSM Permit, (3) Probable Hydrologic Consequences Determination (PHC), (4) Comprehensive Reclamation Plan (HRP), (5) Surface-Water Monitoring Report, and (6) Aquatic Resource Alternation Permit (ARAP) 401 Certification.

[67] USM was allowed to bring its own copying machine to the office where the data were stored and make copies.

[68] The mining companies whose mines were located in Claiborne County, Tennessee included: Mountainside Coal Company, Robert Clear Coal Corporation, Tennessee Mining, Inc. (Previously Robert Clear Coal), LCC Tennessee, LCC (Previously Tennessee Mining Inc.), and Appolo Fuels, Inc.

[69] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984).

[70] 5 U.S.C. § 706(2)(A) (2007).

of its actions. However, when the comments indicate that the agency is using the wrong GPS coordinates for the streams in the area, or that the agency has mischaracterized the stream types in the permit, then ignoring those comments begins to look arbitrary and capricious. Even the slipshod ordinary development must provide correct boundaries and maps of a proposed project; this is especially true for invasive strip-mines mines.[71]

Altogether, the FOIA requests, the sister-organization support and aerial photography provided by Southwings, the collection of water samples from mine's watershed, the comments submitted to the permitting agencies, and the public hearings attended by UMD members united to inform the organization's legal strategy. And, by helping the underfunded and understaffed agencies comply with the requirements of the agency's governing statute by submitting scientific data along with its comments, UMD earned it the credibility it needed to make the agencies listen.

By systemically using the administrative process as a locale for counter-presentation of hard data and information, the campaign transformed the attitudes of the involved agencies toward their participation. What began as disparagement of the credibility of the data presented by the campaign evolved into respect, as the scientific fieldwork supplied by the campaign bore out and supplemented the inadequate resources of the agencies. GIS coordinates, high resolution pictures, stream characteristics, and other hard data showed that the campaign knew what it was talking about in its submissions at hearings and in its public comments. The campaign was able to spend the time that agency officials could not to gain day-to-day information about effects. The tyranny of official expertise was broken by this work. Often the data was supplemented by

[71] PAN APPALACHIAN DEFENDER 7 (Fall 2006).

citizens in the affected communities, who knew better than anyone else the effects of the operation on the land, water, and infrastructure in their areas.

III. PUBLIC INTEREST LAWYERING AND THE ZEB MOUNTAIN CAMPAIGN

> Public interest lawyers are "conflicted agents of the legal system, sympathetic to the methods and goals of resistance movements but bound by the forms of the legal establishment."[72]
>
> — Sameer M. Ashar

The role of a "cause lawyer"[73] remains unsettled, because even if the establishment tolerates the notion of active dissent, the traditional adversarial structure of the American legal system and, in particular, the concept of "standing," require both that there be a "cause" and that it belong to an interested party. As formulated by the Supreme Court, "the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context."'[74]

In response, a radical proposition emerged: that harm suffered by the environment deserves redress even absent a plaintiff with a personal stake in the outcome.[75] Besides a lone

[72] Ashar, *supra* note 42, at 1880.

[73] Sidestepping the thorny issue of how to define a "cause lawyer," this paper will proceed from the position that it includes those who would variously be characterized or self-characterize themselves as partaking in "'activist' lawyering, progressive lawyering, equal justice lawyering, 'radical' lawyering, lawyering for social change, 'critical' lawyering, socially conscious lawyering, lawyering for the under-represented, lawyering for the subordinated, 'alternative' lawyering, political lawyering, and 'visionary' lawyering." Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 33 (Austin Sarat & Stuart Scheingold eds., 1998).

[74] Sierra Club v. Morton, 405 U.S. 727 (1972) (*quoting* Baker v. Carr, 369 U.S. 186 (1962)).

[75] Christopher D. Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

dissent,[76] this idea has been rejected by the courts. Thus, the judicial construct of standing forbids a freestanding "cause lawyer;" the cause must be linked to harm directly suffered by human victims. Notwithstanding this thus-far failed attempt to fight human-created natural disasters on behalf of nature *qua* nature, the environmental justice movement is peculiarly able to open the courthouse doors.

Acquiescing in the notion that standing requires an injured party and that the environment has no recognized voice in the court system, environmental justice rephrases the issue of standing and thereby obviates the problem. Instead of trying to open courts to claims on behalf of mountains or forests, environmental justice seeks to open the courthouse to other voiceless components of the American society: those who have been traditionally absent from the political process, economically disenfranchised populations, and otherwise marginalized communities. What unites these populations is their under-representation in the political marketplace.[77]

[76] Sierra Club v. Morton, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting) ("The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.").

[77] In a cyclical fashion, lack of political representation causes and is caused by lack of ownership of the land or the means of production. The history of economic development in Appalachia exposes the complex and deep-seated nature of this disenfranchisement. Writers have emphasized that the resources of Appalachia have often been developed for the benefit of outside groups, in much the same way that a colony's best interests are subverted to serve the goals of its mother country. *See* Rivkin, *supra* note 22, at 478 (citing research that revealed high levels of "corporate and absentee ownership of surface and mineral rights" in Appalachia); Montrie, *supra* note 10, at 12-13, 16-17 (describing inequitable patterns of land ownership that date back to the colonial era, when two-thirds of the Tennessee mountain region and three-fourths of Eastern Kentucky were owned by "merchant capitalists, land companies, and distant planters," while also describing the "one-way flow of resources" out of West Virginia that persists to this day); Loeb, *supra* note 11, at 75 ("West Virginia is often described as the nation's natural-resources colony. Most of the mineral and timber is owned by out-of-state corporations or powerful family trusts, and these have shaped the state and county governments to serve their economic interests."); EVE S. WEINBAUM, TO MOVE A MOUNTAIN: FIGHTING THE GLOBAL ECONOMY IN APPALACHIA 22-23 (The New Press 2004) ("Politicians and economic development officials in Appalachia, as in most of the South, have concentrated on one economic development strategy: recruiting industry from the North. . . . Advocates of the New South envisioned a region less dependent on Northern manufactured goods and truly part of the modern industrial age. But from the beginning the manufacturing operations recruited by Southern states generally employed very few skilled workers. . . . Thus the New South did produce many new jobs, but without the predicted accumulation of capital, or industrial and commercial independence for the South."). *See supra* note 10 for a discussion of the political use of stereotypes about Appalachia.

Having re-framed the "cause" to focus on "procedural inequities inconsistent with the ideals of participatory democracy,"[78] the environmental justice movement has taken a "Legal Process" perspective in its challenge to those who would harm the environment.[79] Legal Process fits with environmental justice principles because data suggest that the degree to which a marginalized community is politically organized is directly correlated with the likelihood that industry will locate in a community, pollute within a community, or displace a community.[80]

In this way, collective action and political participation serve as counterweights to the forces of "development," a euphemism for the extraction of human and natural resources. Saying that organization is an antidote to environmental discrimination does not, however, answer the antecedent question: whose cause is this anyway? A cause is not amenable to a simple and objective definition, but is instead the result of complex social negotiation:

> [A] 'cause' is not an objective fact 'out there.' A cause, rather, is a socially constructed concept that evolves, if at all, through a process in the course of which experiences, circumstances, memories, and aspirations are framed in a particular way. . . . Yet, inasmuch as the reality of a cause is a constructed and negotiated experience, it is in the very act of legal representation that a cause . . . is asserted or defused, comprehended or dissolved, recognized or silenced. Cause lawyers, in short, are not simply carriers of a cause but are at the same time its producers: those who shape it, name it, and voice it.[81]

---

[78] ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 22 (Robert V. Percival et al., eds., 2006).

[79] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 88-103 (Harvard University Press 1980) ("Malfunction occurs [in a representative democracy] when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.").

[80] "The greater an area's potential for participation in collective action, the higher the firm's expected costs of litigation, lobbying, and compensation, and thus the less likely it will be to locate there." Jay Hamilton, *Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities*, 24 RAND J. ECON. 101, 104-05 (1993).

[81] Romem Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Layers and Bedouins in the Israeli Courts*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 227, 231 (Austin Sarat & Stuart Scheingold eds., 1998). *See supra* Section II.A and *supra* note 42.

Identifying the source of the "cause" is important because client autonomy and attorney-client collaboration are traditional signifiers of "cause lawyering."[82] As such, to say that a lawyer is the producer of the cause creates an internal dilemma. Even if a cause is earnestly adopted on behalf of a marginalized community, the cause can rightfully and skeptically be described as yet another artificial imposition of the will of powerful outsiders on the powerless. Stated differently, when cause lawyering co-opts the political will of a population, even ostensibly for the community's good, there is a danger that underlying inequities will be reinforced rather than deconstructed.[83] Thus, scholars now emphasize that legal change, even if obtained, cannot single-handedly create meaningful and lasting reform.[84]

This criticism relies on a history of co-optation of land and resources, but it also relies on a history of co-optation of powerlessness. For example, a tried and true tactic of "[d]ominant groups . . . [has always been] to portray themselves as oppressed by Big Government: tobacco companies have identified themselves with civil rights, environmental despoilers with

[82] Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1395 (2009) ("Democratic lawyers [i.e., cause lawyers] aim to avoid such a one-directional, didactic approach, with its implicit message of 'here's what I know that you need to learn.' Instead, a democratic lawyer would likely approach the group with greater curiosity and more clearly conveyed respect.").

[83] *See* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics,* 120 HARV. L. REV. 937, 977 (2007) ("It is not the particularities of lawyers as a professional group that create dependency. Rather, it is the dynamics between skilled, networked, and resourced components and those who need them that may submerge goals and create reliance.").

[84] *See, e.g.*, Piomelli, *supra* note 77, at 1406 (stating that "democratic lawyers" refuse to "focus[] narrowly on the judicial and legal arena (and especially on perfecting the law) as the primary way to attain freedom, dignity, and justice for low-income and working-class people, people of color, and their communities" because "[t]hey are unconvinced that legal reform alone – unconnected to other collective efforts or to the groups on whose behalf reformers believe they act – will in fact directly translate into meaningful and lasting progress in ending subordination and deprivation"); Rivkin, *supra* note 22 at 491-92 (describing how the movement against the broad form deed in Kentucky in the 1960's failed in part because the strategy was framed in a way that "block[ed] meaningful participation by citizens;" for example, activists sought relief from the same courts that "had perverted [. . .] the issue in the first place" and there was an "over-reliance on lawyers").

unemployed workers."[85] Thus, in addition to naming the cause, cause lawyers must name the forces that would prevent them from working toward real change, including those who would characterize EJ as "eco-colonialism."[86] By struggling against the critique that well-meaning outsiders are merely the latest incarnation of the Oppressor in a long history of oppression, the post-modern self-assessment does not become a barrier to EJ lawyers' attempts to overcome power differentials and a history of cooptation.[87]

In response to those who criticize cause lawyering, Orley Lobel has observed:

> An argument that has become increasingly prevalent in legal scholarship states that the law often brings more harm than good to social movements that rely on legal strategies to advance their goals. . . . [But] the limits of social change are not confined to legal reform, but in fact are as likely (if not more so) to occur in the realm of extralegal activism. Moreover, the idea of opting out of the legal arena creates a false binary between social spheres that in reality permeate one another.[88]

---

[85] Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, 227, 231 (Austin Sarat & Stuart Scheingold eds., 1998); *cf*, Lobel, *supra* note 78, at 937, 975 ("In a classic example of cooptation, activists should be concerned about the infusion (or indeed confusion) of nonlegal strategies with conservative privatization agendas. Indeed, in significant social policy contexts, legal scholarship oriented toward the exploration of extralegal paths reinforces the exact narrative that it originally resisted - that the state cannot and should not be accountable for sustaining and improving the lifeworld of individuals . . . and that we must seek alternative ways to bring about social reform.").

[86] The pro-coal forces have attempted to deflect public interest criticisms back on the activists who make them. In the Blair Mountain controversy, for example, the Logan County Commissioner publicly declared war on "out-of-state environmentalists" after the filing of Bragg v. Robertson. Loeb, *supra* note 11, at 183.

[87] "The arguably disempowering elements of lawyering for social justice bespeak less of the inability or unwillingness of lawyers and clients to engage in progressive representation than the intransigence of grinding poverty and entrenched system of dominance and stigmatization that they challenge. The dilemmas that lawyers and clients face and their attempts to reconcile them while using the 'master's tools' are inseparable from situated lawyering with clients in a historic, political, and social context." Corey S. Shdaimah, *Dilemmas of "Progressive" Lawyering: Empowerment and Hierarchy*, *in* THE WORLD'S CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY LEGAL Practice 239, 268 (Austin Sarat & Stuart Scheingold eds., 2005).

[88] Lobel, *supra* note 78, at 937, 940. Also, *compare* Ashar, *supra* note 41, at 1904-06 ("[M]any commentators . . . make a broader critique of the atomistic nature of remedies offered by public interest lawyers. . . . Impact litigation and legal services strategies were built on a foundational commitment to rights and 'rights talk,'" which eventually "slipped into politically-contingent indeterminate balancing" and ultimately "had the effect of legitimizing and reinforcing an established political structure, the same structure constructed for managing and oppressing poor people.") *with* Michael McCann & Helena Silverstein, *Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 261, 269-74 (Austin Sarat & Stuart Scheingold eds., 1998) (highlighting research that shows that public interest lawyers are fully cognizant of the limits of litigation and that such lawyers do not inappropriately dominate social movements).

This critique of cause lawyering—that change spurred by outside influence is illegitimate—is precarious because it may obstruct any transformation at all. It freezes in place a hegemonic power structure benefitting those who levy the critique.[89] Tactics like listening projects therefore not only provided the Zeb Mountain movement with material for its mission but also tempered the perception that the lawyers were imposing an outsider's agenda. From this perspective, cause lawyers should not seek to impose a truth (e.g., that mining is harmful to health, economy, and environment) but to expose a truth (e.g., that mining companies do not exist to serve the local communities, the local population, or the local economy). This truthful exposé is necessary because communities may have self-identified with the true oppressor for so long[90] that there is a disconnect between their world view and their world experience.[91] The ability of social movements to mobilize for social change increases the more they are able to explain the need for such change in a manner consistent with their target audience's world view and existing norms. The 'politics of rights' is, as such, an argument about the tight fit between rights-oriented social movement frames and American legal-cultural predispositions rooted, in turn, in a liberal pluralist tradition.[92] In the campaign against mountaintop removal throughout Appalachia, this disconnect has been bridged with facts.

---

[89] *See generally* ANTONIO GRAMSCI, LETTERS FROM PRISON (Frank Rosengarten, ed., Columbia University Press 1994); EDWARD W. SAID, CULTURE AND IMPERIALISM (1993).

[90] From this proposition comes the purpose of the *Myth/Fact* sections of THE DEFENDER: to deconstruct the widely-shared beliefs in the economic and professional benefits of supporting a mining company. [cite Gaventa, Power & Powerlessness]

[91] See Amy Glasmeier & Tracey Farrigan, *Poverty, Sustainability, and the Culture of Despair: Can Sustainable Development Strategies Support Poverty Alleviation in America's Most Environmentally Challenged Communities*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 131, 132 (2003).

[92] Noga Morag-Levine, *The Politics of Imported Rights: Transplantation and Transformation in an Israeli Environmental Case-Lawyering Organization*, *in* CAUSE LAWYER IN AND THE STATE IN A GLOBAL ERA 334, 336-37 (Austin Sarat & Stuart Scheingold eds., 2001).

And, indeed, that is what happened at Zeb Mountain. In Tennessee, social and legal activists recognized that misinformation in the community could not be attributed solely to mining company propaganda, but also resulted from the fact that the agencies charged with monitoring the mining companies are underfunded and understaffed. Thus, they concluded that informed and mobilized communities would be integral to the success of environmental monitoring.[93] To that end, UMD tested the water itself and delivered the results to the agencies.[94] As discussed earlier, this tactic had the added benefit of earning the organization credibility from the agency and trust from the community.

The lesson from both this single tactic and the entire campaign is that, even if UMD's cause did not originate from an organic community upswell, there was a cause that existed. UMD named it and facilitated community organizing, and the community adopted it as its own. "Outsider" involvement cannot be said to have undermined its legitimacy because, like all movements, environmental justice campaigns ineluctably occur in their cultural and historical contexts. Generations of subordination to mining companies' prerogatives in the name of economic survival created conditions where community mobilization required an ideological debunking—factual evidence arguing against the need for coal and the legitimacy of removing mountains to get it.

[93] This lesson is not a new one. For example, the fact that communities have access to, and knowledge of, Toxics Release Inventory (TRI) data has created a powerful incentive for entities to manage their toxic pollution. Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 317-18 (2001) (describing how TRI "strengthen[s] the community's informational hand" and subjects polluters to "informal regulation" because such polluters do not want to create bad public relations).

[94] *See* THE DEFENDER 6-7 (Fall 2006) ("The agencies recognized the value of having citizen volunteers provide data from the field [regarding water testing] without costing tax payers a dime. Many of the agencies who monitor strip mining in Tennessee are hopelessly underfunded and understaffed. UMD began to supplement their work by providing high resolution pictures from the air and ground and it worked.").

Ultimately, the role of law in waging the grassroots campaign against mountaintop removal was circumscribed, or, in the felicitous phrasing of Scott Cummings and Ingrid Eagly, "constrained,"[95] and the concrete outcomes of the litigation filed in the course of the campaign, standing alone, were disappointing. Still, the confluence of extra-legal tactics and paper monkey-wrenching within the regulatory regime were able to: (1) highlight regulatory inadequacy and agencies' illegitimate deferrals to mining companies' claims of permit compliance, and (2) leverage this information so as to organize the community to protect its health, the environment, and the community itself. In a cause against environmental degradation, inaction arguably is complicity. To avoid such a cause out of a fear that action may be perceived as paternalistic can be said to empower the oppressor. The true metric of success for a cause lawyer, as Connie White of Save Our Cumberland Mountains (SOCM) pointed out, must not be whether the "outsiders" got what they wanted, but "whether [community members] feel empowered by their participation."[96] Thus, fostering knowledge and organization on a local scale, like Zeb Mountain, may well be the first step toward the cultural shift that will end mountaintop removal mining once and for all.[97]

[95] Cummings & Eagly, *supra* note 8, at 1292.

[96] Loeb, *supra* note 10, at 132.

[97] There is ample evidence that such a cultural shift is in play. The upsurge of public protests over the coal fuel cycle reflects an awareness that direct action, combined with strategic legal action, public education, and political pressure, are necessary to avert global—as well as local—catastrophes. *See* Elizabeth Kolbert, Profiles: *The Catastrophist*, THE NEW YORKER, June 29, 2009, p. 39 (profiling the NASA scientist James Hansen, who was arrested at a recent protest at a coal-fired power plant in Washington D.C.). *See also* SILAS HOUSE & JASON HOWARD, SOMETHING'S RISING: APPALACHIANS FIGHTING MOUNTAINTOP REMOVAL (University Press of Kentucky 2009) (profiling local leaders in the anti-mountaintop removal movement).