

Y4
.J 89/2
96-78 B

1042

96-78
J 89/2
96/Y4

FEDERAL VENUE STATUTES

DOCUMENT

GOVERNMENT
Storage

FEB 24 1981

FARRELL LIBRARY
KANSAS STATE UNIVERSITY

HEARING

BEFORE THE

SUBCOMMITTEE ON

IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 739 and S. 1472

FEBRUARY 20, 1980

Serial No. 96-78



Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1981

69-478 O

8-108-2
8-108-20

COMMITTEE ON THE JUDICIARY

EDWARD M. KENNEDY, Massachusetts, *Chairman*

BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JOSEPH R. BIDEN, Jr., Delaware
JOHN C. CULVER, Iowa
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

STROM THURMOND, South Carolina
CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
THAD COCHRAN, Mississippi
ALAN K. SIMPSON, Wyoming

STEPHEN BREYER, *Chief Counsel and Staff Director*
EMORY SNEEDEN, *Minority Chief Counsel*

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

DENNIS DeCONCINI, Arizona, *Chairman*

ROBERT C. BYRD, West Virginia
EDWARD M. KENNEDY, Massachusetts

ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming

ROMANO ROMANI, *Staff Director*
ROBERT E. FEIDLER, *Chief Counsel*
JONATHAN M. TOPODAS, *Counsel*

CONTENTS

WEDNESDAY, FEBRUARY 20, 1980

	Page
Opening statement of Senator DeConcini.....	1
Opening statement of Senator Dole.....	3
Opening statement of Senator Laxalt.....	4
Opening statement of Senator Hatch.....	7

TESTIMONY

Rampton, Calvin L., attorney, and former Governor, State of Utah.....	11
Panel of attorneys:	
Watt, James G., president and chief legal officer, Mountain States Legal Foundation; Paul Kamenar, counsel, Washington Legal Foundation, and Gordon H. DePaoli, attorney.....	21
Panel of business representatives:	
Haggard, Jerry L., representing American Mining Congress; Ronald A. Michieli, National Cattleman's Association, The National Wool Growers Association, The Public Lands Council, and the Arizona Cattle Growers Association; and Guy Gelbron, representing Arizona Public Service Co.....	46
Panel of legal experts:	
Halpern, Charles, director, and Andrew Sacks, counsel, Institute for Public Representation.....	63
Panel of legal experts:	
Butler, William, representing the Environmental Defense Fund, and the Natural Resources Defense Council; Peter J. Herzberg, attor- ney, Sierra Club Legal Defense Fund, and Joel T. Thomas, counsel, National Wildlife Federation.....	77
Panel of Government officials:	
Hughes, John Vance, representing James Moorman, Assistant Attorney General, Lands and Natural Resources Division, Department of Justice, accompanied by Richard Stoll, Environmental Protection Agency, and Anne Shields, DOJ.....	99

PREPARED STATEMENTS

Butler, William A.....	88
DePaoli, Gordon H.....	39
Gelbron, Guy.....	56
Haggard, Jerry L.....	52
Hatch, Senator Orrin.....	16
Herzberg, Peter J.....	93
Kamenar, Paul.....	36
Matheson, Governor Scott M.....	10
Michieli, Ronald A.....	55
Moorman, James.....	105
Rampton, Calvin L.....	19
Sacks, Andrew and Charles Halpern.....	71
Thomas, Joel T.....	96
Watt, James G.....	32

IV

APPENDIX

	Page
Additional submissions of James W. Moorman-----	110
Additional submission of Administrative Office of U.S. Courts-----	114

ADDITIONAL PREPARED STATEMENTS

University of Virginia, School of Law-----	116
National Legal Aid and Defender Association-----	119
AFL-CIO-----	122
Washington Council of Lawyers-----	125
Governor Scott M. Matheson-----	129
D. Michael Rappoport-----	131
Executive Office of the President-----	135
Resolution of Upper Colorado River Commission-----	138
Senate Report, 1962, on jurisdiction and venue-----	142

FEDERAL VENUE STATUTES, S. 739 and S. 1472

WEDNESDAY, FEBRUARY 20, 1980

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS
IN JUDICIAL MACHINERY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 5110, Dirksen Senate Office Building, Senator Dennis DeConcini (chairman of the subcommittee) presiding.

Present: Senator DeConcini.

OPENING STATEMENT OF SENATOR DeCONCINI

Senator DeCONCINI. The Subcommittee on Improvements in Judicial Machinery will come to order.

I am pleased to have Senator Laxalt join me in these hearings today. I understand he will be sitting with me. Also we are very pleased with the distinguished number of witnesses we have today. I would like to read my prepared opening statement before we call our first witness.

This morning we will be hearing testimony on two legislative proposals that create changes in the Federal venue statutes. The distinguished Senator from Nevada, Senator Laxalt, is the author of S. 739, which requires that cases be heard in the judicial district where the impact or injury occurs in all civil cases in which the Federal Government is the defendant.

I am the sponsor of S. 1472, which requires that environmental cases be heard in the district where the environmental injury or impact is most substantial, unless it can be shown that the case is truly national in scope.

Each bill makes parallel changes in the venue laws which provide for circuit court review of agency decisions. A great many environmental and other laws have special venue sections which send appeals from certain agency decisions to the U.S. Court of Appeals for the District of Columbia.

The legislation before us this morning addresses specific problems that have been experienced in different regions of the country, most especially the West. But the philosophic premise of the two bills is perfectly consonant with the tenets of federalism. Senator Laxalt and I share the view that local Federal courts—be they trial courts or appeals courts—are the proper forums to deal with issues that affect particular localities.

I am, frankly, disturbed by the large number of environmental cases decided by the Federal courts of the District of Columbia. This is

possible both because of the general venue statute which bestows jurisdiction on the District of Columbia courts because Washington is the residence of the Federal Government and because of the numerous special venue provisions tucked away in many different laws. Neither I, nor Senator Laxalt, are suggesting that judges in the District of Columbia are less able or more biased than their colleagues elsewhere. We do believe, however, that it is inevitable that their understanding of and appreciation for local conditions is both limited and academic.

In fact, this very sentiment was expressed most succinctly by Judge Hart, himself a member of the District of Columbia District Court. Judge Hart said:

Isn't ecology an essential part of the suit? It certainly is. If there is any type of suit that ought to be heard in the neighborhood involved, it is this type of suit. What, in the name of heaven, does somebody sitting in Washington know about the Navajo Indian and ecology of the Southwest? We couldn't be more ignorant. We have not known anything about the Indian here since 1620.

Those who would argue that the law is the law no matter where or who decides it neither understand the nature and organization of the Federal judiciary nor do they appreciate the realities of legal decisions. Issues are not self-evident. If they were, there would be no need for judges. But, because they are not, we depend upon a highly skilled and unbiased judicial system to render decisions. Those decisions will, nonetheless, reflect the knowledge, experiences, and context of the judge and the jury.

Had our Founding Fathers wanted all judicial decisionmaking to occur in the Federal capital, they would have so provided. In fact, the organizational form chosen was designed to allow the social, cultural, and geographic differences within our great Nation to have full scope. Federal courts are based upon districts within States and circuits comprising groups of States.

Furthermore, those circuits tend to define geographic regions that are bound together through commercial and social intercourse. We even speak of the law of this or that circuit, recognizing thereby that substantial and significant differences exist and co-exist. When they become ripe, some of these inconsistencies are decided by the Supreme Court. However, many issues are not resolved by the Supreme Court and it is thus common for different statutory interpretations to continue.

I have become convinced that the ever-growing tendency to litigate environmental issues in the courts of the District of Columbia is seriously eroding this fundamental principle of judicial federalism. Moreover, it is depriving the citizens of this country of a fair and reasonable opportunity to have matters affecting their lives heard in forums comprised of men and women who are intimately acquainted with the issues at stake.

I recently came across an interesting article in the Ecology Law Quarterly, instructing environmental lawyers on the hows and whys of District of Columbia venue. The question of venue, according to the author, can spell the difference between victory and defeat, and thus it is imperative to utilize every possible tactic to keep cases in Washington.

"Few circuits," the author states,

are as understanding of the conservationist cause . . . as the District of Columbia Circuit. Many conservation battlegrounds lie in the Ninth Circuit, a court which has so far been distinctly unsympathetic to environmental concerns.

He goes on to say that:

[A] judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view * * * (and) are likely, therefore, to feel that the public interest lies in building a project, rather than preserving the environment.

The article ends by spelling out the various means by which the environmental lawyer can minimize the local nature of the problem to convince the court that venue should remain in the District of Columbia.

Mr. Brecher's article makes the case for the bills before us today. Implicit in the article is the point that judges and juries familiar with the area and the problem are likely to reach conclusions different from those whose exposure is limited to words in a court brief. I believe that the citizens of the West have the right to have matters that so vitally affect their future and their well-being determined by men and women who, at least, understand in a palpable manner the issues in controversy.

[The full article by Mr. Brecher can be found in the appendix.]

At this point, I am pleased to submit the statement of the distinguished Senator from Kansas and a member of this subcommittee, Senator Dole.

OPENING STATEMENT OF SENATOR DOLE

Mr. DOLE. Mr. Chairman, our hearings today focus on one of those apparently technical legal subjects which, in their operation, have a significant practical impact. The significance of our venue statutes, of course, lies in their place in the determination of where lawsuits shall be tried.

The bills that we are discussing today concern only one area of our venue law—venue for actions against the Federal Government and employees of the Federal Government. Yet from a broad perspective, this aspect of the rules of venue may be one of the most important. In the last several decades, litigation against Federal officers has occupied a greater and greater amount of our Federal judicial resources and has determined the rights and duties of American citizens to an ever greater extent. Expanding concepts of actionable civil rights is one obvious reason for this development. Proliferating Federal regulation is another. On a more mundane level, the Federal Government has become involved in an unprecedented quantity of diverse programs, ranging from military procurement to home mortgage insurance, and much litigation swirls around these Federal activities.

Thus we find, in spite of our ingrained, and often-saluted ideals of representative government that judge-made law is determining a greater portion of our law. This development makes it vitally important, in my view, that our traditional notions of venue and federalism be vigorously maintained.

The principles of venue are based on the view that justice requires the judicial process to be tailored for the convenience of private litigants in order to permit the maximum participation by those directly affected by the litigation. At the same time, the general federalist perspective which permeates our whole system of government is founded on the conclusion that the central government, or a centralized court, is not the best forum for determining every issue of public policy.

Yet the operation of our present venue statutes has resulted in more and more litigation against the Federal Government being heard in the Federal courts of the District of Columbia. This development seems to me to be not only in direct contradiction to the fundamental principles of venue and federalism I have described, but also simply unfair. Litigation is often resolved in a district far removed from the district where the issues of the case have a real impact. Consequently, citizens with a real interest in participating in such litigation are often foreclosed from such participation, often because they are unaware of the particular case.

So, Mr. Chairman, I would like to compliment both you and Senator Laxalt for taking the lead in addressing this problem. Both S. 1472 and S. 739, the subjects of our hearing, are motivated by a common concern over this concentration of litigation against the Federal Government. Some may articulate this issue as part of legitimate frustrations of our western citizens, commonly called "sagebrush rebellion." However, I believe this is a general structural problem of our judicial system of interest to all citizens.

Two of our colleagues who do not sit on this subcommittee, Senator Laxalt and Senator Hatch, have been energetically involved in developing and supporting proposals to deal with this problem. I extend a cordial welcome to them and to all our witnesses today; and I look forward to hearing their testimony.

Our first witness is Senator Laxalt. We ask Senator Laxalt please to come forward and make his statement.

We then follow with a panel of Senator Hatch, the distinguished Senator from Utah, and the former Governor of the State, Calvin Rampton.

OPENING STATEMENT OF SENATOR LAXALT

Senator LAXALT. As the original sponsor of Senate bill 739, I am pleased to be here to testify and to urge the subcommittee to examine my bill carefully and report it to the full committee.

It is my confirmed belief that the purposes of S. 739 are among the most important changes which could be made to the Federal court procedural statutes of this Congress. Although much of the beneficial impact of such changes will be to Western States, its effect would be of great benefit to the entire country.

Until 1962, cases filed against the Federal Government had to be tried in the District Court for the District of Columbia. I think that is an important historical point.

The 87th Congress, however, passed legislation amending the statute to enable citizens to bring suit against the Federal Government in the District Court in the district where they resided. In explaining

why it reported that bill, the Judiciary Committee stated that judicial administration would be made more efficient if cases involving local problems, such as water rights, grazing land permits, and mineral rights could be brought locally rather than only in Washington, D.C. This is the very rationale that Senator DeConcini referred to in his opening remarks.

In 1962, the plaintiffs in cases against the Government were, for the most part, private citizens. That is a vital distinction in this situation. They are private citizens. However, since that time the public interest movement has developed, with the result that many plaintiffs in suits where the Government is defendant, both in environmental cases and in others, are no longer the citizens involved but organizations claiming to represent the interests of others.

As a result, in many such cases, the "real party in interest" is not a party plaintiff, and in many cases does not even know that the case has been filed. Inasmuch as many of those public interest groups are situated in Washington, D.C., the result has been that cases are filed in the District of Columbia District Court, with a District of Columbia public interest lawyer on one side, and a District of Columbia government lawyer on the other. The subject matter, on the other hand, may involve an issue solely within the State of Alaska, the State of Nevada, or anywhere else.

My bill would require that cases having impact or injury in one or more districts be tried in one of those districts. Such an approach is consistent with venue law generally, and is the logical extension of the 1962 change in the venue statute.

The advantages, it seems to me, are obvious. First of all, the fact that a case is heard locally would virtually always be to the convenience of the people affected by the case, or the real parties in interest.

Second, those people could be easily notified of the case, and be given the opportunity to participate and to be kept advised of the progress of the case. Allowing judges to hear such cases who have knowledge of the economy and culture of the area affected by the litigation would certainly serve the interests of judicial efficiency. Cases relating to each other could be consolidated, and a local judge would know of other, related issues which should be resolved in a case, where a judge sitting thousands of miles away, would not.

Finally, and perhaps most importantly, placing cases which affect a particular area in that area will build confidence in our legal system. As the chairman indicated, there is little confidence in the West involving matters affecting us in the legal system here in the District. People in Nevada, and I'm sure people in every other State or the country, do not gain that confidence knowing that a judge thousands of miles away, who is not familiar with local concerns, is deciding a case of vital concern to them.

On the appellate level, my bill uses the same test as it does on the trial level. It requires that appeals from agency proceedings be filed in one of the circuit courts where the injury or impact is most significant. We use the same test and threshold on the appellate level as under trial.

Under present law, of course, virtually all agency appeals may be filed in one of several circuits, and when appeals are filed in more than one circuit, as many are, the circuit where the appeal is filed first is

the one which will hear the case. As a result, we live with an unfortunate and unprofessional system of races to the courthouse to see who can get the most favorable forum.

By requiring that the circuit in an area which will be most affected by a case hear that case, rather than the one where it is first called, we will kill two birds with one stone—eliminate the race to the courthouse, and have the case heard by judges more familiar with the problem, and closer to the place where the people most likely to be affected by the case live.

Mr. Chairman, there is one point which I think needs to be emphasized at the outset of this hearing. It is not the intent of my bill, and I believe it is not the intent of your bill, to change the outcome of any case filed in the Federal court system. You alluded to it. I believe, as I think you believe, in the concept of blind justice, and I am convinced that a case heard by any Federal judge in the country will be decided on the merits and on the evidence presented.

What we are trying to do is to strengthen the Federal court system by decentralizing it, and by assuring that the parties affected by Federal cases be enabled to participate in them. We are also trying to make the system of justice more efficient by allowing judges who are aware of local customs and concerns, and local issues, to try cases instead of those who are thousands of miles away.

I do not want to take more of the committee's time, as I know, from looking at the statements of the witnesses whom we will hear from today, that both sides of this issue will be very ably presented to the subcommittee. I again wish to thank you for allowing me to testify, and I look forward to participating in this hearing today.

Senator DECONCINI. Senator Laxalt, how long have you been involved in this particular problem? You were Governor before you came to the U.S. Senate. Did you have occasion then to come across this particular problem?

Senator LAXALT. This is a problem I have lived with, as you have, for many years, really during all the time I have been practicing law and in my public life as well. We are constantly running into this problem, more so in recent years where matters affecting our local citizens more often than not are being tried here in the District as opposed to our backyards.

Senator DECONCINI. What is the public response to the present procedures versus what you or I are proposing by our bills?

Senator LAXALT. I think it is the heart of the so-called sagebrush rebellion. I do not believe that there is really a great urge on the part of the Western States to assume responsibility for all Federal lands. The thrust of the sagebrush rebellion is that the people in the West want to be heard. They feel isolated.

That is essentially the response we have had from this bill, Mr. Chairman. Our people do not want any unfair edges in terms of settlements of their particular controversies. We have had certain situations which exemplify the need for this bill. One quick example is the *Ruby Lake* case, a conflict with Fish and Wildlife regarding recreational use of a wildlife refuge. It was determined, if you can believe it, on a temporary restraining order issued from the D.C. district court on July 2, ahead of the July Fourth weekend. Nevada residents had been

using it for years for motorboating, but now they were told they could not use it.

Senator DECONCINI. Could not use it?

Senator LAXALT. Could not. Here is a decision thousands of miles away affecting the vital recreational interests of that area where they were blind-sided on a T.R.O.

Senator DECONCINI. Even though legal notice might have been given, certainly public notice was short in coming.

Senator LAXALT. Surely. I might say this is just the type of example that is occurring not only in my State but throughout the West where people just simply want cases involving their interest within the Federal jurisdiction to be tried at home.

Senator DECONCINI. Your bill or my bill would not in any way affect the outcome of that temporary restraining order.

Senator LAXALT. That is right.

Senator DECONCINI. The court there might have ruled the same way but at least it might have been in that forum. Is that right?

Senator LAXALT. Precisely.

Senator DECONCINI. I thank the Senator.

Our next witness will be Senator Hatch, distinguished Senator from Utah, and also Governor Cal Rampton.

Governor Rampton, I am pleased to see you here today. I served with you when you were Governor and I was in the Governor's Office in Arizona. We well recall your great leadership for the Western States. We are pleased to see you here with the distinguished Senator from Utah.

OPENING STATEMENT OF SENATOR HATCH

Mr. Chairman, I appreciate the opportunity to tender a few remarks regarding this subcommittee's commendable initiative to correct a certain pattern and practice of abuse of the Federal judiciary, a pattern of abuse that has become the modus operandi by which a number of special interest groups have imposed extreme interpretations of the law on an unwilling majority of Americans. I am referring to the use of Federal courts in the District of Columbia to acquire judgments against the United States that uniquely affect lives and circumstances in the several Western public lands States.

I would like to express sincere appreciation to my friend and colleague from Arizona, Senator DeConcini, and my friend and colleague from Nevada, Senator Laxalt, for the time and effort that they have devoted to the drafting of S. 1472 and S. 739. It is my hope that the remarks which follow will serve to highlight the social and economic need for this legislative effort as well as to summarize the body of arguments in support of it as a matter of legal principle.

Mr. Chairman, under the Federal rules of civil procedure, Federal courts have the authority to transfer actions brought before them, that are properly within the jurisdiction of the United States, to any other district or division where it might have been brought, if the transfer is for the convenience of parties and witnesses, and is in the interest of justice, 28 U.S.C. 1404(a).

In establishing this authority in the courts, Congress has made clear the primary considerations by which venue is determined in Federal

actions—the convenience of parties and witnesses and the interest of justice.

Rather, however, than leaving this determination solely to the courts, Congress has traditionally chosen to fix proper venue by statute allowing the courts to modify this in the exceptional instance. Until 1962, venue in civil actions brought against Federal agencies and officers was governed by a general statute that limited venue to the district of the defendant's residence.

Federal-question actions, during the tenure of this statute, were properly brought only in the District of Columbia under virtually all circumstances as a result of the indispensable-parties doctrine which prohibited plaintiffs from proceeding against subordinate Federal officers.

In 1962, Congress approved the Mandamus and Venue Act which modified existing venue provisions allowing civil actions to be brought against officers or agencies of the United States in any district in which (1) a defendant in an action resided; (2) the cause of action arose; (3) any real property involved in the action was situated; or (4) the plaintiff resided if no real property was involved. The act also authorized all Federal courts to issue writs of mandamus against public officers, a prerogative before then invested only in the District of Columbia courts.

While the Mandamus and Venue Act has represented a significant step toward promoting the broad objectives of the Federal venue laws, they have been beset by a variety of persistent problems. One of the most significant ones has resulted from the concept of cause of action. The courts, by increasingly having focused upon the wrongful acts of the defendant in determining where the cause of action arose rather than upon the injury allegedly suffered by the plaintiff has effectively allowed the defendant to determine where venue will lie. In the case of Federal Government officers and agencies, this has invariably resulted in venue in the District of Columbia.

S. 1742, introduced by the distinguished chairman of this subcommittee, Mr. DeConcini, and S. 739, introduced by the distinguished Senator from Nevada, Mr. Laxalt, are designed, among other matters, to correct this interpretation of the Mandamus and Venue Act. Each would allow actions to properly be brought within any district in which a substantial portion of the alleged impact or injury occurs, although the scope of coverage of these bills differs.

In determining traditionally where venue is fixed, courts in this country have variously looked to the theory of the claim, the subject matter of the claim, and the parties involved in the claim. In every instance, these factors were assessed and evaluated with an eye toward determining which venue would be most convenient to the participants in the litigation. While often couched in terms of the best interests of justice, these standards have largely been synonymous. It has always been considered in the best interests of justice that parties to litigation have had relatively easy access to the court system. To the extent that such participation became burdensome or cumbersome, the rights of these parties have been viewed as illusory.

The factors upon which most State venue statutes are predicated are each consistent with this aim. There are four grounds of venue that have predominated: (1) That district or division in which real

property or the "res" of an action was located. This factor is premised upon the fact that those witnesses to an action who are best able to discuss the status of the property or the "res," or describe the existing circumstances surrounding it, or describe title to it, are most likely to be found in that district or division. (2) That district or division in which the cause of action has arisen. Again, the convenience of witnesses is the paramount consideration. It is simply more likely that relevant witnesses will be located where an injury of some sort has, in fact, occurred. (3) That district or division in which the plaintiff resides. Convenience of the plaintiff is clearly the dominant justification for this factor. (4) That district or division in which the defendant resides. Convenience of the defendant is obviously the major consideration here.

S. 1472 or S. 739 are each more consistent with these grounds of venue, with the exception of the last grounds, than present law. By insuring that actions are less likely to be brought within the District of Columbia courts, and more likely to be dispersed randomly throughout the country, these bills will make participation in "Federal question" litigation more convenient and more accessible to everyone except certain officers and agencies of the Federal Government.

As this committee stated in a report nearly 20 years ago, venue provisions which require citizen-plaintiffs to bring actions in locations convenient for Federal defendants tailor "our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of the Government."

These bills would do more than clarify which party is preeminent as between the citizen and his government. They will do more than promote the convenience of those from whom the Government springs, and upon whom the burdens of government lie. First, it will, in fact, insure that actions are conducted closer to the relevant events and situs giving rise to the action. Second, it will insure that the influences, often subtle, of local customs and practices are better recognized and reflected in Federal judicial decisions. Third, it will eliminate congestion, particularly congestion of certain specific types of cases, in the Federal courts, and, it is to be hoped, expedite their resolution. Fourth, I believe that it will make it far more likely that genuine controversies are fashioned in the Federal courts, rather than the types of pseudo-controversies that are becoming increasingly evident such as the controversial *National Resources Defense Council v. Hughes* case. Fifth, in the event that the District representation constitutional amendment is ever ratified, these bills will insure that the Senators from the District are not "first among equals" in their influence by virtue of their role in the nomination process for the district courts.

Finally, S. 739 and S. 1472 represent much needed initiatives in the decentralization of the public sector in this country. No longer will the citizens of the 50 States have to perpetually be running to Washington to defend their rights against a government that, in the opinion of some of us, is increasingly without rational bounds. Rather, those who act as public servants in this Nation should occasionally have to come to the citizenry, to survey the results of their edicts and rules, to experience the environment in which the country works and operates outside of Washington, and to better appreciate the inherent

difficulties in rigid, uniform, inflexible regulations that are applicable to the diverse peoples and regions of this Nation.

Mr. Chairman, I ask that my prepared statement in its entirety be made part of the hearing record.

Senator DECONCINI. Without objection, your prepared statement will be included in the record at the conclusion of your testimony.

Senator HATCH. Mr. Chairman, it is my pleasure to introduce to you at this time our former Governor of the State of Utah for three terms, the former chairman of the National Governors Association, and the only three-term Governor Utah has ever had. In 1976, the same year I first ran, the common wisdom was that Governor Rampton could keep his post for another term if he chose not to retire.

Governor Rampton's leadership of the State of Utah, from 1965 to 1977, spanned the 12 years during which the Federal Government changed the philosophy and methods by which it managed the greater part of Utah. Some 67 percent of the land is in Federal hands. The philosophy changed from absentee landlordship to hands-on management.

Governor Rampton was always a promoter of industrial development, particularly of the clean variety. During his administration as Governor, Utah began a private industry swell that continues, presenting myriad new opportunities for Utahans and other Americans, as well as many problems such as the one we are discussing today.

Mr. Rampton was elected in 1964, having never held public office before. I did the same thing 12 years later, and I know it is no easy task. But it is far tougher to leave office after over a decade with greater confidence from the people than before you went in—and that's what Governor Rampton did. When he speaks, I think he speaks for a great number of Utahans and westerners, and we should listen attentively.

I introduce at this time our former Governor of Utah, Governor Calvin Rampton.

Senator DECONCINI. Thank you. I want the record to show we are pleased to see a bipartisan effort on this bill with Governor Rampton being a Democrat and yourself in your distinguished party.

Senator HATCH. I am pleased to appear with Governor Rampton.

Senator DECONCINI. We are glad to see you here.

We have been going to get together on this subject matter for some time, as you and I have discussed. We are very interested in hearing your statement.

I understand you have a statement of the present Governor as well.

Mr. RAMPTON. Yes.

Senator DECONCINI. Without objection, the statement of the Governor of Utah, Scott M. Matheson, will be made part of the hearing record.

[The prepared statement of Governor Matheson follows:]

PREPARED STATEMENT OF GOVERNOR SCOTT M. MATHESON

I appreciate this opportunity to submit a statement in support of S. 739 and S. 1472 to the Senate Subcommittee on Improvements in Judicial Machinery. Both of these bills are designed to establish uniform venue requirements under Title 28 of the United States Code. Senator Laxalt's bill proposes amendments to 28 USC 1391, 2243 and 2112. I concur in the general intent of S. 739 to require

that proper venue is obtained in the judicial district where the substantial portion of the impact or injury occurred. I am particularly intrigued with your bill, S. 1472, because of the immediate and positive impact it could have on the environmental issues in the State of Utah.

As Governor, of the State of Utah, I support S. 739 and S. 1472 for the following reasons:

(1) Utah has many concerns that are not shared by other regions due to our unique environmental problems. Providing that only district courts in the area where the impact is felt have proper venue, guarantees that a familiarity with Utah's unique environmental situation and local precedents is present. Since the Washington, D.C. District Court will have proper venue over environmental issues of national concern, both national and local interests will be protected by this proposed legislation.

(2) Both bills provide that interested parties, who are not necessary parties, can be joined to the action. These bills encourage interested parties to participate since the tremendous cost of participation is reduced because actions must be maintained where the injury of impact occurred. Further, interested parties will be able to easily discover actions in which they want to participate since information about local concerns is more readily disseminated at the local level than it is from Washington, D.C.

(3) These bills encourage further state and federal cooperation and interaction. Local interests will be provided with an important opportunity to participate in matters that affect their every-day lives. Through this opportunity for participation and input, federal law makers would become more aware of local requirements and render their decisions based upon a complete understanding of the issue involved.

In the final analysis however, the purpose that is sought by these bills transcend legal nuances. However valid they may be their justification is grounded in fundamental values of fairness and common sense that distinguishes the American federal system of government.

Senator DECONCINI. Mr. Rampton, please proceed.

Mr. RAMPTON. Thank you very much, Mr. Chairman.

By the way, should I ever decide to run for political office again, which is highly unlikely, I would like a transcript of Senator Hatch's comments.

Senator DECONCINI. We will supply that very generously.

Senator HATCH. That is good information for him to run against me.

STATEMENT OF CALVIN L. RAMPTON, ATTORNEY AND FORMER GOVERNOR, STATE OF UTAH

Mr. RAMPTON. I have submitted a statement to the committee, Mr. Chairman. I would prefer not to read it, as in many parts of it I cover matters which have been covered by statements of the chairman, by Senator Laxalt, and Senator Hatch.

Senator DECONCINI. Without objection, the statement will appear in the record in full at the conclusion of your testimony.

Mr. RAMPTON. I would like to amplify some of the points which have not been touched on.

I would like to give some particular examples of some cases where great injustice has been done and others where it could have been done where actions have been brought in the District of Columbia and there was no local participation.

I don't know whether this panel has had brought before it the case of *National Audubon Society v. Andrus*, No. 76-0943, from this District of Columbia. In that case a stipulated injunction was issued without any consultation with the people who were most vitally con-

cerned in the case. The stipulated injunction, of course, was reached between the attorneys for the plaintiff and the attorneys for the Government agency concerned.

Another such case mentioned by Senator Hatch in his statement a moment ago was *NRDC v. Hughes*, 437 Federal Supplement, 981, where a stipulation was entered into which practically gave the plaintiff in that case a veto over the leasing policies of the Department of the Interior.

Another case with which I am intimately familiar is the case of *Sierra Club v. Andrus*. That was a case brought here in the District of Columbia court and it affected only the water rights known as the reserve water rights on four small rivers in the southern part of Utah. Maybe one of them goes over into Arizona a little way, Senator, but principally they are in the State of Utah. That is all that was affected.

Yet, to the people who lived in that area, it was of vital importance. It was by pure accident that we found out West that this case had been filed at all and we were able to get intervention in the case.

We are in the case now, and I am sure Mr. James Watt, who will testify later and whose organization has represented the local interests, will describe more fully what happened in that case.

However, the fact remains that in my opinion had we not gotten local representation in that case there would have been a stipulated judgment which would have been filed just as there had been in the other cases.

You often hear it said it would be unfair to the Government, or an onerous burden to the Federal Government, to require them to litigate their cases in the various courts in the country. It is my opinion it would be easier for the Government to do this than it is under the present system where the forum is selected here in the District of Columbia by a plaintiff because it may be that the special interest group had its headquarters here.

Most of the knowledge, for example, about the Sierra Club versus Andrus matter is not contained here in the Washington office of the Department of the Interior. Most of the information that will be used in the trial of that case is contained in the BLM office in the State of Utah.

Furthermore, I am quite certain that the Justice Department in Washington and the Solicitor of the Department of the Interior have much heavier caseload than the U.S. Attorney for the District of Utah.

In my opinion, then, it would be much easier for the Government itself as well as for the defendant litigants to try these cases in the district where they arise than it would be if they are all brought here in the District of Columbia.

It is very seldom, of course, and I don't know of a single instance where, in a case such as this, technical default has occurred because the department solicitor or the Department of Justice is always alert that this does not occur. However, once the case is at issue, the pressure on the Washington solicitor's office or the Department of Justice is such that they want to get out from under the case. They want to get out from under it just as easily as they can. They have very little knowledge about the impact of the case. They don't appreciate the impact it will have on the locality. Therefore, any rea-

sonable solution—that is, a percent reasonable to them not knowing the background—any reasonable solution is grasped upon as a basis for a stipulation to settle that case.

It is highly important if justice is to be done that the real parties in these matters appear in the case. It is unfortunate that under most statutes that govern the indispensable parties, that in cases of this kind, the only indispensable party is not the real party in interest but a nominal party. That is the Federal officer being sued, either to be enjoined or mandamus. The real parties in interest, then, the ones on whom the impact will be, are not indispensable parties at all and need not be served, and very often it may be that their rights have been decided in a lawsuit where they have not even heard of the lawsuit, and a lawsuit where, if they hear about it and they are granted intervention, they can defend their rights only at great expense.

In regard to the matter of intervention, the district courts here in the District of Columbia have been rather liberal in permitting intervention in cases of this kind but they have not been liberal in permitting intervention in these cases by private individuals whose rights are to be affected. I can call your attention to a recent case of an environmental defense firm versus Costle. That was a 1978 case.

In that case, applications were made for intervention by a number of public entities in the West and by a substantial number of individuals who were going to be affected individually in their rights by this case.

Permission was given to the public entities but denied the individuals. I think this would not have occurred had the action been brought in the area where the impact would be felt.

I feel this is essential legislation and I think it is a logical step. Our judicial system would be more responsive.

As I was coming to the hearing room this morning, a representative from Governor Matheson's office handed me a prepared statement, prepared by Governor Matheson, with the request that I ask the committee to enter this in the record.

Senator DECONCINI. Governor Matheson's prepared statement has been entered into the hearing record. Express to the Governor of Utah thanks for his concern in bringing forth the statement.

Is there anything further?

[No response.]

Senator DECONCINI. Let me pose a question which I mentioned to Senator Laxalt.

Is it not your belief that this legislation might very well not change the actual outcome of any decision but would change only the venue and the location of where that decision would be made. It is not the intent of either of these bills, is it, to force the Federal court system to change its decision in any particular case?

Mr. RAMPTON. In any particular case it could not be said whether it would be changed or not.

However, as the chairman pointed out in his opening statement, a judge having knowledge and background in a case is much better able to weigh the facts according to law than a judge who does not have that information. In some instances it might result in a different decision but not by any twisting of the law but merely because of better understanding of the law by the judge in the case.

Senator HATCH. I believe it could result in changes in court decisions, but I do not think they would be unlawful nor would there be drastic changes. The reason I think it could result in changes is because there would be a greater propensity on the part of citizen witnesses in the areas of greatest impact to be able to testify locally rather than having to bear the expense of coming to the District of Columbia.

By bringing the action to the citizens, one would find far greater and weightier testimony coming from the local citizenry than we presently find. I think that is a plus.

Whether or not it changes the final result is not the intent of these bills, however if it justly changes the outcome of a case, then that certainly is an improvement over what we have today. Right now, it is a tremendous expense for our citizens from Utah to come here, to the District of Columbia, and have to testify in court on matters that have immense pressure and immense impact upon our State and upon the whole West.

Senator DECONCINI. You would agree, Senator Hatch, that this legislation fundamentally would only make the court more accessible to the citizens.

Senator HATCH. I agree.

Senator DECONCINI. It would not change the structure of the decisionmaking structure.

Senator HATCH. That is right. Each bill under consideration would create greater justice to all parties concerned, it seems to me, than the present system which has a tendency to foreclose the testimony and appearance by citizens from the area of most impact necessary to litigation involved.

Senator DECONCINI. I have no further questions.

Senator LAXALT. You alluded to a point I have, Governor. In terms of the efficiency of the process it is true, is it not, that land and water matters of the type we are discussing require a high level of expertise? It is even a specialty in western water law, is it not?

Mr. RAMPTON. No question. Western law is based upon appropriation whereas the riparian law is involved in other areas. The practical impact of the difference in those two approaches is not readily apparent to a judge who has not lived in these areas.

Senator LAXALT. Asking some judge in the District to pass on intricate water rights problems in the West is rather burdensome to that particular judge, is it not? Yet they are being asked to participate and finally decide this sort of case time after time.

The points I want to make are these, and I think they are valid in terms of the efficiency of the process—to the extent we have people in the West whose tradition and culture, legally and otherwise, involve land and water, we will wind up with a better result, it seems to me. Would you agree with that?

Mr. RAMPTON. I agree with you not only with regard to the judge but more importantly in regard to the Government attorney representing that case.

Senator LAXALT. Good point.

Mr. RAMPTON. It is highly important that one of the litigants bring to the judge an excellent understanding of the practical background of the case. Certainly a lawyer here in the Department of Justice who has no experience with water law would be unable ac-

curately to assess the impact of what he may be willing to present to that court or stipulate that he might be willing to enter into.

Senator LAXALT. Would there not be more motivation on the part of someone within the U.S. Attorneys Office in the Western States to do a better job of advocacy than locally in the Department of Interior?

Mr. RAMPTON. Not only the motivation but I am sure there would be the practical background and also the concerns of the local interests.

Senator HATCH. Regarding a case to which both Governor Rampton and I have referred—*NRDC v. Hughes* is a primary horror story. When the National Resources Defense Council, in 1976—and this is a group of environmental activist attorneys, and they have every right to be—filed suit against the United States alleging certain inadequacies in the Department of Interior environmental impact statement, the suit was prepared by John Leshy in behalf of the NRDC.

Between the time the suit was filed in the Federal district court and the time it came to trial before John H. Pratt, the same Mr. Leshy was appointed to be one of the counselors in the Interior solicitor's office, which office was to be charged with preparing the Interior Department's defense against the said NRDC suit.

Even more important, about the same time, the executive director of the Sierra Club Legal Defense Foundation, Mr. Moorman, was appointed and confirmed to be the Assistant Attorney General for Lands and Natural Resources. He was charged with conducting the Interior Department's defense against the said NRDC.

Mr. Bruce J. Terris, a colleague of Mr. Moorman's in the Sierra Club, moved to NRDC and assumed Mr. Leshy's former position and took the case to trial.

Thus, in *NRDC v. Hughes*, we see plaintiff's attorney, Terris, arguing a complaint which was drafted by defendant Interior's legal counsel. This complaint was then argued against defendant attorney Moorman who only a year earlier was a fellow Sierra Club lawyer.

It should also be added the principal occupation of Mr. Leshy as Associate Solicitor of Interior was the preparation of the new environmental impact study that his lawsuit against the United States ultimately required.

Senator DECONCINI. Did Mr. Moorman actually argue the defense of that case. When he was up for confirmation I happened to be at the hearings that day. There was great concern about potential conflict in which he would find himself.

Senator HATCH. I was there, too.

Senator DECONCINI. I believe you were. I thought he made it clear—and I never have had an opportunity to follow it up—that he would not participate in any of those cases where he was involved. I would like to clarify that for that man's professional reputation. If he did participate I would have some real questions of him.

Senator HATCH. I don't think he argued the case. I don't know that.

I do know this, however. This so-called adversary proceeding that was supposed to occur before Judge Pratt became more like a love-in. No one was particularly surprised that the Federal Government lost the suit.

On top of that, the defendant waived its right of appeal in exchange for a limited extension of Interior's coal leasing authority under terms defined by the plaintiff, the NRDC, until such time as the plaintiff's former employee, Mr. Leshy again, finished rewriting what was to become the foundation for the Federal coal leasing policy in a manner that was frankly pleasing to the NRDC.

If you really look at that, your two bills would do away with that kind of Mickey Mouse game completely.

Senator LAXALT. They have been playing musical chairs.

Senator HATCH. Far too much.

Senator DECONCINI. It would put aside and to rest any potential conflict, or at least the appearance of conflict.

Senator HATCH. That is right. Both of you are cosponsors of S. 1680, and that is the change that is giving such impetus to the sagebrush rebellion. We see these examples all the time to the detriment of fairness and justice not only to the West but, I would submit, to other areas of the country as well, but particularly in the West where we all come from.

I can tell you there is good justification for this sagebrush rebellion as the result of this type of activity which has been going on far too long and which activity I think your bills would go a long way toward stopping.

Senator DECONCINI. I thank you, gentlemen.

[The prepared statements of Senator Hatch and Mr. Rampton follow:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, I appreciate the opportunity to tender a few remarks regarding this subcommittee's commendable initiative to correct a certain pattern and practice of abuse of the Federal judiciary, a pattern of abuse that has become the modus operandi by which a number of special interest groups have imposed extreme interpretations of the law on an unwilling majority of Americans. I am referring to the use of Federal courts in the District of Columbia to acquire judgments against the United States that uniquely affect lives and circumstances in the several western "public lands" States.

I would like to express sincere appreciation to my friend and colleague from Arizona, Senator DeConcini, and my friend and colleague from Nevada, Senator Laxalt, for the time and effort that they devoted to the drafting of S. 1472 and S. 739. It is my hope that the remarks which follow will serve to highlight the social and economic need for this legislative effort as well as to mitigate the body of arguments in support of it as a matter of legal principle.

In the interest of brevity, I have selected from my litany of contemporary Federal horror stories the case of *NRDC vs. Hughes*, 437 F. Supp. 981 (D.D.C. 1977), amended, 454 F. Supp. 148 (D.D.C. 1978), appeal pending, as an outstanding, single example of the above alleged abuse.

In 1976, the natural resources defense council, a group of environmental activist attorneys, filed suit against the United States alleging certain inadequacies in the Department of Interior's coal leasing environmental impact statement. The suit was prepared by Mr. John Leshy on behalf of the NRDC. Between the time that the suit was filed in Federal District Court, D.C., and the time it came to trial before U.S. District Court Judge John H. Pratt, the same Mr. Leshy was appointed to be one of the counselors in the Interior Solicitor's Office that was to be charged with preparing the Interior Department's defense against said NRDC suit.

At about that same time the executive director of the Sierra Club's legal defense fund, Mr. James W. Moorman, was appointed and confirmed to be the Assistant Attorney General for land and natural resources, and charged with conducting the Interior Department's defense against said NRDC suit. Mr. Bruce Terry, a colleague of Mr. Mooreman's in the Sierra Club then moved to the NRDC and assumed Mr. Leshy's former position and carried the case to trial.

Thus, in *NRDC v. Hughes* we see plaintiff's attorney Terry arguing a complaint which was drafted by defendant interior's legal counsel. This complaint was then argued "against" defendant attorney Mooreman, who only a year earlier was a fellow Sierra Club lawyer. It also should be added that the principal occupation of Mr. Leshy as Associate Solicitor of the Interior was the preparation of the new EIS that his lawsuit against the United States ultimately required.

Needless to say, Mr. Chairman, this "adversary proceeding" that was supposed to occur before Judge Pratt was more like a "love-in", and to no one's particular surprise, the Federal Government lost the suit. The defendant then waived its right of appeal in exchange for a limited extension of Interior's Coal Leasing Authority under terms defined by the plaintiff, NRDC, until such time as the plaintiff's former employee, Mr. Leshy, finished re-writing what was to become the foundation for the Federal coal leasing policy in a manner that was pleasing to the NRDC.

Mr. Chairman, I would like to suggest to this subcommittee that the above described mockery of this country's system of jurisprudence would simply not have been allowed to occur in a court that was sufficiently experienced in the issues involved to be able to distinguish the conflicts of interest that are often hidden beneath the guise of some alleged "public interest" litigation. I also maintain that had the court of original jurisdiction been truly one of convenience "in the interest of justice" as provided for in 28 U.S.C. 1391; and had "justice" been defined in a context which recognized the real defendants in the case to be those American citizens whose lives were most likely to be affected by the decision in question, that indeed the case would have been referred to just such a court. Reason under the law would have mandated that *NRDC vs. Hughes* be brought before a court located in the area that was expected to be most impacted by the decision and argued before a judge with pertinent experience.

What I am voicing here, Mr. Chairman, is not simply my dissatisfaction with the decision in *NRDC vs. Hughes* but rather my grave concern over the prostitution of the fundamental principles of law that was allowed to occur as a result of what seems to be the technical naivete of eastern judges who adjudicate matters of western substance. Again, I see *NRDC vs. Hughes* as a "type-case" and I expect that other witnesses will expand the repertoire of such cases for the record as this hearing proceeds. It is clear to me that the judicial branch has failed to interpret the law as the Congress intended in the enactment of the pertinent provisions of 29 U.S.C. 1391 know of no better justification for legislation than the consistent failure of the courts to properly interpret legislative intent.

I would like to observe that the principle of law which I seek to defend today, the principle that renders justice from competent and impartial adjudication of opposing perceptions of the law and the facts of the case, is worthy of such defense no matter what one's position might be on the specific issues which have provoked the infamous *Development vs. Preservation* controversy. I suspect that there are those who advocate either side of that controversy who would sacrifice the American system of law to achieve their objectives. I am here today to take action to prevent that sacrifice and to protect a body of principles that I personally hold to be more valuable to society than any other.

Mr. Chairman, under the Federal Rules of Civil Procedure, Federal courts have the authority to transfer actions brought before them, that are properly within the jurisdiction of the United States, to "any other district of division where it might have been brought" if the transfer is for "the convenience of parties and witnesses" and is "in the interest of justice," 28 U.S.C. 1404 (a).

In establishing this authority in the courts, Congress has made clear the primary considerations by which venue is determined in Federal actions—the "Convenience of parties and witnesses" and the "interest of justice."

Rather, however, than leaving this determination solely to the courts, Congress has traditionally chosen to fix proper venue by statute allowing the courts to modify this in the exceptional instance. Until 1962, venue in civil actions brought against Federal agencies and officers was governed by a general statute that limited venue to the district of the defendant's residence. "Federal question" actions, during the tenure of this statute, were properly brought only in the District of Columbia under virtually all circumstances as a result of the "indispensable parties" doctrine which prohibited plaintiffs from proceeding against subordinate Federal officers.

In 1962, Congress approved the "Mandamus and Venue Act" which modified existing venue provisions allowing civil actions to be brought against officers or agencies of the United States in any district in which (1) a defendant in an action

resided; (2) the cause of action arose; (3) any real property involved in the action was situated; or (4) the plaintiff resided if no real property was involved. The act also authorized all Federal courts to issue writs of mandamus against public officers, a prerogative before then invested only in the District of Columbia courts.

While the Mandamus and Venue Act has represented a significant step toward promoting the broad objectives of the Federal venue laws, they have been beset by a variety of persistent problems. One of the most significant ones has resulted from the concept of "cause of action." The courts, by increasingly having focused upon the wrongful acts of the defendant in determining where the cause of action "arose" rather than upon the injury allegedly suffered by the plaintiff has effectively allowed the defendant to determine where venue will lie. In the case of Federal Government officers and agencies, this has invariably resulted in venue in the District of Columbia.

S. 1472, introduced by the distinguished chairman of this subcommittee (Mr. DeConcini) and S. 739, introduced by the distinguished Senator from Nevada (Mr. Laxalt) are designed, among other matters, to correct this interpretation of the Mandamus and Venue Act. Each would allow actions to properly be brought within any district in which a "substantial portion of the alleged impact or injury occurs," although the scope of coverage of these bills differs.

In determining traditionally where venue is fixed, courts in this country have variously looked to the theory of the claim, the subject matter of the claim, and the parties involved in the claim. In every instance, these factors were assessed and evaluated with an eye toward determining which venue would be most convenient to the participants in the litigation. While often couched in terms of "the best interests of justice," these standards have largely been synonymous. It has always been considered in the "best interests of justice" that parties to litigation have had relatively easy access to the court system. To the extent that such participation became burdensome or cumbersome, the rights of these parties have been viewed as "illusory."

The factors upon which most State venue statutes are predicated are each consistent with this aim. There are four grounds of venue that have predominated: (1) that district or division in which real property or the "res" of an action was located. This factor is premised upon the fact that those witnesses to an action who are best able to discuss the status of the property or the "res," or describe the existing circumstances surrounding it, or describe title to it, are most likely to be found in that district or division; (2) that district or division in which the cause of action has arisen. Again, the convenience of witnesses is the paramount consideration. It is simply more likely that the relevant witnesses will be located where an injury of some sort has, in fact, occurred; (3) that district or division in which the plaintiff resides. Convenience of the plaintiff is clearly the dominant justification for this factor. (4) that district or division in which the defendant resides. Convenience of the defendant is obviously the major consideration here.

S. 1472 or S. 739 are each more consistent with these grounds of venue, with the exception of the last grounds, that present law. By ensuring that actions are less likely to be brought within the District of Columbia courts, and more likely to be dispersed randomly throughout the country, these bills will make participation in "Federal question" litigation more convenient and more accessible to everyone except certain officers and agencies of the Federal Government. As this committee stated in a report nearly twenty years ago, venue provisions which require citizen-plaintiffs to bring actions in locations convenient for Federal defendants "tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of the Government."

These bills would do more than clarify which party is pre-eminent as between the citizen and his Government. They will do more than promote the convenience of those from whom the Government springs, and upon whom the burdens of Government lie. First, it will, in fact, ensure that actions are conducted closer to the relevant events and situs giving rise to the action. Second, it will ensure that the influences, often subtle, of local customs and practices are better recognized and reflected in Federal judicial decisions. Third, it will eliminate congestion, particularly congestion of certain specific types of cases, in the Federal courts, and, it is to be hoped, expedite their resolution. Fourth, I believe that it will make it far more likely that genuine controversies are fashioned in the Federal courts, rather than the types of pseudo-controversies that are becoming increasingly evident such as the controversial *National Resources Defense Council v. Hughes*

case. Fifth, in the event that the district representation constitutional amendment is ever ratified, these bills will ensure that the Senators from the district are not 'first among equals' in their influence by virtue of their role in the nomination process for the district courts.

Finally, S. 739 and S. 1472 represents much needed initiatives in the decentralization of the public sector in this country. No longer will the citizens of the 50 States have to perpetually be running to Washington to defend their rights against a Government that, in the opinion of some of us, is increasingly without rational bounds. Rather, those who act as public servants in this Nation should occasionally have to come to the citizenry, to survey the results of their edicts and rules, to experience the environment in which the country works and operates outside of Washington, and to better appreciate the inherent difficulties in rigid, uniform, inflexible regulations that are applicable to the diverse peoples and regions of this Nation.

PREPARED STATEMENT OF CALVIN L. RAMPTON

My name is Calvin L. Rampton. I reside at 2492 South 2300 East in Salt Lake City, Utah. Since 1946, I have been engaged in the practice of law in Salt Lake City except for the years 1965 to 1976 inclusive during which time I served as Governor of the State of Utah. Both as an attorney representing private litigants and as a holder of public office, I have been closely involved for the last third of a century in matters involving the conservation and development of the natural resources of Utah and the Intermountain West. I appreciate the opportunity to present a statement to this Subcommittee in support of S. 739 introduced by Senator Laxalt and S. 1472 introduced by Senator DeConcini. The purpose of both of these Bills is to provide that the proper venue for litigation of civil actions against the United States shall be in the United States District Court in which the major impact of the litigation will be felt. Senator DeConcini's bill is limited to litigation rising environmental questions. Senator Laxalt's bill has broader application.

At the present time, plaintiffs seeking to ring actions against federal administrative agencies have a rather wide latitude in choice of venue. Yet the majority of such actions are brought in the United States Courts for the District of Columbia. There are a number of reasons for this. One perhaps is historical in that at one time, process from the District Courts was not good beyond the geographic limits of the federal district and as most of the federal executive officers who are involved in the cases, whether nominally or otherwise, resided or had their offices in the District of Columbia, that was the easiest jurisdiction in which to get service. Even at the present time, when the jurisdiction for the issuance of process has been expanded, it is in the course of least resistance for plaintiff's counsel to have process issued out of the District within which jurisdiction service is to be made. Another reason, and probably the most important reason, is that many of the plaintiffs in such actions are national organizations of various types having headquarters in the nation's capitol, or public interest law firms having their headquarters there. It is therefore easier for plaintiff's counsel to institute the action in the District of Columbia.

In cases of lawsuits having broad public impact, it is no doubt appropriate to have cases tried in the District of Columbia Courts. There is intense national interest in such lawsuits. The facilities of both the plaintiff and the defendant may be more readily available in Washington and so the national interest may well be better served by trial in the District of Columbia Courts. A different situation entirely exists, however, where the principal impact of a case will be felt only in certain regions or localities within the country or by only a relatively few of our citizens.

Though the impact of the litigation is local in nature and in fact may vitally affect the rights of individual citizens specifically rather than the general public interest, the nominal parties to such suits and the only "necessary" parties are the executive officers of the federal government having the responsibility in the particular subject matter. Those who are most deeply affected may often have decisions made by the District of Columbia Courts affecting their particular economic or social welfare without even knowing that the litigation is in progress, and if they learn of it, being able to defend their rights only at great inconvenience and expense.

As previously stated, localities and individuals which may be affected by the outcome of litigation of the type we are here discussing are in every practical

sense of the word the real parties in interest in the litigation. They are not, however, under our present statutes, "necessary" parties. The only "necessary" parties are the nominal parties: the federal officer being mandamusd or enjoined. The defense of such lawsuits often tends to get lost in the busy offices of the Department of Justice or the Solicitors of the various departments concerned. Technical defaults will not often occur, but with the many issues involving broad national questions being addressed by these offices, lawsuits having local or regional impact do not receive the attention which they would receive if counsel for the areas or individuals which will feel the impact were equally involved in the lawsuit.

Several suits brought recently in the District of Columbia have been settled in manners not entirely satisfactory to the states and local interests which are affected by the settlements. In *National Audubon Society v. Andrus* (Civil No. 76-0943), for example, a stipulated injunction was issued. In *NRDC v. Hughes*, 437 Fed. Supp. 981, the Department of Interior agreed to a settlement which in fact, as recognized by the court, gave the plaintiffs a veto power over the issuance of federal leases, a federal discretionary matter. I am not suggesting any impropriety on the part of the litigants but I am concerned that settlements and injunctions are being agreed to without full consideration of the impacts upon the regions which are affected. Whether such stipulations are made because of the work load of the Justice Department, or because counsel are not aware of the impact of the settlement is immaterial. The fact is that the interests of those most vitally concerned are not protected.

The question is how these parties can best be involved in order that such lawsuits may have the attention which our system of government purports to assure for the rights of each individual citizen. The media of this country, principally the print media, gives rather extensive coverage to the dockets of our courts. However, extensive publicity is given only to those cases which attract readership interest. National publications or the wire services do not give wide dissemination to information concerning the filing of actions in the District of Columbia Courts which have only very limited regional or individual impact. On the other hand, if a case is filed in the United States District Court where the impact will be felt, the local media will give coverage, giving an opportunity for a locality or an individual which, while not the real party in interest in the legal sense is the true party in interest, to intervene in the case for the protection of their or its interests. A case in point is the case of *Sierra Club v. Andrus*, filed in November, 1978. This case involves water rights on four small rivers in Southern Utah. It has a vital impact on the people in the area concerned. There was no major news coverage of the filing of the case and it was almost by accident people in my home state learned of the existence of the case so that some local municipalities and water districts were able to intervene in this matter which would vitally affect their interests.

Once having learned of the existence of the lawsuit which vitally affects the local interests, the individual or the local governmental agency which will be impacted, must then, in order to protect their or its interests, apply for intervention in the suit in the District of Columbia. The District of Columbia Court has been liberal in allowing intervention in such cases by public entities, but not so liberal in the case of individuals. For example, in the case of *EDF v. Costle*, a 1978 case, a number of states were allowed to intervene but the petitions of private parties were denied. The District of Columbia Courts, however, have most uniformly denied motions for changes of venue in such cases and have proceeded with litigation. Persons or public entities far distant from the District of Columbia in order to adequately protect their interests even where they have learned of the case and where intervention is granted must now, in addition to their local counsel who is familiar with the case, employ associate counsel in the District of Columbia. Witnesses must be brought thousands of miles. The cost of such litigation often prohibits the persons actually affected from making an adequate defense of their rights.

It would not add to the burden of the federal government or the officers of the federal government who may be nominal parties in the case if the case is filed and heard in the district affected. Most of the facts of the case are within the knowledge of the state or regional officers of the various departments concerned rather than within the knowledge of personnel residing in the District of Columbia. Furthermore, the local United States Attorneys Offices and regional Solicitors Offices of the various departments are usually more familiar with the matters concerned and better able to participate in the case than those in the Washington office of the Department of Justice or the departmental Solicitors.

Matters of the type which we are here discussing can best be heard and adequately adjusted by a judge having knowledge of the economy and culture of the area being affected by the litigation. Let us suppose, for example, that a case involves water rights, as so many cases of this type do. It is easy for a judge anywhere to learn from the lawbooks and the briefs of counsel that water rights in the arid west are based upon the doctrine of prior appropriation rather than the doctrine of riparian rights which prevails through most of the rest of the country. However, it is difficult for a judge whose entire experience has been in water-abundant areas of the nation adequately to set in proper perspective the evidence and the law if he has had no exposure to the impact of water and water rights in the water-short areas of our nation. I am not suggesting that a federal judge in the District where the litigation will have impact is going to be improperly influenced by local interests. The care with which our federal judges are chosen and the protection of tenure afforded to them prevents such a situation from arising. However, in any situation a judge who has a better understanding of the background against which a case arises, can better decide the facts and apply the law in a manner to reach justice, than can a judge who does not have such an advantage.

In a nation as large and diverse as ours, there is a danger of too much centralization of governmental action. Specific problems in widely scattered areas require specific rather than generalized approaches. There is a great deal to be said for a certain amount of provincialism. The United States government has recognized this in the executive department by creating regional offices, and in most instances, sub-offices within the various states. The citizens deal with these district or regional officials and their interests are decided in Washington, if at all, only through a course of well defined appeals. In the legislative branch of our government, people are able to be heard through their elected members of Congress, who represent and report to their representative constituency. Only in the case of the Judiciary may people's rights be affected by decisions made by counsel or judges unknown to them, in a jurisdiction far distant and often without their knowledge. Passage of the Bills being considered by this Committee would go a long way toward correcting such a situation.

Senator DECONCINI [continuing]. The next witnesses and panel consist of James G. Watt, president and chief legal officer, Mountain States Legal Foundation, Denver, Colo.; Gordon H. DePaoli, Woodburn, Wedge, Blakey, Folsom & Hug, Reno, Nev.; and Paul Kamemar, counsel, Washington Legal Foundation, Washington, D.C.

Gentlemen, please summarize your remarks as Governor Rampton and Senator Hatch did. Your full statements will appear in the record following your oral testimony.

Please proceed.

PANEL OF ATTORNEYS:

STATEMENTS OF JAMES G. WATT, PRESIDENT AND CHIEF LEGAL OFFICER, MOUNTAIN STATES LEGAL FOUNDATION; PAUL KAMENAR, COUNSEL, WASHINGTON LEGAL FOUNDATION, AND GORDON H. DePAOLI, ATTORNEY

Mr. WATT. My name is James Watt. I do have a statement I would like to have inserted.

Senator DECONCINI. Without objection.

Mr. WATT. I would like to do four things in the statement. I would like to discuss the philosophical need for the legislation, and present some actual case histories, as Governor Rampton did, and discuss some of the technical natures of the two bills you introduced as well as vigorously oppose the position presented by the U.S. Department of Justice.

I had a chance this morning to review their letter and that needs to be addressed. Hopefully this panel will have a chance to do that.

I am the president and chief legal officer of the Mountain States Legal Foundation, a public interest law center dedicated to representing the interests of the Western States in Federal courts and the interests of people of the Mountain West.

The legislation that is before you deals with venue laws. The venue laws require that the court having jurisdiction over cases or controversy would be "in the interest of justice" a court located in the district convenient to the parties.

The members of this committee from the West, in fact all members, are aware of the brewing sagebrush rebellion. This rebellion is a reaction by the western people to the continued Federal Government domination and control of the vast public lands of the West. The Federal lands are kept off the tax rolls and managed with little regard for the interests of the States, local governments, or individual citizens. I want to speak particularly to the members of this committee from the Eastern States, Senator Ted Kennedy and Senator Bob Byrd, in an effort to demonstrate the need for the enactment of legislation in the nature of these bills.

Legislation is needed in order to remedy a wrong and help restore faith in our judicial system and our Federal Government, as well as address one of the major causes of the sagebrush rebellion.

Today, we of the West believe that in too many instances our States are being treated like colonies. "Foreigners"—bureaucrats who seem to be out of control—are making the decisions affecting the land, water, and resources which are the foundation of wealth for the West and indeed in many respects the Nation.

In addition, we find that eastern judges—judges who are "foreign" to many values of the West—are making decisions which control our destiny as a people and as a vital force in America's economy.

The lawsuits are brought to eastern courts, principally the Federal District Court for the District of Columbia, because those filing the suits under section 1391 feel they can best realize their objectives by using a Federal judge who has not had the experience of living or practicing law in the West. We cannot always determine the real motives of those who seek Federal judges who are "foreign" to the area or region to be impacted by the cases. But in many instances, the apparent motive is to deny economic opportunity, access to the public lands, or challenge State control of our precious water supplies.

While the motives are not always clear, the impacts of a lawsuit filed in one jurisdiction in an effort to control the use of resources in another jurisdiction are clearly evident. One of the glaring violations of the spirit of the venue law is that the "real parties in interest"—the people living and working in the affected areas—are not necessarily involved and a "foreign" judge is making decisions on matters that the local judge should be acting upon.

Courts have been liberal in spite of some of the problems.

Because the requirements for standing have been considerably broadened by the courts, these special interest and public interest legal groups have been allowed to bring suits to challenge Government actions dealing with people and places, even though the moving party is only generally affected. In spite of the injustices created,

we believe that the broadening of the definition of standing is good. Without the broader definition allowing court action, the bureaucracy, which in too many instances is unchecked, would have even greater latitude in limiting the freedoms of Americans.

The public interest must be protected and the courts can be used to check the excess activities of the bureaucrats. The problems are created, however, when a special interest group files a suit, which will have a tremendous impact on an easily identified population or geographic area, in a jurisdiction far from the residence of the "real parties of interest."

It is the willingness of courts in one jurisdiction to take cases affecting other jurisdictions which must be stopped. Such a willingness has created a distrust of the judicial system that when added to the insensitivities of the bureaucrats, builds the resentment and frustration behind the sagebrush rebellion.

Senator Laxalt, you gave the case history of Ruby Marsh. It is a despicable situation. Unfortunately it is not the only one.

Governor Rampton and Senator Hatch addressed with considerable expertise *NRDC v. Hughes* which raises many questions about our legal profession and the conduct of it.

Governor Rampton also referred to another case, *Environmental Defense Fund v. Costle* dealing with the controlled water problems of the Colorado River. This lawsuit was designed, prepared, researched and developed by the Environmental Defense Fund in Denver, Colo. Those lawyers resident in Colorado and Western States bring the case to Washington, D.C., because they can get a better judge to accomplish their objectives.

As Governor Rampton pointed out, we finally got the attorneys general of the respective seven States to intervene in that case. The cities of Salt Lake, Denver, San Diego and a host of other groups were denied the right to intervene in this suit even though they were willing to pay the price.

Our group, the Mountain States Legal Foundation, was the only group allowed to intervene in that suit other than the attorneys general. We had to do it because we feared a sweetheart lawsuit between EDF and the Department of Justice and EPA lawyers for reasons that Senator Hatch addressed a moment ago.

Another case Governor Rampton pointed to was the *Sierra Club v. Andrus*, which again was prepared by the Sierra Club lawyers in Denver, Colo., with their offices there and their good lawyers as well. They prepared that lawsuit to control directly four rivers in the State of Utah and Arizona. Their real objective was to establish that all waters arising on public domain lands would be subject to a Federal reserve water right doctrine. That was their objective.

They sought to file not in a western court where they ran the risk of finding a judge who might understand water value, but they came to the District of Columbia. It sought to get a "foreign" judge to rule on a crucial issue to the West. The "real parties in interest," the people of Utah and the West, did not have access to the D.C. court.

On behalf of the small town of Escalante, Utah, three small irrigation groups, and our members, the MSLF, assumed the financial burden and inconvenience of going to Washington, D.C., to defend these State water rights and keep the U.S. Justice Department from

straying from the traditional water law of the Nation. Last week, we filed our motion for summary judgment in this case.

Senator LAXALT. In what case was that?

Mr. WATT. We have moved for summary judgment.

Senator LAXALT. Under the reserve rights theory?

Mr. WATT. We are still on procedural rights problems. What I am about to say you will not believe but it is still true. We are on cross motion for summary judgment and we are deep into discovery now. The Sierra Club and the Government are squabbling over affidavits involved.

In another case of long standing in Colorado, it dealt with the rights of the city to divert water from the western slope and build treatment facilities.

That case was brought by the city of Denver in Colorado. Many extreme environmentalist groups appeared.

When it appeared they would lose that lawsuit, six of them raced to Washington, D.C., and filed the lawsuit here to frustrate justice. We had to come back here, the foundation, to intervene in that lawsuit to stop another sweetheart deal from developing.

It is interesting Mr. Moorman raised those two cases in his letter to the committee and points out that motions to change venue were made and denied. That is an important point. The facts are that this eastern court here in the District of Columbia refused the Government's motion to take the cases back where they should have been handled in the first place.

The cost in coming back here is tremendous in trying to protect the interest of the Western States in eastern courts.

With regard to these two pieces of legislation——

Senator LAXALT. Will the witness yield on this point? Has anybody broken out any figures in terms of the cost to the clients and litigants of coming here and being involved in these cases as opposed to trying them at home? Has anyone broken that out at all as to the disparity?

Mr. WATT. I have not quantified those figures but they must be tremendous.

Senator LAXALT. We had better look into that. It is a heavy item.

Mr. WATT. Governor Rampton made a good point. The docket for the U.S. attorneys offices in Wyoming, Nevada, Utah and Colorado is easier to deal with than coming to the District of Columbia. It is cheaper to handle it back there in many instances.

With regard to these two bills, I think we must have a bill. I think it would be important to pass them as soon as possible. There are some risks involved, and they related to the right of parties who contest a judge's determination as to whether a case should be transferred or not.

However, the biggest concern with regard to the technical considerations would be that language in Senator DeConcini's bill which talks about the language you have in your bill, language of national importance. That is very worrisome to us because I assure you that in the minds of some of these extreme environmentalist groups nothing they do is of regional interest.

The cases we have cited clearly are local and regional in interest.

Senator DECONCINI. I understand that. However, the potential plaintiff would not be the determining factor as to whether it is a national interest. It would be the court.

Mr. WATT. OK.

Senator DECONCINI. I agree with you. I think anybody who brings it and who wants it filed here rather than in the local area would say it is a national interest. However, the burden is on them, and the presumption is that it is not a national interest.

Mr. WATT. I understand that, Senator. It has to be raised to bring the issue. That would not be an appealable item probably for any other party. You would have to come back here to fight the issue. You would have to rely on the Department of Justice to raise the point it is not a national issue but a local one. You have to exercise faith in Government.

Of greater concern, and I think you were out of the room a moment ago, in some of the cases I am citing and which Governor Rampton referred to which our foundation is involved in, the Department of Justice moved to change venue for local cases affecting our Colorado River Basin and the city of Denver, and the District of Columbia. Judges refused to change venue on local issues because they want jurisdiction. They want to control our Western resources and our Western people in these types of cases because in their viewpoint they are of national importance.

Yes; they are, for precedent-setting purposes, but they impact our people and we ought to have judges who understand those facts.

In defining whether it is of national importance it is a critical issue. I am fearful of that language in your legislation and would urge that that be changed for that purpose.

Let me make a quick comment on Mr. Moorman's letter to the committee, and it follows this same line.

On page 9 he states that if the plaintiff determines his suit impact to be primarily local and affects fewer than five States, then he would have a duty to notify.

Well, I don't trust the plaintiffs to be that determining factor and I don't want to have to spend the money to come back to Washington to fight some of these narrow special interest groups. They ought to file that suit, as your bill provides, in the region where the impact is and to allow the plaintiff to determine what the national importance is or, if I might go further, risk submitting it to the District of Columbia judges to determine that.

They are not focusing on the real issue that your bill attempts to address. I think that is an important point we have to control.

I have talked about the two cases Mr. Moorman cites here, and I think your bills are much superior to the position taken by the Department of Justice. I urge you to reject their recommendations to you in this matter.

That highlights my statement.

Senator DECONCINI. Mr. Kamenar?

Mr. KAMENAR. Let me express my appreciation to you and members of your subcommittee for this opportunity to testify on S. 739 and S. 1472 which would alter the Federal venue law in suits involving the environment or where the Federal Government is a defendant. I am honored to share this panel.

The Washington Legal Foundation is a nonprofit corporation organized to engage in litigation and the administrative process in matters affecting the public interest. We currently have more than 57,000 members and contributors throughout the country.

WLF is currently involved in litigation across the United States regarding Government regulation, crime victims, major constitutional issues and other vital public interest legal matters.

Under the current Federal venue statute, in suits where the Federal Government is a defendant, the plaintiff may at his option bring suit in Federal District Court for the District of Columbia. This option has often been exercised by environmental groups who prefer to litigate in District of Columbia courts, and it works a considerable hardship on citizens involved with the subject of the lawsuit who may wish to intervene.

There are inevitable delays and inefficiencies when a trial is held so far from where the controversy arose. This also contributes to the unresponsiveness of the judiciary, who do not sit in the area where the claim arose and therefore may not understand the nature of the litigation or the interest of the local people involved. The Washington Legal Foundation deplors the abuses of the current venue statute which allows unresponsive courts in Washington to hand down decisions which will have a major impact on the people of a State, without attempting to understand their problems or respond to their concerns.

The Washington Legal Foundation believes the bills offered would improve judicial fairness and efficiency.

As the chairman pointed out this morning, a recent item in the Ecology Quarterly is quite explicit in spelling out the tactical considerations behind the environmental use of the venue laws. This article bears closer analysis since it clearly demonstrates how the current venue laws have been used to unfairly aid environmentalists and deny a fair hearing to the people most directly involved in the litigation.

Naturally when challenging a water project in Arizona, environmentalists prefer to avoid a court in that area which may be influenced by favorable local public opinion and the interest involved in that area.

While we believe an independent judiciary is a foundation of our American constitutional system, the expanding breadth of judicial review and the issues which the courts must consider make it essential that the judiciary reflect the needs and beliefs of the local citizenry.

It is no secret courts often consider social, economic, and other policy considerations when they are making a decision. They do not operate, as some would suggest, in a complete vacuum or in an ivory tower. Being realistic, we believe that the courts should therefore hear the case in the area where impact or injury occurred.

There is some relief in 1404, the current law. However, this is not really completely solving the entire problem. There is in addition a heavy burden on the defendant to show inconvenience to the court before the court will disturb the plaintiff's choice of forum.

Alluding to the importance of Congress taking the lead in this area, the Supreme Court has said that " * * * venue rules nevertheless pose policy considerations which are and which should be weighed by Congress and not by this court."

Therefore, the Supreme Court sent Congress a clear signal that if we are to make effective reform measures in dealing with venue it is the policy decision which should be made by the Congress, and in that regard we support the efforts of both bills before the committee

and urge they be passed and that they be modified in ways suggested by Mr. Watt and as will be mentioned by Mr. DePaoli, who can give more specific examples regarding the problem in this area and how the bills before you today will solve some of these specific problem areas.

Senator DECONCINI. Mr. DePaoli?

Mr. DEPAOLI. I am Gorden DePaoli. I am a member of Woodburn, Wedge, Blakey, Folsom and Hug.

Most of my practice has been in civil litigation and since 1975 almost exclusively in the Federal courts. I have been involved in litigation with the United States Environmental Protection Agency, the States of Nevada and California, the Pyramid Lake Paiute Tribe of Indians, the Sierra Club, the Natural Resources Defense Council, Inc., and the Mountain States Legal Foundation.

Venue refers to a place where a lawsuit should be tried. To advance the administration of justice, a venue statute should be carefully drawn to permit maximum personal participation by those directly affected by the litigation and to promote maximum indirect citizen participation by allowing those affected who do not become parties to attend and listen. Such participation reduces the need for additional litigation and insures that the search for the truth is aided by concerned adversaries.

Moreover, a general venue provision ought to place problems in courts familiar with the problems involved.

Today, decisions of Government almost always aggrieve someone, sometimes directly, other times indirectly. It has given rise to membership corporations representing particular points of view having offices strategically located around America. The interests of these corporations and those of citizens directly affected often conflict. At times even the interests of citizens directly affected conflict. In this situation one person or group might be willing to live with a decision while others are not.

A membership corporation seeking to change that decision, it may seek to do so in a way that citizens directly affected cannot tolerate. If no real property is involved it may sue where they reside. If no real property is involved it may sue where there is official residence, often here in Washington.

Citizens directly affected by the ultimate resolution must either do nothing and hope for the best or incur the heavy expense and inconvenience of litigating in Washington. Judges familiar with the problems being litigated and suited to handling them intelligently never see them.

Courts here are burdened with additional litigation. Many times the only result of that litigation is more litigation.

Senator Laxalt has given you one example involving Nevada interests. I would like to give you another.

In the early 1970's the Pyramid Lake Paiute Tribe, a Nevada Indian tribe, represented by the Native American Rights Foundation, filed suit in Washington against the Secretary of the Interior.

At issue in that action was whether the water supply of the Truckee-Carson Irrigation District should be reduced by 30 percent in order to provide more water for Pyramid Lake.

TCID is an irrigation system organized under Nevada law. It operates the Newlands reclamation project in Nevada and represents

numerous farmers who irrigate 60,000 acres through the system. TCID was not a party to the Pyramid Lake litigation.

The Pyramid Lake Indian Reservation is located wholly within Nevada. The lake lies within the reservation and relies on Truckee Lake for its water.

Water for TCID comes from Carson River following storage in Lahontan Reservoir and from diversion of water from the Truckee River at Derby Dam through the Truckee Canal, all in Nevada.

Involved in that action being tried in Washington were questions of interpretation of the Truckee River final decree and of the Carson River temporary restraining order. Both were subject of action before the Nevada Federal court.

Also involved were questions of conservation and prevention of waste within TCID's 600 miles of canals and ditches, all in Nevada.

Without regard to the merits of that controversy, a carefully drawn venue statute would not have permitted it to be tried in Washington. Citizens directly affected, including the tribe, were all in Nevada. The property involved was in Nevada. The judge familiar with the problem was in Nevada.

As has been Nevada's experience, that litigation resolved nothing. In 1974 the TCID filed suit in Nevada against the Secretary to have the regulations adopted pursuant to the Washington judgment declared invalid. The tribe has intervened in that action, and it is pending in the Nevada Federal courts.

With the single exception these bills would place venue actions against Government agencies and officials, and actions arising under environmental laws in a judicial district where a substantial portion of the injury or impact occurs. The exception is in S. 1472 and related to issues, impact or injury alleged to be nationwide in scope.

I have the same concerns about that exception as does Mr. Watt. Frequently purely local cases involve issues which are nationwide in scope in the sense they present novel questions of law under important Federal statutes. However, it seems to me there is no lower Federal court better suited than any other to hear and resolve national issues.

From time to time policy judgments, such as the need for immediate and uniform interpretation and application, may lead you to make an ad hoc designation of such a court. Such a designation should be narrow and specific, and should involve very strong policy considerations. It should involve very strong policy considerations because there is much to be said for allowing important and difficult legal issues to follow the normal path of diverse views to ultimate resolution in the constitutional court set up for that purpose, the U.S. Supreme Court.

The other test provided by the bill is directly related to the policies involved in choosing an appropriate forum. It will not place an undue burden on the Government. U.S. attorneys are present in every judicial district, and many Government agencies are represented regionally.

In most cases any property involved would be located where the impact or injury occurs to the extent that a view of that property is of assistance to the court, and it will be readily and economically available.

Both witnesses and affected citizens who cannot participate in trials in Washington are likely to live in the neighborhood where the impact or injury occurred. They will be able in most cases to participate in those districts.

It seems to me these are important advantages for the cause of public confidence in our legal process. Respect for our judicial system is not enhanced when a Nevada family eager for a boating Sunday discovers it may not use a lake it has used for years or a Nevada farmer discovers his water supply has been reduced by more than 30 percent, all by order of a trial judge sitting in a courtroom 2,500 miles away.

Recurrent problems like the mineral-water rights, grazing and wild horse problems of the West will be tried by judges familiar with them and the area involved.

Related cases may be consolidated, or if not consolidated perhaps tried by the same judge.

All necessary and proper parties can be joined to insure that their interests are represented, and that the search for the truth is aided by interested adversaries.

A decision in that kind of litigation will be binding and meaningful and will not simply lead to additional litigation.

To the extent that the courts here are heavily burdened with litigation, these bills will lighten that burden. That may well result in more expeditious decisions both in cases tried here and cases that are not.

The spirit of these bills is consistent with venue policy. I think it is important, however, carefully to analyze the language used so they will operate as intended.

Time has not permitted me to analyze that language in detail, and has not allowed me to examine every existing Federal venue provision. The relationship between existing venue provisions and these bills, particularly S. 1472, should be examined carefully.

I do have some brief observations. In the first instance the forum is selected by the plaintiff. A properly drawn statute will enable him and require him to select an appropriate forum. If it is not so drawn, an inappropriate forum may be chosen and there will be threshold litigation.

The operative language of S. 793, particularly the word "determined," implies in every case a formal decision will be made concerning where the impact or injury actually occurs. The language of S. 1472 avoids that implication.

Improper venue is a defense personal to a party and, if not properly raised, is waived. Moreover, a person intervening on either side of a controversy may not object to improper venue. In actions involving the United States, unless a provision is added requiring those persons defending the Government to raise the defense, the salutary purposes this legislation seeks to achieve may be waived by the action or inaction of a Government attorney. I suggest such language be added.

In addition intervenors should be allowed to object to venue under these bills.

Finally it might be well to provide that written notice be given to the attorney general of each State where the alleged impact or injury occurred.

With appropriate changes these bills will do much to advance the proper and efficient administration of justice in America. I strongly recommend passage of such legislation, and I thank you for allowing me to appear before you today.

Senator DECONCINI. Thank you very much, gentlemen.

You referred to section 1404. Apparently it has not achieved what it should have. Can you elaborate a little? Why has it not worked?

Mr. KAMENAR. I already pointed out that 1404 is not mandatory. It allows the district court to transfer civil action to any district or division where it might have been brought for the convenience of the parties and witnesses.

I believe Mr. Watt gave us a couple examples of where the district court here and other courts have refused such requests to transfers based on this section.

Furthermore, there is also the possibility that a venue may be waived by the parties, and that may be a serious problem with respect to some of the earlier testimony we heard today about sweetheart types of lawsuits where the Government does not necessarily object to the venue provision here.

Finally, it has not really done the job because the courts impose a strict burden on the party seeking to move the case away from that particular court and, to make a showing why it should be moved, the courts, we all realize, enjoy, if I may say so, acquiring jurisdiction in a case, especially if the case has impact which is nationwide.

I believe the bills we have here will effectively take care of this type of problem.

Senator DECONCINI. Does the legal history of the venue statute give us insight as to the intent of Congress in your opinion?

Mr. KAMENAR. I think it clearly does. The legal history of the venue provisions clearly show that the intent of venue is to bring the case where it is most convenient as well as where the best interests of the parties will be served before the court.

I think the provision before the committee today is merely an extension of the 1962 provisions. I think it is merely an extension of that provision and I do not believe there will be the problems, as the testimony that will be read this morning would lead you to believe. Perhaps some fine-tuning may be necessary but nothing that is insurmountable.

Senator DECONCINI. Mr. DePaoli?

Mr. DEPAOLI. Senate report on H.R. 1960, adopted in 1962, clearly indicates that that section was intended to move litigation out of Washington to places where the citizens affected lived and worked and it was intended to make justice and administration more efficient by having recurring problems decided by judges familiar with them as well as the areas involved.

Senator DECONCINI. I have no further questions.

Senator LAXALT. Consideration in 1962, as indicated here, was precisely the same as we have here. We merely want to enlarge the situation to meet problems we have in connection with increased participation regarding public interest law firms.

Mr. WATT. That is right, Senator. The real issue, then, in facing the venue controversy, is who are the real parties in interest.

Senator LAXALT. That is the basic question involved in this proposed legislation.

Mr. WATT. As you point out, the new ingredient to the judicial arena is the public interest group, or the special interest group. We call groups such as mine public interest groups. There are other groups which are focused narrowly on saving a place or a river or right to work, and so on.

We come forward to the court and say that the public is the impact. Those x thousand members may not have any idea their interests are impacted, but a public interest group like mine, the Sierra Club, and others, say it is so.

The question is whether we want to allow public interest groups like the one I represent or these others to exist. I think the answer is clearly yes. I don't like some of the results obtained by some of them but clearly we have to protect that public interest from the Government, which is irony in itself. It is terrible to be in that position.

Senator LAXALT. Mr. Kamenar, I was impressed by a point you made in connection with the signal from the Supreme Court. That is a valuable addition to the record.

Mr. KAMENAR. Time and time again words from the Supreme Court come down clearly in this regard, that the courts recognize they have a certain responsibility and Congress has a certain responsibility to take.

In the past Congress might have been lax in several areas. I believe this is a great opportunity to rectify that situation and pick up that challenge by the Supreme Court.

Senator LAXALT. I think so, too.

Mr. DePaoli, I think your point with regard to the notices of the Attorney General should be included.

Also the point you made as to the manner in which the proposed bill 739 is drafted would really require a separate legal proceeding to determine whether or not the impact or injury is there is terribly important to our situation. Your proposed language gets rid of that additional legal step which would perhaps force a hearing here, and to that extent be counterproductive.

Mr. DEPAOLI. That is correct.

Senator LAXALT. I thank all of you for your help.

One other point. There has been no discussion in our approach with regard to the appellate and circuit side. What are your impressions in connection with our approach there, which has the same essential thrust as we do on the trial side?

Mr. WATT. We feel strongly we must not create a mini-Supreme Court here in Washington. We have tremendous confidence in judges throughout America. The thought that the District of Columbia courts are better than the rest smacks of elitism and it is just not true.

I have had a chance, as you know, to be here in Washington and deal with these courts extensively. I do not knock them, but I have now had an opportunity to practice law in our Western States and I am proud of our western judges and hold them up to anybody else. They are equally qualified to determine constitutional questions and statutory provisions as anybody else.

To ease the minds of two Senators—just because you come to Washington does not give you an elite wisdom.

Senator LAXALT. Otherwise, on the circuit court point, do you essentially agree with our approach?

Mr. KAMENAR. Yes; I think there is some testimony by one of the environmentalists who objects to it in the sense it is not merely a venue provision but a jurisdictional one.

Senator LAXALT. Yes.

Mr. KAMENAR. I have no problem with that inasmuch as most of the specific steps or provisions allowing for review in this circuit—I have not found legislative history that indicated why this particular circuit is more capable than any other circuit and that bill will not produce untoward results by using the test you mentioned.

Senator LAXALT. As has been alluded to here, we are constantly impressed, particularly within the framework of the Appropriations Committee, by how overburdened the courts are in the District on both the trial and appellate levels. We would be serving them to some extent by relieving them of some of that burden and sending it out into the respective States.

Mr. WATT. That is right.

Mr. DEPAOLI. I agree with the remarks which have been made. What it boils down to is what should be the rule and what should be the exception. There may be times when there should be an exception requiring certain matters to be heard by a single court of appeals, but that should be the exception and not the rule.

Senator LAXALT. Thank you, Mr. Chairman.

Senator DECONCINI. Thank you very much, gentlemen, for your thorough review of our legislation and your indepth comments.

[The prepared statements of Messrs. Watt, Kamenar, and DePaoli follow:]

PREPARED STATEMENT OF JAMES G. WATT

It is an honor to be invited to testify before this committee. I have been asked to speak to Senator Laxalt's S. 739 and Senator DeConcini's S. 1472, the spirit of which concerns fundamental principles of the government of this Nation. With the Committee's approval, I would like to briefly discuss the philosophical need for legislation such as represented by these bills. Then, I would like to present a few actual case histories demonstrating the need for such legislation and outlining the abuses some "public interest lawyers" are bringing to the judicial system. Finally, I would like to discuss with the members of the Committee the technical aspects of the bills and urge that this basic reform to judicial procedure be adopted by the Congress of the United States.

My name is James G. Watt. I am President and Chief Legal Officer of the Mountain States Legal Foundation, a public interest law center. The Foundation is dedicated to representing in the state and federal courts, the interests of the people of the Mountain West. We focus our attention on those issues concerning our constitutional liberties, and the institutional concepts of private rights, private property and the private enterprise system. The organization is a 501(c)(3) charitable foundation supported by tax-deductible contributions from individuals, farmers and ranchers, labor union members, businesses and foundations.

These bills would amend 28 U.S.C.A. concerning matters of venue. It was always intended that the venue laws would require that the court having jurisdiction over a case or controversy would be "in the interest of justice," a court located in a district convenient to the parties, 28 U.S.C. § 1404 (1976).

I am confident that legal historians and legal scholars could unfold an interesting line of reasoning for the development of the basic principle; that "in the interest of justice," a lawsuit must be brought in a court of competent jurisdiction convenient to the parties. It is not my intention to give a historical background on that issue, but rather to illustrate how the violation of the spirit of this principle is contributing to a distrust across our Nation, which has serious consequences.

The members of this committee from the West, and in fact all members of Congress representing western states, are all too aware of the brewing Sagebrush Rebellion. This rebellion is a reaction by the western people to the continued federal government domination and control of the vast public lands of the West.

The federal lands are kept off the tax rolls and managed with little regard for the interests of the states, local governments, or individual citizens. I want to speak particularly to the members of this committee from the eastern states, Senator Ted Kennedy and Senator Bob Byrd, in an effort to demonstrate the need for the enactment of legislation in the nature of these bills.

Legislation is needed in order to remedy a wrong and help restore faith in our judicial system and our federal government, as well as address one of the major causes of the Sagebrush Rebellion.

Even before the founding of our republic, Americans felt deeply about the need for representation in the government decisionmaking process. The early founders resented having the laws made by "foreigners" and interpreted by "foreign" judges. When the colonial leaders' demands for involvement in government decisions were denied, rebellion followed. We like to call it a revolution for America's freedom and liberty.

Today, we of the West believe that in too many instances, our states are being treated like colonies. "Foreigners"—bureaucrats who seem to be out of control—are making the decisions affecting the land, water and resources which are the foundation of wealth for the West and indeed in many respects, the Nation.

In addition, we find that eastern judges (judges who are "foreign" to many values of the West) are making decisions which control our destiny as a people and as a vital force in America's economy.

The lawsuits are brought to eastern courts, principally the Federal District Court for the District of Columbia, because those filing the suits under § 1391, feel they can best realize their objectives by using a federal judge who has not had the experience of living or practicing law in the West. We cannot always determine the real motives of those who seek federal judges who are "foreign" to the area or region to be impacted by the cases. But in many instances, the apparent motive is to deny economic opportunity, access to the public lands, or challenge state control of our precious water supplies.

While the motives are not always clear, the impacts of a lawsuit filed in one jurisdiction in an effort to control the use of resources in another jurisdiction are clearly evident. One of the glaring violations of the spirit of the venue law is that the "real parties in interest" (the people living and working in the affected areas) are not necessarily involved and a "foreign" judge is making decisions on matters that the local judge should be acting upon.

This violation of the spirit of the law is a new innovation. The venue laws were enacted to provide convenience, "in the interest of justice," to the parties in litigation. It had always been presumed that all the parties to be affected by the litigation would be named in the suit. Two developments have emerged which have altered these principles:

- (1) The creation of special interest litigating groups; and,
- (2) The broadening by the courts of the requirements for standing.

Only recently have special interest or public interest law groups been created to take broad public issues to the courts for resolution.

Because the requirements for standing have been considerably broadened by the courts, these special interest and public interest legal groups have been allowed to bring suits to challenge government actions dealing with people and places, even though the moving party is only generally affected. In spite of the injustices created, we believe that the broadening of the definition of standing is good. Without the broader definition allowing court action, the bureaucracy, which in too many instances is unchecked, would have even greater latitude in limiting the freedoms of Americans.

The public interest must be protected and the courts can be used to check the excess activities of the bureaucrats. The problems are created, however, when a special interest group files a suit, which will have a tremendous impact on an easily identified population or geographic area, in a jurisdiction far from the residence of the "real parties in interest." (In fact, some of the suits are designed to avoid the "real parties" interest and to select through forum shopping, a judge who will be inclined to rule in a particular manner or maybe not even understand the real values concerning the people or the geographic area to be impacted.)

It is the willingness of courts in one jurisdiction to take cases affecting other jurisdictions which must be stopped. Such a willingness has created a distrust of the judicial system that when added to the insensitivities of the bureaucrats, builds the resentment and frustration behind the Sagebrush Rebellion.

When Senator Paul Laxalt introduced his bill, he told of the Ruby Marsh case. Ruby Marsh is a fish and wildlife refuge in Nevada, which has been a great rec-

recreation spot for many years. A special interest group decided that recreation in the area should be terminated, in spite of its many years of successful multiple management. That eastern group went to an eastern court with an eastern judge, to enjoin the peoples' use of the Nevada area. The U.S. Government using Washington D.C. lawyers, defended the case, which in itself causes you to wonder about the commitment to the effort to protect the interests of the people of Nevada. The "real parties of interest," the people of Nevada, learned about the case when the U.S. Marshall came to enforce the court order which eliminated the use of Ruby Marsh as a recreation area.

NRDC. v. Morton, 388 F. Supp. 829 (D.D.C. 1974)

The eleven public domain states have a substantial portion of their lands managed by the Bureau of Land Management and the Forest Service. These lands are managed for multi-purpose uses with the primary purpose being livestock grazing. When the Natural Resources Defense Council sought to reduce grazing of livestock on the public domain (plus other motives) they filed suit in Washington, D.C. Now, the BLM is managing the lands of the western states under the direction and guidelines of the eastern judge. Is the judge capable? Of course. The point is that an eastern special interest group brought a suit in an eastern court with an eastern judge, to control the management of western lands. The impact was in the West. The decisions were not made by people from the affected area, but rather by "foreigners."

Environmental Defense Fund v. Costle, No. 77-1436 (D.D.C. 1977)

Nothing is more valuable to the West than control of the water. From the very beginning, state law controlled water rights. The states learned to work together and over time, the seven Colorado River Basin states, in cooperation with Congress, forged "the law of the river."

A special interest group, the Environmental Defense Fund, is seeking to destroy the seven-state salinity control program which was approved under federal law by the EPA. EDF prepared the suit in its Denver office and filed it in the Federal District Court for the District of Columbia. The EDF suit was filed after the change of Administration and many of us feared a "sweetheart" lawsuit.

After we alerted many western interests, the Attorneys General of the seven basin states came to Washington, D.C. to intervene in the lawsuit. A motion to change the venue to a western state, where the impact and the "real parties of interest" were located, was denied. Many water user groups sought to intervene, however, only the seven states through their Attorneys General, and the Mountain States Legal Foundation were allowed to enter the case. At great expense, the eight intervenors are trying to control this case so that the states can continue in concert to control their waters. The impact is in the seven states of the Colorado River Basin—the judge sits in Washington, D.C.

Sierra Club v. Andrus, No. 78-2213 (D.D.C. 1978)

In another case of major significance to the West, the Denver office of the Sierra Club's Legal Defense Fund prepared a suit asking the court to order the Secretary of Interior and his agents to "define, assert and protect federal reserved water rights . . . in southern Utah and northern Arizona."

The Sierra Club wants to establish that all waters arising on public domain lands are subject to a federal reserved water right. To establish such a legal principle would be devastating to the West. You will not be surprised to learn that this group with offices in the Rocky Mountain area did not seek to find a Utah judge to hear its case. It, of course, filed its suit in Washington, D.C. It sought to get a "foreign" judge to rule on a crucial issue to the West. The "real parties in interest," the people of Utah and the West, do not have easy access to the D.C. court.

On behalf of the small town of Escalante, Utah, three small irrigation groups, and our members, the MSLF, assumed the financial burden and inconvenience of going to Washington, D.C., to defend these state water rights and keep the U.S. Justice Department from straying from the traditional water law of the Nation. Last week, we filed our Motion for Summary Judgment in this case.

National Wildlife Federation v. Andrus, No. 78-1522 (D.D.C. 1978)

In another case in which the MSLF was involved, these so-called "public interest lawyers" again violated the spirit of the venue laws. In this controversy, the City of Denver determined an additional water treatment facility was needed to meet the needs of its booming population. A bond issue to finance the expensive facility

called the Foothills Project, and other water projects, was put to a vote of the people. By a substantial margin, they voted the funds to build the project. After two and one half years of delay and court action, it is now under construction, but the road to construction was tortuous and costly. Because of the delays caused by bureaucrats and environmentalists, the project costs escalated from \$70 million to \$135 million.

When it became apparent the federal judge would see that the law and facts overcame the obstructionists' views, six environmentalist groups raced to the Federal District Court for the District of Columbia and filed suit to enjoin the federal government from allowing construction to start on rights-of-way which had already been granted. The MSLF intervened to keep a "sweetheart" deal from developing. The Department of Justice did file a motion to change venue, which was quickly denied. After costly litigation affecting the local water consumers, the case was settled along with an overall compromise which allowed the City of Denver to basically do what it had intended in the beginning—except, of course, the costs due to delay had soared to \$135 million.

CONCLUSION AND TECHNICAL COMMENTS

We believe that lawsuits should be brought in those courts located where the real impact is to be realized. We believe the cases should be heard by judges who have lived and practiced law in the general area of the court's jurisdiction. We believe it is wrong for so-called "public interest lawyers" to forum shop in the East in an effort to control the people and the public resources of the West. The opposite is, of course, equally true. (It would be wrong to bring a controversy dealing with fishing habitats of Cape Cod, Massachusetts, in a Wyoming Federal District Court.)

America has been strong because the people have had confidence that "their own" have governed and judged them. The present movement by these special interest legal groups to forum shop in the East in an effort to control the West must be stopped.

The bills, S. 739 and S. 1472, being considered today are aimed at the right objective. We fully support the spirit of both bills.

Both bills have one weakness which although not fatal to the objective, causes us to exercise "faith in our government." The weakness is that if the Department of Justice representing the named federal defendants, did not raise as a defense this new law to a suit filed in a jurisdiction other than where the impact or injury was realized, the issue of venue would be waived. And, further, I do not see how it could be attacked by another party at a later time. On the other hand, if the Department of Justice did raise the issue and the court did not accept its arguments that the suit was brought in the wrong court, I do not believe that the judges' ruling would be a final judgment permitting interlocutory appeal. It may be appropriate to require that when a civil action against the federal government is filed, which would have an impact on the environment or natural resource base of a state, notice be given to the Attorney General of the affected state or states.

In spite of these weaknesses, I believe we should trust that the Department of Justice lawyers would be faithful to the spirit and intent of the law and that judges would be fair in considering whether or not their court is the proper court "in the interest of justice."

S. 739 may create problems because it is so general and broad in application. It would cover all civil actions brought against the federal government. Frankly, I have not thought through all the potential situations which might be affected by the all-inclusive nature of the bill. I must add, however, I know of no problems created by the approach.

S. 1472 attempts to address a narrower range of issues—only environmental and natural resource litigation. However, it has a serious flaw which must be corrected. The bill would require that civil actions be filed in the judicial district where the alleged impact or injury occurs, if it is "less than nationwide in scope." Let me assure this committee that in the minds of these extreme special interest groups, nothing they do is "less than nationwide in scope."

In addition, the phrase "less than nationwide in scope" would require the court to exercise judgment on the scope of the case. This issue alone may be an issue of dispute which need not be litigated. A further point brings a personal issue to the forefront. Does an eastern judge or the moving special interest group think that the federal judges sitting in the West are inferior or less competent to address national issues or constitutional questions? We think the judges of the West are extreme-

ly competent and we have great confidence in their ability to interpret the Constitution and the statutes of the Nation.

In our case, *National Wildlife Federation v. Andrus*, concerning the needed construction of water treatment facilities for the City of Denver, it was argued by the "environmentalists" that the case had national issues and was "nationwide in scope," and that the court should not grant the Motion for Change of Venue from the Washington, D.C. District Court to the Federal District for the State of Colorado. The eastern judge agreed and kept the case in Washington, D.C.

That phrase must be corrected, if S. 1472 is to be adopted.

PREPARED STATEMENT OF PAUL D. KAMENAR

On behalf of the Washington Legal Foundation, let me express my appreciation to the distinguished members of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery for this invitation to testify on certain proposals which would alter the federal venue law in suits involving the environment or where the federal government is a defendant.

The Washington Legal Foundation is a non-profit corporation organized to engage in litigation and the administrative process in matters affecting the public interest. We currently have more than 75,000 members and contributors throughout the country. My comments here today will reflect exclusively the interest of our members and the public as a whole, not any organizational interest of the Washington Legal Foundation. The Washington Legal Foundation is currently involved in litigation across the United States regarding government regulation, crime victims, major constitutional issues and other vital public interest legal matters.

Under the current federal venue statute, in suits where the federal government is a defendant, the plaintiff may, at his option bring suit in Federal District Court for the District of Columbia. This option has often been exercised by environmental groups who prefer to litigate in District of Columbia courts, and it works a considerable hardship on citizens involved with the subject of the lawsuit who may wish to intervene. There are inevitable delays and inefficiencies when a trial is held so far from where the controversy arose. This also contributes to the unresponsiveness of the judiciary, who do not sit in the area where the claim arose and therefore may not understand the nature of the litigation or the interest of the local people involved. The Washington Legal Foundation deprecates the abuses of the current venue statute which allows unresponsive courts in Washington to hand decision which will have a major impact on the people of a state, without attempting to understand their problems or respond to their concerns.

Prior to 1962, a citizen seeking judicial review of federal administrative actions could proceed only in the District Court for the District of Columbia. This was due to a historical accident dating back to the early 19th century. The jurisdiction of the D.C. District Court, alone among federal district courts, derived partly from the laws of Maryland which governed the area ceded to the District in 1801. Maryland law provided jurisdiction to issue writs of mandamus. As a result, only a D.C. District Court could grant a writ of mandamus to compel administrative action. In addition, any other judicial action against a federal bureaucrat may require the presence of an "indispensible superior," usually an agency head or department secretary whose official residence in Washington, D.C. Therefore if, as is often the case, it is necessary to join this superior in a suit, the suit must be brought in Washington. This situation worked a hardship on citizens seeking to sue the federal government and in 1962, the Congress acted to remedy the problem.

The Mandamus and Venue Act of 1962 dealt with these two vexing problems faced by a plaintiff seeking judicial review of administrative actions. The law enacted section 1361 of Title 28 of the United States Code which grants every district court the authority to issue writs of mandamus to compel government officials to perform duties or make decisions in matters of discretion.¹ In addition, the federal venue statute, section 1391 of Title 28, was changed to make it easier to bring suit against a federal official. The current law provides:

"A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided

¹ 28 U.S.C. § 1361.

by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no property is involved in the action."²

The Senate Judiciary Committee Report specified that the legislation did not create any new causes of action against the United States.³ The Senate Report also explained the underlying purpose of the legislation:

"* * * where a citizen lives thousands of miles from Washington, where the property involved is located outside the District of Columbia, where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial process to the convenience of the government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government."⁴

Until recently, many courts⁵ and commentators⁶ have argued that the plaintiff in a suit against the United States should have his choice of forum since the federal government, with its nationwide network of attorneys, would never be inconvenienced, regardless of where the suit is brought. However this position fails to consider the potential hardship imposed on third parties in the state where the controversy arose who might wish to intervene as defendants and are forced to litigate in a distant and inconvenient forum. The recent case *Defenders of Wildlife v. Andrus*⁷ presents a vivid example of this problem.

The 1962 Act was a sensible modification of the law which facilitated access to federal courts by citizens seeking review of administrative actions. The Act also relieved the burden on D.C. courts while encouraging the resolution of litigation in local forums with all the benefits attendant on such decentralization. The legislative proposals currently pending before this subcommittee would continue the reform begun in 1962 by tightening the venue laws to eliminate abuses and assure that litigation proceeds in the appropriate forum. The Washington Legal Foundation believes that these proposals are in the public interest and would improve judicial efficiency and fairness.

A recent article in the *Ecology Law Quarterly* by environmental lawyer Joseph Brecher is quite explicit in spelling out the tactical considerations behind environmentalists' use of the venue laws.⁸ (This article bears closer analysis since it clearly demonstrates how the current venue laws have been used to unfairly aid environmentalists and deny a fair hearing to the people most directly involved in the litigation.)

It is common knowledge that certain courts espouse a legal ideology which predisposes them to rule a certain way on some commonly litigated issues. The Brecher article complements the District of Columbia Circuit for its sophistication and knowledge of environmental matters and the "understanding" it has shown to conservationist causes. The article also states that certain other circuits such as the ninth have been "distinctly unsympathetic to environmental concerns." Beecher goes into some detail discussing the problems with trying environmental suits in the locality where they arose:

"A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view. Local residents and newspapers are apt to favor projects in their locality, even at the cost of substantial environmental damage, for two reasons. First, large federal landholdings or depressed economic conditions often make the local tax base extremely small. Thus, residents see the construction of new projects in terms of upgraded schools, libraries, roads and other public facilities. Second, public leaders in the affected area often support such projects because of the new jobs and economic expansion associated with them. Judges and juries in the affected areas are likely, therefore, to feel that the public interest lies in building a project rather than preserving the environment."⁹

This is typical of a common attitude among environmentalists who feel that the American people are not capable of recognizing their own self interest and therefore decisions should be made not by the people in the political process,

² 28 U.S.C. § 1391.

³ S. Rep. No. 1992, 87th Cong., 2d sess., reprinted in (1962) U.S. Code Cong. & Ad. News 2784 [hereinafter cited as S. Rep. 1992].

⁴ S. Rep. 1992, *supra*, at 2786.

⁵ *Nestor v. Hershey*, 425 F. 2d 504 (D.C. Cir. 1969).

⁶ Note, *Proper Venue for an Action When at Least One Defendant is an Officer or Employee of the Federal Government*, 57 Minn. L. Rev. 1005 (1973).

⁷ *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978).

⁸ Brecher, *Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers*, 2 *Ecology L.Q.* 91

⁹ 2 *Ecology L. Q.*, *supra*, at 94.

but by an independent judiciary. Naturally, when challenging, for instance, a water project in Arizona, the environmentalists prefer to avoid a court in Arizona which might be influenced by favorable local public opinion. While an independent judiciary is a foundation of the American constitutional system, the expanding breadth of judicial review had made it essential that the judiciary reflect the needs and beliefs of local citizens. The Washington Legal Foundation believes for these reasons that it would be in the public interest for litigation to be conducted in the district where the controversy arose and where local interests in the controversy can be more clearly articulated.

Courts have long recognized the potential for abuse, if by forum shopping, court cases are tried far from the location of the controversy on which they are based. The Supreme Court has recognized that "... the open door (of venue choice) may admit those who seek not simply justice, but perhaps justice blended with some harassment."¹⁰ The Senate Judiciary Committee in its report on the Mandamus and Venue Act of 1962 stated:

"Frequently * * * proceedings involve problems which are recurrent but peculiar to certain areas, such as water rights, grazing land permits and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently."¹¹

An even more serious abuse is the danger of precedent-setting test cases being brought far from the site of an actual controversy before a judge with a reputation for sympathy for the cause urged in the complaint.¹²

The Brecher article also recognized the problem of efficiency and judicial economy in choosing venue. However, rather than advocating that cases be tried in the district where the controversy arose, Brecher advises environmentalists to seek venue in Washington. While parties and witnesses may live in the west, Brecher focuses on the fact that "experienced environmental lawyers usually have their offices in coastal cities."¹³ It is well established in the case law that the venue of a lawsuit should be determined with the convenience of the litigants in mind.¹⁴ Clearly, however, the current venue law is being used to bring cases into D.C. District Court which should have been tried nearer the origin of the controversy. A court in Washington may be convenient for government attorneys and environmentalists, but certainly not for local citizens who are the real parties to environmental and other disputes. The public interest in fair and effective judicial administration should be considered in choosing a forum as well as the interests of the nominal parties.¹⁵ A much sounder approach would provide for trial in the district where the controversy arose, which is usually the residence of the witnesses and the location of the physical evidence. The Supreme Court evaluated these factors in *Gilbert*:

"Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."¹⁶

Brecher's final reason for bringing environmental suits in D.C. District Court is even more astounding:

"Publicity is an important element in all environmental campaigns. Often the lawsuit is of secondary importance, serving primarily to focus public attention on an issue * * *. A suit in Washington is certain to receive more extensive coverage by the media than one in the district of Utah for example."¹⁷

When the current liberal venue law is being used for such purposes as these, it is clearly time for a change to bring the law back to its true purpose: serving the convenience of the litigants and other parties involved.

Some relief from problems of inconvenient venue is provided by Section 1404 of Title 28 which provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."¹⁸

¹⁰ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

¹¹ S. Rep. 1992, *supra*, at 2786.

¹² *Kings County Economic Community Development Ass'n v. Hardin*, 333 F. Supp. 1302, 1304 (N.D. Calif. 1971); *Hartke v. Federal Aviation Administration*, 369 F. Supp. 741, 746 (D.C.N.Y. 1973).

¹³ 2 Ecology L. Q., *supra*, at 93.

¹⁴ *Neiboco v. Bethlehem Shipbuilding Corp. Ltd.*, 308 U.S. 165 (1939).

¹⁵ *Gulf Oil Corp. v. Gilbert*, *supra*, at 508.

¹⁶ *Id.*

¹⁷ 2 Ecology L. Q., *supra*, at 93.

¹⁸ 28 U.S.C. § 1404.

The District Court for the District of Columbia has, in recent years looked with increasing favor on motions to transfer environmental cases to the district where the controversy arose.¹⁹ While § 1404 can be used by defendant to transfer a case to a more convenient forum, there are inevitably attendant costs and delays, so that the "forum non conveniens" doctrine should not be relied upon in the place of an effective venue statute. In addition, there is a heavy burden on the defendant to show inconvenience before the court will disturb plaintiff's choice of forum.²⁰ Alluding to the importance of Congress taking the lead in this area, the Supreme Court has said that " * * * venue rules nevertheless pose policy considerations which are and which should be weighed by Congress and not by this court."²¹

It is the position of the Washington Legal Foundation that proposed this legislation would be in the public interest by moving lawsuits out of the District Court for the District of Columbia and back to the district where the controversy arose. Such a move would increase judicial efficiency and assure that courts would, to some degree, reflect the interests and opinions of those people who will be most directly affected by the litigation.

Speaking for the Washington Legal Foundation and its 60,000 members and contributors, I would like to thank you, Mr. Chairman, for this invitation to testify before the Senate Judiciary's Subcommittee on Improvements in Judicial Machinery on this proposed legislation.

PREPARED STATEMENT OF GORDON H. DEPAOLI

I. INTRODUCTION

Chairman DeConcini and members of the subcommittee, my name is Gordon DePaoli. I am a member of the Reno, Nevada law firm of Woodburn, Wedge, Blakey and Jeppson. I have been engaged in the private practice of law since 1973. Although I have worked in several areas of the law, most of my practice has been devoted to civil litigation. Since 1975 I have practiced almost exclusively in the federal courts. During the last two years I have been active in litigation involving Lake Tahoe, Pyramid Lake, and the Truckee and Carson Rivers in Nevada. (I have participated in litigation with the United States Environmental Protection Agency, the States of Nevada and California, the Pyramid Lake Paiute Tribe of Indians, the Sierra Club, the Natural Resources Defense Council, Inc. and Mountain States Legal Foundation.)

My approach today is first to examine venue's purposes and the deficiencies in existing law. The bills before you today must then be measured against venue's purposes. Finally, the specific language of the bills must be considered to ensure that their spirit is not defeated by their letter.

II. VENUE'S PURPOSES

Venue refers to the place where a lawsuit should be tried. 15 C. Wright and A. Miller, *Federal Practice & Procedure* § 3801 (1976) (hereinafter "Wright and Miller"). Statutory provisions limiting venue are intended to place the trial in a judicially efficient location and to protect litigants and witnesses from inconvenient forums. *Whittier v. Emmet*, 281 F. 2d 24, 30 (D.C. Cir. 1960), cert. denied 364 U.S. 935 (1961). (To advance the administration of justice, a venue statute should be carefully drawn to permit maximum personal participation by those directly affected by the litigation and to promote maximum indirect citizen participation by allowing those affected who do not become parties to attend and listen. Such participation reduces the need for additional litigation and ensures that the search for the truth is aided by concerned adversaries.)

A general venue statute should be an attempt to promote those purposes (*Van Dusen v. Barrack*, 376 U.S. 612, 623 (1964)). There will, of course, be times when a general venue statute will not direct an action to a convenient forum and the court will be required to consider a motion to transfer or change venue. But that should be the exception, not the rule.

The general venue statute should reduce to an absolute minimum the need for this case-by-case determination. Such determinations divert the parties and the courts from "the merits of the lawsuits while they argue about and decide

¹⁹ *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1971).

²⁰ *Shutte v. Armo Steel Co.*, 431 F. 2d 22.25 (3d Cir. 1970).

²¹ *Denver and Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 569 (1967), Black J. dissenting.

where those merits may be conveniently determined." 15 Wright and Miller at § 3841. As Professor David Currie of the University of Chicago Law School has observed, deciding the location of the most convenient forum on an individual, case-by-case basis "costs altogether too much time and money." D. Currie, *The Federal Courts and the American Law Institute*, (Part II), 36 U. Chi. L. Rev. 268, 307 (1969). Professor Currie further suggests that the need for transfer provisions, like 28 U.S.C. § 1404(a), is eliminated when general venue statutes are drawn to assure that actions are commenced in an appropriate forum. *Id.* at 309.

When the bills under consideration and the present law are analyzed with venue's purposes in mind, the deficiencies in the present law and the benefits of the proposed amendments become apparent.

III. THE HISTORY OF SECTION 1391(E)

In considering these bills it is useful to examine Section 1391(e) and the reasons for its enactment in 1962 as part of H.R. 1960. By 1962, the then existing law on venue for actions against federal officers and agencies was recognized as unsatisfactory. Often a citizen's only choice was between bringing the action in the United States District Court for the District of Columbia or abandoning his claim. *McNeil v. Leonard*, 199 F. Supp. 671 (D. Mont. 1961) was typical. There a Montana rancher brought an action against the district manager of the Bureau of Land Management in the United States District Court for the District of Montana to compel the manager to grant him a grazing permit in Montana. The district judge dismissed the action, and regretfully noted that the rancher's only alternative to abandoning his claim was litigation in the District of Columbia (199 F. Supp. at 671).

The result in *McNeil* was required by an early Supreme Court decision which held that lower federal courts lacked jurisdiction to mandamus federal officers, *McIntire v. Wood*, 11 U.S. 504 (1813). Later in *Kendall v. United States*, 37 U.S. 524 (1838) the Court held that mandamus was available, but only in the courts of the District of Columbia as heirs to the common law powers of the courts of Maryland. Attempts to circumvent these rulings by labeling the action as one for an injunction often failed, "sometimes because of the transparency of the label and at other times upon the principle requiring joinder of a superior officer, usually residing in Washington, over whom the local district court lacked both venue and process." (*Liberation News Service v. Eastland*, 426 F. 2d 1379, 1383 (2d. Cir. 1970) (Friendly, J.) This situation was particularly burdensome with respect to land-related disputes in the Western States. *Liberation News Service*, 426 F. 2d at 1383; C. Byse and J. Fiorca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Action, 81 Harv. L. Rev., 308, 308-09, 313 (1967).

After years of effort a remedy was provided when H.R. 1960 became law. Speaking of the then existing law, the bill then under consideration, and of important policy considerations, the Senate Committee on the Judiciary in its report said:

"The committee is of the view that the current state of the law respecting venue in actions against Government officials is contrary to the sound and equitable administration of justice. Frequently, the administrative determinations involved are made not in Washington but in the field. In either event, these are actions which are in essence against the United States. The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U.S. attorneys are present in every judicial district. Requiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition.

"On the other hand, where a citizen lives thousands of miles from Washington, where the property involved is located outside of the District of Columbia, where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government.

"However, disregarding considerations of convenience, broadening of the venue provisions of Title 28 to permit these actions to be brought locally is desirable from the standpoint of efficient judicial administration. Frequently, these pro-

ceedings involve problems which are recurrent but peculiar to certain areas, such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently.

"In addition, the present venue provision results in a concentration of these actions in the District Court for the District of Columbia, a court which is already heavily burdened. Court congestion is increased and substantial delays are incurred. The broadened venue provided in this bill will assist in achieving prompt administration of justice by making it possible to bring these actions in courts throughout the country, many of which are not nearly as burdened as the District Court for the District of Columbia.

"To achieve these results, section 2 of this bill amends section 1391 of Title 28 of the United States Code to provide that an action may be brought against an officer or an employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, in any judicial district where a defendant resides, or in which the cause of action arose, or in which any real property involved in the action is situated, or if no real property is involved in the action, where the plaintiff resides."—S. Rep. No. 1992, 87th Cong., 2d Sess. (1962) (*reprinted in U.S. Code, Cong. & Ad. News 2784, 2785-87*); see also H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961).

H.R. 1960 as originally introduced allowed actions to be brought wherever the plaintiff resides whether or not real property was involved in the action. Then Deputy Attorney General and now Associate Justice of the United States Supreme Court Byron R. White stated, in a letter to Senator Eastland:

"The pending bill would place venue in any judicial district 'wherein the plaintiff resides.' We recommend that this be changed to grant venue in any judicial district 'in which the cause of action arose, or in which any property involved in the action is situated.' The principal demand for this proposed legislation comes from those who wish to seek review of decisions relating to public lands, such as the awarding of oil and gas leases, consideration of land patent applications and the granting of grazing rights or other interests in the public domain. The applicants may reside in any State, or several States of the Union, and it would be unwise to have the Secretary sued in Maine with respect to an oil and gas lease in Wyoming. On the other hand, there is no objection to permitting one who has done business involving land in Wyoming to bring any suit concerning that land in the State where it is located."—Letter from Byron R. White to James O. Eastland (Feb. 28, 1962) *reprinted in 1962 U.S. Code Cong. & Ad. News 2788, 2789.*

The Senate Committee on the Judiciary saw the merit in Justice White's suggestion and amended the bill accordingly.

This history demonstrates that Section 1391(e) was intended to achieve venue's central purposes. It was intended to move litigation against government out of Washington to the jurisdiction where many of the determinations in question were made, where the citizens directly affected lived and where the property involved in the action was located. It was intended to make the administration of justice more efficient by having recurrent problems peculiar to certain areas decided by judges familiar with them. The provision was further intended to eliminate delays which resulted from undue burdens on the District Courts of the District of Columbia.

IV. PROBLEMS WITH SECTION 1391(E) AND THE NEED FOR REFORM

A. Introduction

In 1960 when it enacted H.R. 1960, Congress was dealing with a particular problem. It had in mind the individual citizen plaintiff aggrieved by the decision of a government official, usually one in the field. The 1962 legislation allowed that plaintiff to sue where the property involved was located, where the cause of action arose, or where he or the official resided. Problems caused by the legal doctrine requiring joinder of a superior officer were eliminated by the provision broadening service of process beyond the territorial limits of the district (*Liberation News Service, 426 F. 2d at 1383-84*).

Decisions of government officials almost always aggrieve someone, often directly, sometimes indirectly. That has brought about a new kind of "three-way" litigation. It has given rise to membership corporations representing particular points of view and with offices strategically located around America. The interests of these corporations often conflict with those of a citizen who is directly and

adversely affected by government's decisions. An example is found in the conflicting interests of the American Horse Protection Association, Inc. and those of a Nevada rancher whose grazing will be improved by a round-up of wild horses.

In this "three-way" situation either the membership corporation or the impacted citizen may be willing to live with a government decision while the other is not. When, for example, the membership corporation seeks to change that decision, it may seek to do so in a way that the citizen directly affected cannot tolerate. The membership corporation may take advantage of Section 1391(e) in ways never intended by its drafters. If no real property is involved, it may sue where it resides. Whether or not real property is involved, it may sue the government officer at his official residence. Rather than taking advantage of the broadened service of process provisions of Section 1391(e), it sues the department head at his official residence, Washington, D.C. Unfortunately, the residence of the plaintiff and the official residence of the government officer, even when he is directly involved, bear no necessary relationship to issues of convenience and of efficient judicial administration.

Citizens directly affected by the ultimate resolution of the action are placed in the same position they were in before enactment of H.R. 1960 in 1962. They must either do nothing and hope for the best or incur the expense and inconvenience of litigating in Washington. Judges familiar with the problems being litigated and suited to handling them expeditiously and intelligently never see them. The District of Columbia Courts are further burdened with additional litigation. Two examples involving Nevada demonstrate these points.

**B. *Pyramid Lake Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D.C. 1973)—
*The Pyramid Lake Litigation***

In the early 1970's the Pyramid Lake Paiute Tribe of Indians (the "Tribe"), a Nevada Indian tribe represented by the Native American Rights Foundation, filed suit in Washington against the Secretary of the Interior, Civil Action No. 2506-70. In that action the Tribe challenged as arbitrary and capricious a regulation establishing the basis on which water should be provided to the Truckee-Carson Irrigation District (TCID) during the succeeding twelve months (*Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 254 (D. D.C. 1973)). TCID, an irrigation district organized and existing under the laws of Nevada, operates the Newlands Reclamation project in Nevada and represents numerous farmers who irrigate some 60,000 acres through its system. TCID was not a party to the Pyramid Lake litigation.

The Department of Justice defended the Secretary. It did not seek to transfer the action and did not move to dismiss for failure to join indispensable parties, like TCID. At about the same time the Department of Justice had filed an original petition on behalf of the Tribe in the United States Supreme Court concerning the Tribe's claim to additional water against Nevada and California (354 F. Supp. at 254-55).

The Pyramid Lake Indian Reservation is located wholly within Nevada. Pyramid Lake lies within the Reservation and depends on the Truckee River's Nevada flows for its water. TCID operates wholly within Nevada. As noted, some 60,000 irrigated acres of land depend on TCID for water. Nevada's Stillwater National Wildlife Refuge also depends on TCID for water. Water for TCID comes from the Carson River in Nevada following storage in Lahonton Reservoir in Nevada and from diversion of water from the Truckee River in Nevada at Derby Dam in Nevada through the Truckee Canal in Nevada (354 F. Supp. at 255, 259).

Throughout the Pyramid Lake litigation the right to the use of the waters of the Truckee River and its tributaries was the subject of an action in the United States District Court for the District of Nevada, *United States of America v. Orr Water Ditch Company*, In Equity No. A-3 (1914). Although a final decree had been entered in 1944, the action was and is active in that certain matters, including interpretation and implementation of the final decree, are routinely before that Court.

Also concurrently with the Pyramid Lake litigation, the right to the use of the waters of the Carson River and its tributaries was subject to an action pending in the United States District Court for the District of Nevada, *United States v. Alpine Land & Reservoir Company*, In Equity No. D-183 (1925). In that action a temporary restraining order, entered on the basis of a special master's report, governed distribution of the waters of the Carson River. That action too was actively before the Nevada federal court.

At issue in the Pyramid Lake litigation was whether TCID's water supply as determined by the government should be reduced by thirty percent in order to

provide more water for Pyramid Lake. Involved in that issue, being tried in Washington, were questions of interpretation of the Truckee River final decree and of the Carson River temporary restraining order. Also involved were questions of prevention of waste within TCID's some 600 miles of canals and ditches all located within Nevada (354 F. Supp. at 257-258).

Without regard to the merits of that controversy, a carefully drawn venue statute would not have permitted it to have been tried in Washington. The citizens directly affected, including the Tribe, were all in Nevada. The property involved was in Nevada. The judge most familiar with the problem was in Nevada.

As might be expected the Washington litigation resolved nothing. In 1974 TCID filed suit in Nevada against the Secretary seeking to have the regulations adopted pursuant to the Washington judgment declared invalid (*Truckee-Carson Irrigation District v. Secretary of the Department of Interior*, Civil Action No. R-74-34 BRT (D. Nev. 1974)). The Tribe has intervened in that action.

Denying the United States' motion for summary judgment in that case, the Nevada judge speaking of the Washington case said:

"No one can read Judge Gesell's comprehensive opinion without marveling at his understanding of the problems existing in the administration of the Newlands Project. It is, nevertheless, obvious that the case was presented to him by parties who did not represent competing adverse interests. The United States of America has never been able to decide whom it represents in these controversies. Its ambivalence is somewhat terrifying to a lawyer steeped in the concept that the search for truth is best abetted by litigation among competing adverse interests."—*Id.*, Order Denying Summary Judgment (June 9, 1976).

c. *Defenders of Wildlife v. Andrus*, Civil Action No. 78-1332, 455 F. Supp. 466 (D. D.C. 1978)—*The Ruby Lake Litigation*¹

A second example of deficiencies in Section 1391(e) arose in July of 1978 when Defenders of Wildlife, a non-profit, tax exempt corporation organized under the laws of the District of Columbia and with offices there, represented by Covington and Burling, sued the Secretary of the Interior and two other officials located in Washington, D.C. in the United States District Court for the District of Columbia, *Defenders of Wildlife v. Andrus*, Civil Action No. 78-1332. The action sought declaratory and injunctive relief to prohibit the defendants from permitting power boating within Ruby Lake National Wildlife Refuge and from permitting all boating within the Refuge prior to July 15 of each year.

Ruby Lake National Wildlife Refuge is located wholly within the State of Nevada. The issue in that action was whether recreational use of Ruby Lake, as permitted by regulations adopted by the Secretary, interfered with the Refuge's primary purpose. Specifically, Defenders contended that the type of boating permitted would adversely affect the canvasback and redhead duck populations within the Refuge. Ruby Lake is the only publicly-owned boating recreational area within 125 miles of Northeast Nevada's primary population centers. Fishing and boating has been accommodated since the Refuge was established in 1963. Recreational figures for 1976 showed substantial use for fishing, hunting, water skiing and pleasure boating. The primary users are Nevadans.

The Department of Justice, representing the Secretary, did not move to transfer as it had in other cases involving Nevada interests (*See, e.g., American Horse Protection Association, Inc. v. Stanley K. Hathaway*, Civil Action No. 75-1178, Mem. Opinion and Order (D. D.C. July 24, 1975); *American Horse Protection Association, Inc. et al. v. Cecil Andrus, et al.*, Civil Action No. 78-0606, Order (D. D.C. May 26, 1978)). The State of Nevada intervened in the action and unsuccessfully moved to transfer it to the United States District Court for the District of Nevada pursuant to 28 U.S.C. § 1404(a).

Like the Pyramid Lake litigation, the Ruby Lake case only spawned additional litigation. Nevada has since filed two actions against the United States concerning the Ruby Lake Refuge. In an action filed in a Nevada state court, Nevada contends that substantial amounts of the water in Ruby Lake belong to the public for recreational use (*State of Nevada, et al. v. United States of America, et al.*, Civil Action No. 11473, in the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine (September 29, 1978)). In an action filed in the United States District Court in Nevada, the State claims ownership to the bed of

¹ This was actually the second action brought by Defenders of Wildlife. The first action, *Defenders of Wildlife v. Andrus*, Civil Action No. 78-1210 (D. D.C. 1978), resulted in a remand of the regulations in question to the Secretary of the Interior for a determination of whether "the permitted recreational use would not interfere with the Refuge's primary purpose."

Ruby Lake and that therefore Ruby Lake could not have been included within the Refuge (*State of Nevada v. United States of America, et al.*, Civil Action No. R-78-0157 BRT (D. Nev. September 29, 1978)). Both actions are still pending.

C. S. 739 AND S. 1472 AND VENUE'S PURPOSES

With one exception the pending bills will place venue in actions such as those just described in a judicial district where a "substantial portion of the impact or injury" will occur. The exception is contained in S. 1472 and relates to issues, impact or injury alleged to be "nationwide in scope." In my judgment that exception could and probably would emasculate the "substantial impact or injury" provisions of the bills. Frequently purely local cases involve issues which are nationwide in scope simply because they present novel questions of law under important federal statutes.

I am currently involved in a purely local action which presents several novel questions of law under the Clean Water Act. I am also involved in a purely local action which presents important questions under the Clean Air Act. That action, *Sierra Pacific Power Company and Idaho Power Company v. U.S. Environmental Protection Agency*, Civil Action No. R-79-229 BRT (D. Nev. 1979), presents the very basic issue of whether a determination by EPA that a facility is a "new source" under the provisions of § 111 of the Clean Air Act is reviewable in the first instance in District Court or the Court of Appeals. The facility involved is a new coal-fired steam electric generating plant located in Humboldt County, Nevada. The plaintiffs are two public utilities engaged in providing electric service to approximately 700,000 customers in Nevada, California, Oregon and Idaho.

The jurisdictional issue is clearly one which has nationwide implications. However, that does not mean that it and, more importantly, the merits of the controversy ought to be decided in the District of Columbia. The jurisdictional issue has been determined in the Fifth Circuit in *PPG Industries, Inc. v. Harrison*, 587 F. 2d 237 (5th Cir. 1979), and because certiorari has been granted in that action (48 U.S.L.W. 3186) (October 1, 1979), will probably and properly be decided by the United States Supreme Court this term.

There is no lower federal trial or appellate court which is more particularly suited than any other to hearing and resolving issues which are nationwide in scope. (*See, Starnes v. McGuire*, 512 F.2d 918 (D.C. Cir. 1974)). From time to time policy judgments, such as an exceptional need for immediate uniform interpretation and application, may lead you to make an ad hoc designation of such a court. Any such designation should be narrow and specific and should not be made in a general venue statute. (It should involve very strong policy considerations because there is much to be said for allowing import and difficult legal issues to follow the normal path of diverse views to ultimate resolution in the constitutional court set up for that purpose, the United States Supreme Court.)

The "substantial portion of the impact or injury" test provided in the two bills is a logical extension, necessitated by changed circumstances, of the rationale which brought about the 1962 amendment to Section 1391(e). It is directly related to the policies involved in choosing an appropriate forum.

The new test will not place an undue burden on government. United States attorneys are present in every judicial district. In addition, some government agencies are represented regionally or by the Department of Justice or both. I am currently involved in two actions in Nevada with the Environmental Protection Agency. In those actions EPA is represented by a United States attorney, by counsel from EPA and by the Department of Justice.

In those cases involving real property, the property involved will be located where the impact or injury occurs. In 1962 Justice White felt it unwise to allow government to be sued in "Maine with respect to an oil and gas lease in Wyoming." It is just as unwise today to permit government to be sued in Washington with respect to the division of Nevada water among Nevadans. In litigation, a view of the property involved is often of great assistance to the Court. Under these bills, such a view will be readily and economically available.

Both witnesses and affected citizens who are unable to participate in trials or hearings in Washington are likely to live in the neighborhood where the impact or injury has occurred. They will be able in most cases to participate in their own or nearby judicial districts or circuits. These are important advantages for the cause of public confidence in our legal processes. Respect for our judicial system is not enhanced when a Nevada family eager for a boating Sunday discovers that it may not use a lake it has used for years or a Nevada farmer is

advised that his water supply has been reduced by thirty percent, all by order of a judge sitting in a courtroom more than 2,500 miles away.

Recurrent problems peculiar to certain areas, like the mineral, water rights, grazing and wild horse problems of the West, will be tried by judges familiar with them and the area involved. Related cases will be consolidated or at least heard by the same judge. Necessary and proper parties will be joined to ensure that their interests are represented and that the search for the truth is advanced by litigation among truly competing adverse interests. A decision in such litigation will be binding and meaningful and will not simply engender further litigation.

To the extent that the District of Columbia courts are heavily burdened with litigation the bills will lighten that burden. The result may well be more expeditious decisions both in the cases that are not tried there and in the cases that are.

As part of a general federal venue statute, these bills will reduce the need for the time-consuming and costly determination of venue on a case-by-case basis. They will require most actions to be initially filed in the most convenient forum and will allow the parties and the courts to proceed directly with the merits.

VI. THE SPECIFIC LANGUAGE OF S. 739 AND S. 1472

Having examined the policy considerations involved in a statutory provision limiting venue and determined that the spirit of both bills is consistent with those policies, it is important to carefully analyze the bills' specific language so that they will operate as intended. Unfortunately time has not permitted me to analyze the language in detail; nor has it permitted me to examine every existing federal venue provision. The relationship between those provisions and these bills, particularly S. 1472, should be examined carefully. I do have some general observations.

S. 739 is limited in its operation to civil actions in which a defendant is the United States, its employees or agencies. S. 1472 is limited to civil actions arising under Acts of Congress "relating to environmental quality." Because of the limitations in each bill you are not faced with a choice of adopting one or the other of the bills. That is so because not every civil action involving impact or injury will be brought under an Act of Congress relating to environmental quality. *Pyramid Lake Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D.C. 1973) mentioned earlier did not arise under any Congressional Act related to environmental quality. It was an action brought under the Administrative Procedure Act, 5 U.S.C. § 706, challenging certain regulations as invalid. If you were to enact only S. 1472, that action could still have been commenced in Washington, D.C. On the other hand, not every action brought under federal environmental laws will have the United States as a defendant and in such cases enactment of only S. 739 would not require that the action be brought where the impact or injury occurs. Therefore the fullest consideration should be given to enacting both bills or a single bill which covers both situations.

It is important to remember that in the first instance the forum is selected by the plaintiff. A properly drawn venue statute will require the plaintiff to select the correct forum. If it is not so drawn the plaintiff may select an inappropriate forum and the parties and the courts will be diverted from the merits while determining where the action is to be tried. The operative language in S. 739 provides:

"(2) In any such action in which it is *determined* that a substantial portion of the impact or injury is in one or more judicial districts, such action shall be brought in one of such judicial districts." [Emphasis added.]

That language, particularly the word "determined," implies that in every case a formal decision will be made concerning where the impact or injury is actually occurring. The language of S. 1472 avoids that implication. The language of S. 739 could very well be changed to read as follows:

"(2) In any such action in which impact or injury is alleged, such action shall be brought in a judicial district in which a substantial portion of the alleged impact or injury occurs."

Section 2 of S. 739 could also be similarly changed.

It is also important to keep in mind that improper venue is a defense personal to a party and, if not properly raised, is waived. *Concession Consultants, Inc. v. Merisch*, 355 F. 2d 369 (2d Cir. 1966). (Moreover, a person intervening on either side of a controversy may not object to improper venue) *Trans World Airlines, Inc. v. C.A.B.*, 339 F. 2d 56 (2d Cir. 1964), cert. denied 382 U.S. 842 (1964)). In actions involving the United States, unless a provision is added requiring those persons defending the government to raise the defense, the salutary purposes this

legislation seeks to achieve may be waived by the action or inaction of a government attorney.) I suggest that language be added providing that an objection to venue under these new provisions may not be waived and providing further that the objection may be raised by intervening parties. Finally, in order to allow all interested persons an opportunity to intervene, I suggest that written notice be given to the attorney general of each state where the alleged impact or injury occurs.

These additions will provide added incentives to plaintiffs to select the appropriate forum at the outset. If plaintiffs do not, the additions will ensure that government lawyers make a timely objection and that an appropriate person in each state where the alleged impact or injury occurs is notified and has an opportunity to seek to intervene. These provisions will insure that litigation takes place between competing adverse interests.

With appropriate changes these bills will do much to advance the proper and efficient administration of justice in America. I strongly recommend passage of such legislation.

The next panel is comprised of Jerry Haggard, Evans, Kitchel and Jenckes, P.C., Phoenix, Ariz., representing American Mining Congress; Ronald A. Michieli, National Cattleman's Association, Washington, D.C.; and Guy Gelbron, Snell and Wilmer, Phoenix, Ariz., representing Arizona Public Service Co.

Gentlemen, your full statements will appear in the record following your oral testimony. Would you summarize them for us?

PANEL OF BUSINESS REPRESENTATIVES:

STATEMENTS OF JERRY L. HAGGARD, REPRESENTING AMERICAN MINING CONGRESS; RONALD A. MICHIELI, NATIONAL CATTLEMAN'S ASSOCIATION, THE NATIONAL WOOL GROWERS ASSOCIATION, THE PUBLIC LANDS COUNCIL, AND THE ARIZONA CATTLE GROWERS ASSOCIATION; AND GUY GELBRON, REPRESENTING ARIZONA PUBLIC SERVICE CO.

Mr. HAGGARD. I am Jerry Haggard from Phoenix, Ariz., representing the American Mining Congress which appreciates this opportunity to present its testimony on Senate bills 739 and 1472. We also wish to commend the subcommittee for considering the bill.

We support these bills and do recommend certain amendments. The two bills would simply cause Federal civil suits covered by these bills to be tried in the most appropriate Federal forum as determined by the convenience and justice to all parties.

The bills would not decrease or increase any requirements to comply with Federal law. There should not be any question about any effect on Federal law enforcement, although from reading some of the statements distributed this morning by opponents of the legislation one would think almost that Federal law is being changed.

Each bill essentially provides that the Federal suits must be brought in those judicial districts or circuits in which the issues raised will have the greatest effect.

S. 739 places venue restriction only on Federal suits in which an officer or employee or agency of the United States is a defendant.

S. 1472, on the other hand, is broader and it is not limited to actions against the Government. It extends to private civil litigants in en-

vironmental litigation arising under Federal law. For that reason we favor the broader concept of S. 1472.

We believe the rationale that supports the enactment of Senate bill 739 has equal application to S. 1472.

To have actions brought in the judicial district which will be most impacted is desirable for numerous reasons. We have heard many of those reasons this morning. I am struck by the similarity of arguments by each of the witnesses.

The chairman stated these in his opening statement and Senator Laxalt stated the similarity of reasons for enactment of this legislation as well. Of course that is because they are obvious. Because they are obvious, it increases their validity and strength. I will reemphasize some of those reasons.

One of the major reasons for limiting venue is to use the legal expertise and knowledge of judges in the area involved in the litigation.

Often the issues raised in these actions involve problems of a particular area, such as water rights, mineral rights, property use management, and environmental quality. Judges in those areas are most experienced with those problems.

Another reason for limiting venue is to increase convenience of the parties, witnesses, and the judiciary, thereby increasing efficiency and economy of the system.

Another reason is that presently there is a concentration of these Federal actions in the District of Columbia and substantial delays result.

Another good reason I have been impressed with, having practiced in the District of Columbia and now in Arizona, is to increase the public confidence in the judiciary.

Whenever there are few or no limits on the forums in which litigation may be brought, there will always be a tendency for some parties to forum-shop and to prefer some forums over others. This is not healthy for our judicial system. The mere indication of preferences for a particular forum tarnishes the public confidence in the objectivity and fairness of our judicial system.

All the aforementioned considerations support venue in the local judicial district in which the issues raised will have the greatest impact or injury.

While the American Mining Congress strongly supports S. 739 and 1472, we do recommend certain amendments to S. 739 in order to clarify the identification of the proper judicial forum and to consolidate in a single bill the proposals contained in S. 739 and S. 1472. The amendments recommended by the American Mining Congress are attached to this statement. As previously indicated, the primary intent of the recommended amendments is to make it clear that in Federal civil actions which involve issues of environmental law or name the Government, its employees or agencies, as a party thereto, venue shall be in those judicial districts or circuits in which the issues raised will have the greatest impact or injury. The amendments are intended to facilitate identification of the most appropriate and convenient judicial forum. The amendments also effectively incorporate in S. 739 the principal provisions of S. 1472 with respect to environmental litigation.

We again express our appreciation for this opportunity to comment on this legislation. We urge the subcommittee to report favorably the

combined bills as we have recommended them to be amended and to recommend that the bills be passed.

One final comment. I want to express our strong support generally for the many areas of regulatory reform urgently needed for our Nation to again gain the strength it can achieve through the proper utilization of our industry and our resources. These bills are a significant step in this direction but they are only one of many reforms needed to achieve this goal.

Senator DECONCINI. Thank you.

Mr. Michieli?

Mr. MICHELI. I am here in behalf of the National Cattleman's Association, the National Wool Growers Association, the Public Lands Council and the Arizona Cattle Growers Association. We strongly support enactment of legislation such as S. 739 and S. 1472 to amend the venue statutes to require cases involving Federal actions to be tried in the district court in areas where that action occurs or where the impact is substantial.

Under existing laws, suits against the Federal Government can be tried in Washington, D.C., where the seat of our National Government is located. As a matter of fact, many plaintiffs deliberately choose to file suits here in Washington even though they involve actions occurring elsewhere.

We should ask why this is so and we should ask whether justice is served in such cases.

The Washington, D.C., District Court is particularly favored for environmental suits and it is no wonder why, considering the decisions that court has made in such cases.

We believe certain groups like to file suits in Washington, D.C., because they know that they will get a more sympathetic judge, or, perhaps just as importantly, a judge who is not familiar with local needs and interests which may be affected by the judge's decision.

An example is a suit brought by the Natural Resources Defense Council against the Department of the Interior to require the Bureau of Land Management to prepare site-specific environmental impact statements on livestock grazing decisions. During the course of this case it became apparent that the district judge did not know the first thing about the complex issues involved. He not only did not know anything about the range science issues involved but he did not know anything about the public lands in general.

We do not think the judge in that case fully appreciates the magnitude of the impacts caused by his decisions, the millions of dollars which will be spent on paperwork rather than range improvements, the scientifically unsound decisions which will now be made, and the economic hardships imposed on range users and on local and regional economies.

To show you a case in point, when that suit was filed it was estimated it would cost \$55 million. It has now run over the \$750 million figure and we have only 7 of the 143 districts completed.

I am not saying the eventual outcome possibly might not have been the same if the case were tried in a State in which some of the public lands involved are located but at least the judge might have known something about the public lands—its history and uses—and maybe he would have comprehended the arguments of the defendants a little better.

Another example of a case argued in Washington, D.C., although it does not appear logical to do so, is the one filed by the American Horse Protection Association and the Humane Society of the United States which resulted in an injunction against the roundup of wild horses on the public lands in Challis, Idaho. This injunction has been in force since 1976 and remains in force even though another law says that BLM must remove excess horses from the range. In the meantime, the horse population has increased and they are ruining the range and driving out wildlife and forcing ranchers out of business. The Federal agency, range scientists, wildlife specialists, and local residents unanimously agree that something must be done. But not the judge.

There are no wild horses in Washington, D.C., and the Federal judge in the case apparently does not appreciate the urgency of the situation. The defendants can present all the evidence and arguments they can think of but it doesn't do much good if the issues are not understood.

There must be some reasons why not all Federal courts are located in Washington, D.C., and it occurs to us that these are the reasons why legislation such as bills S. 739 and S. 1472 are necessary and needed. Otherwise we might as well abolish our district court system and bring all Federal judges to Washington, D.C.

The purpose of the courts and the litigation process should be the truth arrived at after the fullest possible consideration is given to all relevant factors. Cases should not be scheduled to give employment to—or suit the convenience of—so-called public interest law firms. If anything, cases should be tried in areas in which the opportunities for the affected public to express their views to the court are the greatest. The procedure should not encourage the holding of cases in an area where it is inconvenient for affected parties and witnesses to appear in court.

These principles, of course, should not only apply to civil actions in which the Federal Government is the defendant but also to the review of Federal actions.

The proof of the suspicion that the District of Columbia District Court and District of Columbia Court of Appeals are prejudiced is revealed, we believe, by the fact that many environmental interest groups insist on provisions in statutes specifying that cases involving that statute will be heard in the District of Columbia courts.

We commend Senator DeConcini and Senator Laxalt for their efforts to call attention to a subject that must be given serious consideration. There is a need to provide a counterbalance to the extreme overzealousness that prevailed in the 1960's regarding environmental issues. We must strive to improve our environment but we must do so in a manner which recognizes economic and other realities. We achieve nothing of permanence if we insist on overnight environmental purity and ruin our economy and other important values in the process.

Senator DECONCINI. Thank you.

Mr. Gelbron?

Mr. GELBRON. My name is Guy Gelbron. I am with the law firm of Snell & Wilmer, representing Arizona Public Service Co.

I would like to thank you for the opportunity to testify before this subcommittee with regard to an issue which we consider to be extremely important and one which affects many, many cases and

decisions which will amount to literally billions of dollars at the State level.

Rather than pursue of my written comments, which I will submit later, perhaps I will cite several examples and concentrate on only one case in particular, one which is illustrative of the problem and possibly the solution, that being the continued support of the kinds of bills you are considering today.

The section I would like to concentrate on is the visibility protection section of the Clean Air Amendment of 1977. That section, I should clarify initially, does not mean a visible plume. It refers only to an emission of sulphur dioxide which is colorless and invisible and cannot be seen when it is emitted from a plant.

Over a period of time, scientists are still debating how much time it takes, but in a number of hours that pollutant, which is a gas, converts into particles and becomes like dust in the air and obscures visibility to some extent. Scientists argue as to how much—whether it reduces visibility in the West 85, 75, 80, or 60 percent, but it is somewhere in that range.

Visibility protection applies in the Clean Air Act to what is defined in the Clean Air Act as mandatory class I areas. These wilderness areas overwhelmingly, both as to size and number, exist in the West where in and not the East.

The act mandates EPA to study the visibility problem. These studies are being conducted in the East—out of North Carolina. They mandate EPA to determine what will be the best available technology, technology which will have to be placed on powerplants in order to bring the sulphur dioxide emission to a lower level than is even required for health and welfare reasons. They require EPA to impose these requirements on all powerplants and major sources which are less than 15 years old.

The problem of visibility protection and emphasis of its impact on the West is highlighted by the fact—and it was passed in August of 1977's Congress—that it passed with widespread newspaper reports that the real purpose of this particular act was the Sierra Club and other environmental groups desiring to put controls on three particular powerplants—Four Corners powerplant, Navajo and Mojave powerplants.

These three powerplants, which have a combined megawatt rating of 6,500 megawatts, are owned 50 percent by the three Arizona utilities—Arizona Public Service Co., Salt River Project, and Tucson Electric Co. They supply electricity to Arizona.

The other 50 percent is owned by other utilities. These three powerplants supply electricity to Texas, New Mexico, and California.

Literally several million people utilize electricity of these three powerplants. This particular law came out of Congress with a precise death-bell ringing on these three powerplants.

EPA has been studying the effect of the visibility protection statute on these powerplants and exceeded its mandated deadline for promulgation of regulations.

On August 30, 1979, Friends of the Earth filed a lawsuit against EPA contending that EPA must comply with the mandated dates contained in the act.

That lawsuit, which affects three coal-fired powerplants in the West, plants which use coal in the West and which heat homes and air-condition homes and are used by industry in the West, that lawsuit was filed in the East, filed in the District of Columbia.

It is precisely for this kind of forum-shopping that we strongly support bringing an end to this kind of practice. It is not a question of whether the eastern judge is good or bad or whether he is proindustry or proenvironment. That is not the issue. The issue is that eastern judges should not be the ones deciding the welfare of the West.

To some extent an argument can be made that western judges are more familiar with the problem, more educated in how to solve these problems, and they are more familiar with the practical everyday situations faced by the people in the West. But that really is not the thrust. The thrust is that if there are people here in the East who are willing to take proenvironmental cases and turn them against the western interest, this law would take care of that.

Senator DECONCINI. You give an interesting set of circumstances regarding that case, but it is very possible that you might have an eastern transplanted judge in the West, and if these bills became law you would still have an eastern interpretation.

However, your point is, is it not, that the venue should be where the alleged offense has occurred or where the violation has occurred rather than having it such a large distance from there?

Mr. GELBRON. That is correct.

Senator DECONCINI. You do not object, given a hypothetical case or even the one you are suggesting now, decision contrary to the interest of the utilities and perhaps to a certain segment of the public as long as was decided in the West. Is that correct?

Mr. GELBRON. That is correct. That is where the impact is.

Senator DECONCINI. Yes, where the impact is. It is possible under the case you cite that perhaps the western judge would also rule as the eastern judge would.

Mr. GELBRON. That very well might be. If I might bring the subcommittee up to date on this lawsuit.

At the time the complaint was filed the utilities attempted to intervene. Friends of the Earth opposed their intervention.

Before the judge was able to rule on the intervention issue, the Friends of the Earth and EPA worked out a friendly settlement as to the schedule which EPA would pursue in promulgating these regulations.

Since utilities were not parties to the lawsuit they were not able to participate in this friendly settlement agreement.

Senator DECONCINI. You were barred. Your clients were barred from being really considered in the judge's determination or in the settlement?

Mr. GELBRON. That is correct. They are talking about 6,500 megawatts in today's energy problem society which are in the West.

Senator DECONCINI. And if this had been filed in the West is it your belief you would have had a greater opportunity to intervene and be heard prior to any settlement between the EPA and the plaintiff?

Mr. GELBRON. I don't think there is any question about it, yes.

Senator DECONCINI. Thank you.

Gentlemen, I have no further questions. Your statements are very good and illustrative of the particular problems we face now with the existing venue and the decisions which have been made.

The questions I had were to ask you to cite some specific examples, which you did, for the record, and as we will ask other panel members to do.

Thank you for taking the time, preparing your detailed statements and submitting them. Those statements in their entirety will be made part of the hearing record.

[The prepared statements of Messrs. Haggard, Michieli, and Gelbron follow:]

PREPARED STATEMENT OF JERRY L. HAGGARD

The American Mining Congress appreciates this opportunity to present this Statement to the Subcommittee in connection with its consideration of S. 739 and S. 1472. The American Mining Congress is the largest national trade association for the mining industry, having a membership in excess of 700 companies and individuals who are actively engaged in mineral activities in the United States. My name is Jerry L. Haggard from the law firm of Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, and I am a member of the Public Lands Committee of the American Mining Congress.

The American Mining Congress, on behalf of its members, takes this opportunity to commend the Subcommittee for considering improvements which can be made in the federal judicial machinery, to voice its support and approval of the principles embodied in S. 739 and S. 1427, and to recommend amendments to S. 739 so as to consolidate the proposed legislation into a single bill.

The two bills which this Subcommittee is considering would simply cause federal civil suits covered by these bills to be tried in the most appropriate federal forum as determined in each individual case by considerations of convenience and justice to all parties. The bills would not decrease or increase any requirements to comply with federal law. They are concerned only with the appropriate forum in which these federal suits may be brought. Each bill essentially provides that these federal suits must be brought in those federal judicial districts or circuits in which the issues raised will have the greatest impact or injury. The bills simply discourage the filing of these federal civil suits in judicial districts which have little or no relation to the litigation. The two bills, however, differ in scope. S. 739 places this venue restriction only on federal suits in which an officer, employee or agency of the United States is a defendant. S. 1472, on the other hand, is not limited to actions against the government. S. 1472 extends the venue restriction to private civil litigants in environmental litigation arising under federal law. For that reason, we favor the broader concept of S. 1472. The rationale supporting enactment of S. 739 has equal application to S. 1472.

The American Mining Congress strongly supports both bills, but recommends that they be consolidated into a single bill.

The proposals in S. 739 and S. 1472 effectively insure that those judicial districts or circuits in which the resolution of particular issues will have the greatest impact or injury will be the judicial districts or circuits which will consider and decide such issues. Requiring actions to be brought in the judicial district that will be substantially impacted by such actions is desirable for numerous reasons which we will identify and explain.

1. JUDICIAL EXPERTISE

One major reason for limiting venue is to increase the opportunity to utilize more fully the legal expertise and knowledge of the judges in the area involved in the litigation. Frequently, the issues raised in the actions described in S. 739 and S. 1472 involve problems which are recurrent but peculiar to certain areas, such as water rights, mineral rights, property use management and environmental quality. These are problems with which judges in those local judicial districts are more familiar and which they can handle expeditiously and intelligently. The venue provisions of S. 739 and S. 1472 will facilitate prompt administration of

justice by requiring actions to be brought in the local judicial districts whose judges are more familiar with local conditions and the impacts of such actions within their district.

2. ECONOMY AND EFFICIENCY IN JUSTICE

Another reason for limiting venue is to increase the convenience of the parties, witnesses and the judiciary, resulting in more efficient and less expensive judicial administration. In balancing the interests of the litigants, the United States Supreme Court listed the following considerations in determining the appropriate judicial forum:

"Important considerations are (1) the relative ease of access to sources of proof; (2) availability of compulsory process of attendance of unwilling, and the cost of obtaining attendance of willing witnesses; (3) possibility of view of premises, if view would be appropriate to the action; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." (*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508.)

3. DISTRIBUTING COURT BURDENS

As a matter of practice, the present venue provisions have resulted in a concentration of these federal actions in the District Court or Court of Appeals for the District of Columbia, courts which are already heavily burdened. Court congestion is thereby increased and substantial delays are incurred. As the United States Supreme Court stated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1946):

"Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." (330 U.S. at 508.)

The District Court for the District of Columbia also expressed its concern regarding this problem in *Altman v. Central of Georgia Railway Co.*, 254 F.Supp. 167, 175 (D.D.C. 1965):

"The courts of the District of Columbia are, of course, open to all litigants who have good reason to utilize them. But the exigencies of this court's docket and its responsibilities to the Washington community necessitate that access be denied where local concern in the litigated matter is at best very remote."

S. 739 and S. 1472 will assist in reducing such congestion and thereby facilitate prompt administration of justice by requiring actions to be brought in the local judicial districts many of which are not nearly as burdened as the District Court or Court of Appeals for the District of Columbia.

4. PUBLIC CONFIDENCE IN THE JUDICIARY

Whenever there are little or no limits on the forums in which litigation may be brought, there will always be a tendency for various groups of litigants to prefer some forums over others. This is not healthy for our judicial system. The mere indication of preferences for a particular forum tarnishes the public confidence in the objectivity and fairness which our judicial system must constantly protect.

All the aforementioned considerations support venue in the local judicial district in which the issues raised will have the greatest impact or injury.

Although the seat of government is in Washington, the enforcement of the statutes and regulations which are at issue in such federal litigation is usually carried out by federal officials in local agency offices. Accordingly, providing for the government to defend government officials and agencies or sue other parties in forums other than Washington would not be a burdensome imposition, as the government official or agency will be defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district, and U.S. Attorneys are present in every judicial district. On the other hand, where an individual citizen or a company lives and operates thousands of miles from the District of Columbia, where the property involved is located outside the District of Columbia, and where the cause of action arose and the impact or injury occurs elsewhere, to allow such an action to be brought in Washington is to permit the judicial process to be tailored to the convenience of the government and Washington-based interests rather than to provide readily available, inexpensive judicial remedies for the individual citizen or company involved in the litigation.

Although the American Mining Congress strongly supports the principles embodied in both S. 739 and S. 1472, we do recommend certain amendments to S. 739 in order to clarify the identification of the proper judicial forum and to consolidate in a single bill the proposals contained in S. 739 and S. 1472. The amendments recommended by the American Mining Congress are attached to this statement. As previously indicated, the primary intent of the recommended amendments is to make it clear that in federal civil actions which involve issues of environmental law or name the government, its employees or agencies, as a party thereto, venue shall be in those judicial districts or circuits in which the issues raised will have the greatest impact or injury. The amendments are intended to facilitate identification of the most appropriate and convenient judicial forum. The amendments also effectively incorporate in S. 739 the principle provisions of S. 1472 with respect to environmental litigation.

With respect to the general repealing clause contained in Section 2 of S. 1472, we believe it would be preferable to provide for express repeals of particular statutes. See, 1A C. Sands, *Statutes and Statutory Construction* §§ 23.07-23.09 (4th Ed. 1973). For this reason and to insure against any uncertainty as to which statutes or parts of statutes are superseded or repealed by S. 739, the American Mining Congress recommends that the Subcommittee staff thoroughly review Title 28 and other titles of the United States Code, and expressly identify and amend any additional statutory provisions thereof which are inconsistent with, or contrary to, S. 739, as amended.

The American Mining Congress again expresses its appreciation for this opportunity to comment on this proposed legislation to improve the federal judicial machinery. We urge the Subcommittee to report favorably S. 739 with our proposed amendments and recommend that the bill be passed as so amended. We wish to take this opportunity also to express our strong support generally for the many areas of regulatory reform urgently needed for our nation to again gain the strength it can achieve through the proper utilization of our industry and resources. S. 739 and S. 1472 are a significant step, but only one of many reforms needed to achieve this goal.

AMENDMENTS TO S. 739

(Recommended by the American Mining Congress)

1. Page 1, lines 3 and 4 should be amended to read as follows: "That subsections (c), (e) and (f) of Section 1391 of Title 28, United States Code, are amended to read as follows: "(c) Except as provided in subsection (f), a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

2. Page 2, lines 7 thru 10 should be amended to read as follows: "(2) In any such action in which a substantial portion of the impact or injury is in, or the issue raised primarily concerns activities within, one or more judicial districts, such action shall be brought in one of such judicial districts."

3. The following new subsection (f) should be added between lines 21 and 22 on page 2: "(f) A civil action arising under the National Environmental Policy Act, under any Act of Congress pertaining to land management, wildlife protection, energy conservation, or air, water, hazardous or solid waste, pesticide, radiation, toxic substances, or noise pollution, or under any other Act of Congress relating to environmental quality, in which a substantial portion of the impact or injury is in, or the issue raised primarily concerns activities within, one or more judicial districts, such action shall be brought in one of such judicial districts."

4. Page 3, lines 7 thru 10, should be amended to read as follows: "(b) In any such proceeding in which a substantial portion of the impact or injury is in, or the issue raised primarily concerns activities within, one or more judicial circuits, venue of such proceeding shall be in one of such judicial circuits."

5. Page 3, lines 13 thru 18, should be amended to read as follows: "(1) by inserting immediately after the third sentence the following new sentence: 'In any case in which a substantial portion of the impact or injury is in, or the issue raised primarily concerns activities within one or more judicial circuits, venue of such proceedings shall be in one of such judicial circuits; and' "

6. The following new section should be added following line 22 on page 3: "SEC. 4. Chapter 83 of Title 28 is amended by adding at the end thereof the following new section: "*Section 1295. Appeal from agency actions relating to the environment.*"

"Appeals from reviewable agency actions, decisions, or orders arising under the National Environmental Policy Act, under any Act of Congress pertaining to land management, wildlife protection, energy conservation, or air, water, hazardous or solid waste, pesticide, radiation, toxic substances, or noise pollution, or under any other Act of Congress relating to environmental quality, in which a substantial portion of the impact or injury is in, or the issues raised primarily concern activities within, one or more judicial circuits, shall be taken in one of such judicial circuits."

PREPARED STATEMENT OF RONALD A. MICHELI

My name is Ronald A. Micheli and I am here on behalf of the National Cattle-men's Association, the National Wool Growers Association, the Public Lands Council and the Arizona Cattle Growers Association. We strongly support enactment of legislation such as S. 739 and S. 1472 to amend the Venue Statutes to require cases involving federal actions to be tried in the District Court in areas where that action occurs or where the impact is substantial.

Under existing laws, suits against the federal government can be tried in Washington, D.C. where the seat of our national government is located. As a matter of fact, many plaintiffs deliberately choose to file suits here in Washington even though they involve actions occurring elsewhere.

We should ask why this is so and we should ask whether justice is served in such cases.

The Washington, D.C. District Court is particularly favored for environmental suits and it is no wonder why, considering the decisions that Court has made in such cases.

We believe certain groups like to file suits in Washington, D.C. because they know that they will get a more sympathetic judge, or, perhaps just as importantly, a judge who is not familiar with local needs and interests which may be affected by the judge's decision.

An example is a suit brought by the Natural Resources Defense Council against the Department of the Interior to require the Bureau of Land Management to prepare site-specific environmental impact statements on livestock grazing decisions. During the course of this case it became apparent that the District Judge did not know the first thing about the complex issues involved. He not only did not know anything about the range science issues involved but he did not know anything about the public lands in general.

We do not think the judge in that case fully appreciates the magnitude of the impacts caused by his decisions, the millions of dollars which will be spent on paperwork rather than range improvements the scientifically unsound decisions which will now be made, and the economic hardships imposed on range users and on local and regional economies.

I am not saying the eventual outcome possibly might not have been the same if the case were tried in a state in which some of the public lands involved are located but at least the judge might have known *something* about the public lands—its history and uses—and maybe he would have comprehended the arguments of the defendants a little better.

Another example of a case argued in Washington, D.C., although it does not appear logical to do so, is the one filed by the American Horse Protection Association and the Humane Society of the United States which resulted in an injunction against the roundup of wild horses on the public lands in Challis, Idaho. This injunction has been in force since 1976 and remains in force even though another law says that BLM must remove excess horses from the range. In the meantime, the horse population has increased and they are ruining the range and driving out wildlife and forcing ranchers out of business. The federal agency, range scientists, wildlife specialists and local residents unanimously agree that something must be done. But not the judge.

There are no wild horses in Washington, D.C. and the federal judge in the case apparently does not appreciate the urgency of the situation. The defendants can present all the evidence and arguments they can think of but it doesn't do much good if the issues are not understood.

There must be some reasons why not all federal courts are located in Washington, D.C. and it occurs to us that these are the reasons why legislation such as bills S.739 and S.1472 are necessary and needed. Otherwise we might as well abolish our District Court system and bring all federal judges to Washington, D.C.

The purpose of the courts and the litigation process should be the truth arrived at after the fullest possible consideration is given to all relevant factors. Cases should not be scheduled to give employment to—or suit the convenience of—so-called public interest law firms. If anything, cases should be tried in areas in which the opportunities for the affected public to express their views to the court are the greatest. The procedure should not encourage the holding of cases in an area where it is inconvenient for affected parties and witnesses to appear in court.

These principles, of course, should not only apply to civil actions in which the federal government is the defendant but also to the review of federal actions.

The proof of the suspicion that the D.C. District Court and D.C. Court of Appeals are prejudiced is revealed, we believe, by the fact that many environmental interest groups insist on provisions in statutes specifying that cases involving that statute will be heard in the D.C. Courts.

We commend Sen. DeConcini and Sen. Laxalt for their efforts to call attention to a subject that must be given serious consideration. There is a need to provide a counterbalance to the extreme over-zealousness that prevailed in the 1960's regarding environmental issues. We must strive to improve our environmental but we must do so in a manner which recognizes economic and other realities. We achieve nothing of permanence if we insist on overnight environmental purity and ruin our economy and other important values in the process.

PREPARED STATEMENT OF GUY G. GELBRON

My name is Guy Gelbron. I am a partner in the Phoenix, Arizona, law firm of Snell & Wilmer, which represents the Arizona Public Service Company, the largest electric and gas utility serving the State of Arizona. On behalf of my client, I wish to thank you for the invitation and opportunity to testify before this Committee with regard to Senator DeConcini's Senate Bill 1472 and Senator Laxalt's Senate Bill 739. With the Committee's approval, because my area of specialization relates to environmental matters and environmental litigation, the majority of my comments will be addressed to Senator DeConcini's bill, which provides for special venue provisions in environmental cases, rather than Senator Laxalt's bill, which is more general and broader in scope.

In presenting my remarks, I first will address some of the basic concepts of venue, which, I believe, provide a sound basis for the adoption of legislation with the objectives of Senate Bill 1472. Second, I will discuss the need for such legislation by examining one section of a federal environmental statute which has tremendous local impacts in Arizona, but was litigated far from the situs of such impacts. Finally, I will offer to this Committee some policy considerations in support of the bill's objectives.

At the outset, it should be stated clearly and unambiguously that Arizona Public Service Company supports the objectives attempted to be effectuated through the proposed legislation under consideration today. Without a doubt, the proper forum in which environmental cases should be heard is the court of the district where the environmental impact occurs or is proposed to occur. Such a view is generally consistent with the original concept and historical evolution of the venue doctrine. Under early English common law, a jury of one county could not try any matter arising in another county. This original rule was formulated because of the constitution of the ancient jury who were but witnesses to prove or disprove the allegations of the parties; hence, each case had to be tried by a jury from the same geographical area as the area where the case arose, who were presumed to have personal knowledge of the parties involved in the litigation as well as the facts surrounding the dispute.

The general focus of the original rule was on geographical location, and this focus was retained in the subsequent development of the venue doctrine. As the common law evolved, the proper venue of an action, in the sense of the place of trial, was determined entirely by the consideration of whether the cause of action was in character a transitory or local one. Transitory actions could be brought in any court of general jurisdiction in the county or district in which the defendant could be found and served with process, but local actions could be brought only where the cause of action arose or where the subject matter was located.

Of interest to environmental litigation, actions for injuries to real property were regarded as local in character, and had to be brought where the land was located. In general, such actions included damages to trees and crops and the pollution of water.

Under modern practice, venue is ordinarily fixed by constitutional or statutory provision. One of the basic principles under which the venue laws were enacted was to provide convenience to the parties in litigation, in the interest of justice. (28 U.S.C. § 1404(a)). Although such provisions generally have diminished the importance of distinguishing between transitory and local actions, frequently one finds that actions affecting realty have been treated in the same manner as at common law. For example, the Arizona venue statute provides that no person may be sued out of the county where he resides unless the case can be brought within one of nineteen exceptions. One such exception is: "Actions for the recovery of real property, for damages thereto, . . . to prevent or stay waste or injuries thereto, and all other actions concerning real property, shall be brought in the county in which the real property or a part thereof is located." A.R.S. § 12-401(12).

Federal environmental legislation, of course, is concerned not only with the protection of public land, but also with the protection of public health, and the quality of air that we breathe and the water that we drink. The point that I would like to make, however, is that matters respecting environmental protection, whether involving land, air, water or public health, are associated with a particular locality. If a particular locality is affected by air, water, solid waste, pesticide, radiation or noise pollution, and an action is brought under federal legislation governing such pollution, the common law venue doctrine, as well as many state statutory provisions, would support the proposition that the action should be brought where the cause of action arose, or where the subject matter is located.

It is apparent that these original concepts are retained in Senator DeConcini's bill. As the Senator stated when introducing his bill: "The role of the court in environmental cases is to protect the public interest and to balance social and economic factors along with environmental considerations. No court is better equipped to achieve a fair result in this task than the court which is familiar with the local setting, resources, and concerns."

In preparation for this hearing, I reviewed various pertinent articles regarding the two bills being considered today and came across an article in a Mountain States Legal Foundation publication which indicated that Mr. James G. Watt, President and Chief Legal Officer of the Foundation, will be testifying before the Committee today. Because Mr. Watt and I are representing two defendants in an environmental case in New Mexico, and in order to avoid relating to you the same "war stories", I contacted Mr. Watt's office and received a copy of his testimony which I reviewed with great admiration. Mr. Watt's testimony covers several actual case histories which demonstrate the need for the legislation which is under consideration today and outlines some of the abuses which some of the "public interest lawyers" are bringing to the judicial system. Rather than burden this Committee with more examples similar, if not identical, in nature to those presented by Mr. Watt, with the Committee's approval, I would like to clarify Arizona Public Service Company's position in support of the concept embodied in the proposed legislation by presenting to the Committee a case study involving only one section of the Clean Air Act Amendments of 1977. Let you think that this is an isolated example, virtually every significant section of that Act can be utilized for the same purpose. The environmental scenario which I will relate to you deals with the so-called "visibility protection" section of the Clean Air Act Amendments of 1977 (42 U.S.C. § 7491).

The visibility protection provisions of the Clean Air Act Amendments of 1977 set forth requirements intended to remedy and prevent any existing and future visibility impairment in Class I areas. Class I areas are defined in the Act (42 U.S.C. § 7472) to include all (1) international parks, (2) national wilderness areas which exceed 5,000 acres in size, (3) national memorial parks which exceed 5,000 acres in size, and (4) national parks which exceed 6,000 acres in size. Parenthetically, this last classification has been designated as Class I areas irrevocably since the Act provides that "national parks . . . which are in existence on August 7, 1977, shall be Class I areas and may not be redesignated." (42 U.S.C. § 7472(a)(4)).

Attachment 1 to my testimony contains a compilation by the U.S. Environmental Protection Agency ("EPA") of the geographical areas within the United States which have been designated as Class I areas. As you can see from this exhibit, the overwhelming majority of the Class I areas, both by number and size, are located in the West. These are the geographical areas which are the beneficiaries of visibility protection provided in the Clean Air Act Amendments of 1977.

The protective provisions included in the Act require EPA to study visibility, its causes and remedies, and within the next few years, require all existing "major

stationary sources" which in 1977 were less than 15 years old located in the vicinity of Class I areas to install "best available retrofit technology" so as to meet new emission limitations for pollutants which may "reasonably be anticipated to cause or contribute to visibility impairment."

The impact of the visibility protection provisions upon the energy needs and economic well-being of the United States is beyond the scope of this testimony. As an aside and in light of the relatively recent re-emergence of energy problems in our country, my personal view is that if one purposefully wanted to erode the economic progress of this country and rob it of its ability to become independent and self-sufficient in its energy needs, that person would advocate today keeping the visibility protection section that is presently included in the Clean Air Act Amendments of 1977 intact and unchanged.

The tremendous effect of the section on the social, economic and energy needs of the West, due to its applicability to Class I areas, can be easily demonstrated by analyzing, as I have done, the impact of the visibility protection section upon one western state, the State of Arizona. The impact is two-fold. First, the section's requirements will affect most major industrial sources, including coal-fired power plants and copper mining operations in the State of Arizona and require their owners to invest substantial sums in pollution control equipment in excess of what they are already spending or planning to spend. Second, inclusion of this section in the Clean Air Act Amendments of 1977 was accompanied by widespread news reports that its "real" purpose was to impose high SO₂ emission controls upon three coal-fired power plants, Four Corners, Navajo and the Mohave Generating Stations which are located in the Four Corners region.

Approximately fifty percent of these three power plants, which collectively have a generating capacity of approximately 6,500 megawatts, is owned by the three largest utilities in the state, Arizona Public Service Company, Salt River Project, and Tucson Electric Company. These three Arizona utilities' responsibility for the expenditures associated with any pollution control retrofit requirements imposed pursuant to the visibility protection provisions of the Act would be enormously expensive. As an example, just the retrofitting for visibility protection of the Four Corners Power Plant has been reported, the quotation being attributed to EPA, at approximately one billion dollars (\$1,000,000,000) of capital expenditures. I should point out for your information that the other fifty percent of these three power plants is owned by other utilities who serve consumers, in addition to Arizona, in New Mexico, including Albuquerque, in Texas, including El Paso, and in Southern California, including Los Angeles. Several million people in the West light up their homes, work in factories and industrial facilities, and enjoy recreational activities in facilities all powered by these three coal-fired power plants.

On August 30, 1979, Friends of the Earth commenced a lawsuit against EPA for the purpose of requiring the Agency to promulgate the visibility regulations, which will adversely affect the operation of these three and other Western coal-fired power plants, by the date prescribed in the Clean Air Act. The lawsuit was commenced not in the West but in the East, in the United States District Court for the District of Columbia. The future of three of the largest coal-fired power plants in the world, all located in the West in the Four Corners region, was held in the hands of an Eastern judge. The utilities most affected by the visibility protection regulations attempted to intervene in the suit and were opposed by Friends of the Earth. In the meantime, a settlement agreement was prepared between Friends of the Earth and EPA, one in which the utilities were not allowed to participate since they were not parties to the suit.

It is precisely for this reason that Arizona Public Service Company supports in principle the proposed legislation which is the subject of today's hearing. And it is totally irrelevant whether the Eastern judge is regarded as a good or a bad judge, pro-environment or pro-industry. Interests located in the West, utilizing resources of the West, affecting the economy of the West and the welfare of its millions of residents, impacting the very nature and lifestyle of the West, producing in and, on occasion, polluting the West, should not be constantly and continuously subjected to venue in the East. Nor, for that matter, should the reverse be true. As was stated by Senator DeConcini at the time of the introduction of Senate Bill 1472: "The Bill, thus, is intended to decentralize judicial decisionmaking and review of environmental matters. In a sense, it reflects the principles of federalism upon which our Founding Fathers built our Government. It simply allows a local Federal court the opportunity to speak to the issues affecting its district."

In my final set of remarks I will focus on several policy considerations which in my opinion support the objectives of Senate Bill 1472. First, as noted by Senator

DeConcini in introducing his bill, there are a multitude of Federal statutes which regulate environmental quality, many of which contain specific venue provisions. Frequently these provisions are inconsistent and confusing, and result in a good deal of threshold litigation, precisely the kind of litigation that venue statutes are intended to avoid.

To illustrate this inconsistency and confusion, I will address two statutes, the Clean Air Act and the Federal Water Pollution Control Act. Section 307 of the Clean Air Act states that a petition for review of the EPA administrator's action in promulgating national air standards, hazardous emission standards, standards of performance for new stationary sources and certain other standards and determinations may be filed only in the U.S. Court of Appeals for the District of Columbia. That section further provides that a petition to review approval or promulgation of an implementation plan may be filed only in the U.S. Court of Appeals "for the appropriate circuit."

Several suits have been filed that raise the question of what constitutes the "appropriate circuit." For example, in May 1972 EPA announced its decision to grant a two-year extension for states to meet air quality standards for transportation-related pollutants, and it approved state implementation plans that failed to provide for (1) adoption of transportation controls, and (2) maintenance of the air standards.

In June 1972, the National Resources Defense Council ("NRDC") sought to challenge this EPA action. It initially sought a declaratory judgment from the District of Columbia Circuit that the court's decision on NRDC's petition would apply to all affected plans, not only to approval of the District of Columbia's implementation plan. The D.C. Circuit denied NRDC's request for declaratory judgment. NRDC then filed identical petitions in the ten other circuit courts of appeals, to preserve the right to review nationwide effects of the action. Motions to transfer the case to the D.C. Circuit were then filed by the NRDC with the other ten circuits. Five courts of appeals stayed proceedings pending the outcome in the District of Columbia; the remaining five granted NRDC's motion. The First Circuit, which was one of the five which approved the transfer, was the only circuit to write an opinion.

In resolving the venue question, the First Circuit considered the basis of the Clean Air Act's distinction between matters reviewable only by the Court of Appeals for the District of Columbia Circuit and matters reviewable by an "appropriate" circuit. The court quoted a portion of the legislative history that had been cited by the EPA:

"Because many of these administrative actions are national in scope and require even and consistent national application, the provision specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia. For review of the approval or promulgation of implementation plans which run only to one air quality region, the section places jurisdiction in the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located." *National Resources Defense Council v. Environmental Protection Agency*, 465 F. 2d 492, 494 (1st Cir. 1972), quoting Senate Report No. 91-1196, 91 Cong., 2d Sess. 41 (1970).

The EPA argued that because Congress provided for exclusive judicial review in the D.C. Circuit for certain matters set forth in Section 307, then the "appropriate" circuit could never be the D.C. Circuit for other matters not specifically mentioned. However, the First Circuit did not feel the Senate Report was dispositive of the question before it. The Senate Report, the First Circuit noted, implied concern for a geographic approach to review only in those cases where particular attention is given to one plan devised for one region. The report, the court stated, did not have in mind the situation where application of a uniform national decision effectively preordained simultaneous approval of all plans. In determining the "appropriate circuit" under the circumstances of the case, the court held that the issue should be decided in a single proceeding in the District of Columbia.

Following transfer, the case then was heard by the District of Columbia circuit. The court agreed with the First circuit that, by using the phrase "appropriate circuit," congress "did not intend that all suits involving approval of state implementation plans be brought in the judicial circuit where the state is located." (*National Resources Defense Council v. Environmental Protection Agency*, 475 F. 2d 969 (D.C. Cir. 1973).) Congress intended a flexible approach in determining which circuit is appropriate, the court stated.

The flexible interpretation of the term "appropriate circuit" adopted in the NRDC opinions requires the courts to decide what is the most suitable forum. Yet no simple test is offered. Thus a tremendous amount of threshold litigation is generated. As stated by Professor Currie:

"In their desire to achieve a sensible resolution of the particular case, the NRDC opinions appear to leave us essentially without a venue statute for determining where to challenge action with respect to the approval of implementation plans." Currie, "Judicial Review under Federal Pollution Laws." (62 *Iowa Law Review* 1221, 1266 (1977).)

As stated previously, Federal statutory provisions on venue are not only confusing, and thus responsible for breeding much litigation, but also inconsistent. Standing in stark contrast to the venue provisions of the Clean Air Act is the venue provision in the Federal Water Pollution Control Act. Unlike the Clean Air Act, the Federal Water Pollution Control Act makes no provision for centralized review of regulations of nationwide impact. Section 509 provides that nationally applicable performance standards for new sources are reviewable in the circuit in which the petitioner "resides or transacts such business." Professor Currie has stated that the reference to the circuit where the petitioner "resides" is ambiguous. If in the case of a corporation, the provision is interpreted to mean that a corporation resides wherever it does business, then the provision is too broad. However, restricting the definition of residence to the place of incorporation or principal place of business may also be undesirable where, for example, such location is far from the plant from which a discharge subject to the Act emanates. (See Currie, *supra*, at 1270.)

What I hope the foregoing comments illustrate is that several of the existing venue provisions in Federal environmental legislation are inadequate. Such provisions are inconsistent, confusing, and generators of litigation. Senator DeConcini's bill goes a long way toward eliminating these problems. In proposed section 1409 the bill provides in part:

"A civil action arising under the National Environmental Policy Act, . . . or under any other Act of Congress relating to environmental quality, in which the issue raised or the impact or injury alleged is less than nationwide in scope, may be brought only in a judicial district in which such issue arises or in which a substantial portion of the alleged impact or injury occurs."

Very similar language is used in proposed section 1295 respecting appeals from agency actions relating to the environment. In general, this straight-forward legislation statement in favor of local venue in environmental cases helps to clarify what is the proper forum.

I must add a cautionary remark, however, respecting the phrase "less than nationwide in scope," which is employed in both proposed section 1409 and proposed section 1295. As Mr. Watt will testify, in the minds of those groups that are opposed to economic growth and progress, nothing they do is "less than nationwide in scope." Furthermore, the phrase may generate its own species of threshold litigation. That is, as I am sure this Committee recognizes, whether an injury or impact is "less than nationwide in scope" may frequently arise as a disputed issue. In my opinion, a general legislative statement on venue should establish that local review is the norm, and is to be departed from only in rare instances and upon a special showing. In those extreme cases, the court's transfer power may be relied upon to avoid undue multiplicity of litigation.

Another policy consideration which supports the concept of local review of alleged environmental impacts and injuries is that if most environmental actions and appeals are brought in the District of Columbia, both courts and interested parties are deprived of the benefit of diverse views on difficult legal questions.

In *E. I. du Pont de Nemours and Company v. Train*, 430 U.S. 112, 51 L. Ed. 2d 204 (1977), the U.S. Supreme Court considered the validity of certain EPA regulations promulgated under the Federal Water Pollution Control Act. The Court held that the EPA had the authority to issue the regulations, and in reaching its decision, stated:

"When as in this litigation, the Agency's interpretation is also supported by thorough, scholarly opinions written by some of our finest judges, and has received the overwhelming support of the Court of Appeals, we would be reluctant indeed to upset the Agency's judgment. Here, on the contrary, our independent examination confirms the correctness of the Agency's construction of the statutes.²⁶

Judges in the West are equally competent as those in the East in their ability to interpret the Constitution and Federal statutes. Providing for local review of environmental impacts and injuries offers the advantage of hearing from a diverse group of judges on complex legal questions.

²⁶ This litigation exemplifies the wisdom of allowing the difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view." (*Id.* at 135, 51 L. Ed. 2d at 221-222.)

In his prepared statement Mr. Watt refers to the "brewing Sagebrush Rebellion," and states that this rebellion is a natural human reaction to Eastern control over matters affecting the land, water and resources of the West. This comment points to yet another reason for a legislative enactment which achieves the objectives of Senator DeConcini's bill. The concentration of environmental cases in the District of Columbia, and in particular those cases affecting resources in the West, confers enormous power in a single tribunal, a power which is totally incompatible and out of touch with the needs of the West. Legislation of the type being considered today will aid in undoing the great injustice by Eastern courts wielding too much power over matters of concern primarily to residents of the West.

Finally, the general venue laws were enacted to provide convenience to the parties in litigation. Compelling parties in the West to travel long distances to the East to litigate matters of interest in the West is a great inconvenience and contrary to basic venue principles. Senator DeConcini's bill would help to restore the notion of a convenient forum for the litigants.

I am grateful for the opportunity to address this Committee with respect to an extremely important issue. On behalf of the Arizona Public Service Company, I urge this Committee to favorably recommend passage of this type of venue legislation.

[From the Environment Reporter]

AIR POLLUTION—EPA STAFF LISTS CLASS I AREAS FOR SIGNIFICANT DETERIORATION

The Clean Air Act amendments of 1977 specify the following mandatory Class I areas for prevention of significant deterioration of air quality regulations, according to an Environmental Protection Agency staff compilation:

NATIONAL PARKS OVER 10,000 ACRES

- Alaska*—Mt. McKinley National Park, 1,939,492 acres.
Arizona—Grand Canyon, 902,557; Petrified Forest, 94,189.
California—King's Canyon, 460,122; Lassen Volcanic, 106,372; Redwood, 62,304; Sequoia, 306,823; Yosemite, 761,096.
Colorado—Rocky Mountain, 261,985; Mesa Verde, 52,000.
Florida—Everglades, 1,400,533.
Hawaii—Hawaii Volcanoes National Park, 229,177; Haleakala National Park, 27,823.
Idaho—Yellowstone (Mountain, Wyoming), 2,219,822.
Kentucky—Mammoth Cave, 51,310.
Maine—Acadia, 36,930.
Michigan—Isle Royale, 539,279.
Minnesota—Voyageurs, 219,120.
Montana—Glacier, 1,013,595; Yellowstone (Idaho, Wyoming), 2,219,822.
New Mexico—Carlsbad Caverns, 46,755.
North Carolina—Great Smokey Mountains (Tennessee), 517,014.
Oregon—Crater Lake, 160,200.
South Dakota—Wind Cave, 28,000.
Tennessee—Great Smokey Mountains (North Carolina), 517,014.
Texas—Big Bend, 709,088; Guadalupe Mountains, 79,972.
Utah—Arches, 73,388; Bryce Canyon, 36,010; Canyon Lands, 337,559; Capitol Reef, 241,865; Zion, 147,000.
Virginia—Shenandoah, 190,420.
Washington—Mount Rainier, 235,404; North Cascades, 504,785; Olympic, 897,884.
Wyoming—Grand Teton, 310,418; Yellowstone (Montana, Idaho), 2,219,822.

ATTACHMENT 1

NATIONAL WILDERNESS AREAS OVER 5,000 ACRES

- Alabama*—Sipsey River, 12,000 acres.
Alaska—Bering Sea National Wilderness, 41,113; Tuxedni, 6,402; Simeonof, 25,141.
Arizona—Chiricahua, 18,000; Galiuro, 53,000; Mazatzal, 206,000; Mount Baldy, 7,000; Petrified Forest Wilderness, 93,402; Pine Mountain, 20,000; Sierra Ancha, 21,000; Superstition, 124,000; Sycamore Canyon, 48,000.
Arkansas—Caney Creek, 14,000; Upper Buffalo, 11,000.

California—Aqua Tibia, 16,000; Caribou, 19,000; Cucamonga, 9,000; Desolation, 63,000; Dome Land, 62,000; Emigrant, 106,000; Hoover, 43,000; John Muir, 500,000; Lassen Volcanic Wilderness, 79,000; Lava Beds Wilderness, 28,000; Marble Mountain, 215,000; Minarets, 110,000; Mokelumne, 50,000; San Gabriel, 36,000; San Geronio, 35,000; San Jacinto, 22,000; San Rafael, 143,000; South Warner, 70,000; Thousand Lakes, 16,000; Ventana, 95,000; Yolla Bolly-Middle Eal, 110,000.

Colorado—La Garita, 48,000; Maroon Bells-Snowmass, 71,000; Mount Zirkel, 72,000; Rawah, 28,000; West Elk, 61,000; Weminuche, 400,907; Flat Tops, 235,230; Eagles Nest, 133,910; Great Sand Dunes, 33,450.

Florida—Bradwell Bay, 22,000; Saint Marks, 17,750; Okefenokee (Georgia), 343,000.

Georgia—Okefenokee (Florida); Cohutta (Tennessee), 35,000; Wolf Island, 5,100.

Idaho—Craters of the Moon Wilderness, 43,000; Sawtooth, 216,000; Selway—Bitterroot, 1,240,000.

Kentucky—Beaver Creek, 5,500.

Louisiana—Breton, 5,000.

Michigan—Seney, 25,000.

Minnesota—Boundary Water Canoe, 747,840.

Montana—Anaconda—Pintlar, 158,000; Bob Marshall, 950,000; Cabinet Mountains, 94,000; Gates of the Mountains, 29,000; Mission Mountains, 75,000; Scapegoat, 240,000; Red Rock Lakes, 32,350.

Nevada—Jarbidge, 65,000.

New Hampshire—Great Gulf, 6,000; Presidential Dry Range, 20,000.

New Jersey—Brigantine, 6,600.

New Mexico—Bosque—Del Apache, 30,850; Gila, 434,000; Pecos, 168,000; San Pedro Park, 41,000; Wheeler Peak, 6,000; White Mountain, 31,000.

North Carolina—Joyce Kilmer Slickrock (Tennessee), 15,000; Linville Gorge, 8,000; Shining Rock, 13,000.

North Dakota—Lostwood, 5,500.

Oregon—Diamond Peak, 35,000; Eagle Cap, 294,000; Gearheart Mountain, 19,000; Kalmiopsis, 77,000; Mount Hood, 100,000; Mt. Jefferson, 14,000; Mount Washington, 47,000; Mountain Lakes, 23,000; Strawberry Mountain, 34,000; Three Sisters, 197,000.

South Carolina—Cape Romain, 28,000.

Tennessee—Cohutta (Georgia); Joyce Kilmer Slickrock, North Carolina.

Vermont—Bristol Cliffs, 6,500; James River Face, 8,000.

Virginia—James River Face, 8,000.

Washington—Glacier Peak, 465,000; Goal Rocks, 83,000; Mount Adams, 32,000; Pasayten, 505,000; Alpine Lakes, 303,508.

West Virginia—Dolly Sods, 10,250; Otter Creek, 20,000.

Wisconsin—Rainbow Lake, 6,000.

Wyoming—Bridger, 383,000; North Absaroka, 351,000; Teton, 864,000; Washakie, 691,000; Fitzpatrick, 191,103.

INTERNATIONAL PARKS (NONE OVER 6,000 ACRES)

Maine—Roosevelt—Campobello, 2,721 acres.

NATIONAL MEMORIAL PARKS

North Dakota—Theodore Roosevelt National Memorial Park, 70,408 acres.

Senator DECONCINI [continuing]. Our next panel comprises Prof. Charles Halpern, director, Institute for Public Representation, Washington, D.C., as well as Andrew Sacks, counsel, Institute for Public Representation, Washington, D.C.

We are pleased to have you with us here today.

Let me advise you that your full statements will appear in the record following your oral testimony. Please highlight them for us.

PANEL OF LEGAL EXPERTS:

STATEMENTS OF CHARLES HALPERN, DIRECTOR, AND ANDREW SACKS, COUNSEL, INSTITUTE FOR PUBLIC REPRESENTATION

Mr. HALPERN. Thank you, Senator. We appreciate your invitation to testify before the subcommittee and we will try briefly to summarize the points made in our prepared statements.

We are here to testify against the two bills being considered by the subcommittee, but before we present our testimony I want to state that we are much impressed by the concerns which motivate these bills and to a large degree we share these concerns.

In particular we want to identify ourselves with the Senator's concern about assuring full public participation before public policy is formulated which will affect citizens.

As public interest lawyers we are dedicated and committed to the idea of representation of unrepresented interests. We believe that decisions made by the Federal Government will be better if they hear from the broadest range of interested persons.

In addition, we share your concern with assuring that the Federal courts remain an accessible and efficient forum for the resolution of disputes involving important Federal policy.

I know that you, Senator DeConcini, have exercised leadership in trying to assure that court congestion does not overwhelm the Federal courts. In part we are concerned that the legislation under consideration today will be contrary to many of the efforts you have undertaken in other forums.

Mr. Sacks and I are both associated with the Institute for Public Representation, associated with the Georgetown University Law Center. We are engaged in public interest practice involving the representation of unrepresented interests in Federal agencies and courts, and we are particularly concerned with procedural problems within administrative agencies and within the Federal courts, so the subject matter of this legislation is close to the interest of the Institute, and our effort is to bring to bear the perspectives coming from the law school community.

Mr. Sacks will now summarize our statement and we are both available for questions.

Senator DECONCINI. Mr. Sacks?

Mr. SACKS. The Institute is opposed to both S. 739 and S. 1472. Each bill is intended to preclude venue in the District of Columbia in specified civil actions. S. 1472 applies to all civil actions in district court and all reviews of agency actions in the court of appeals under any statute relating to the environment. S. 739 would apply to all civil actions in district court where the Government is a defendant.

Each bill is surprisingly broad. S. 1472 covers all actions in district court under environmental statutes whether or not they are challenges to agency actions.

Under S. 739, all suits against the Government, not limited to environmental suits but all suits against the Government, apparently including even civil rights suits, would be covered.

The current venue rules, particularly as applied to suits against Government officials or those suits challenging agency actions, are characterized by flexibility. For suits in district court against Government officials or agencies, venue is where a defendant resides, or the

District of Columbia, where the plaintiff resides or has his principal place of business, or where the cause of action arose. That is 28 U.S.C. 1391(e), the target of S. 793.

More typically, for review of administrative actions venue is proper where the petitioner resides or in the District of Columbia. The flexibility of the system is enhanced by liberal transfer provisions which give the court broad discretion to transfer cases for the convenience of parties in the interest of justice.

The critical problem with each bill is that they are inconsistent with one simple premise underlying and justifying the venue doctrine—convenience of parties.

The proposed rules are really not addressed to the convenience of parties but focus instead on injury or impact to a geographical area.

The rules greatly reduce flexibility and convenience the current system affords in several ways. They would reduce the flexibility and convenience the system affords plaintiffs, reduce the freedom of choice afforded plaintiff to choose a forum by reducing the number of convenient forums available.

Perhaps most critically they remove venue from what is the most convenient forum for plaintiffs, the residence or principal place of business.

Similarly they remove venue from what is typically the most convenient forum for defendant's purpose.

Finally they would reduce judicial flexibility by reducing the number of convenient forums and the court's discretion of transferring cases in the interest of justice because transfer is allowable to a forum only where venue would initially have been proper.

These bills contemplate removing venue from the District of Columbia in suits against the Government—for example, suits challenging agency action—but in suits against the Government and suits challenging these actions the administrative proceedings have taken place here, relevant documents are here, and many of the interested or affected parties are here or have representatives here.

One such case is *American Gas Company v. FPC*, 55 F. 2d 852. In that case it involved a review of FPC actions concerning natural gas ratemaking under the Natural Gas Act.

On the briefs in that case were State representatives from New Jersey, New York, Minnesota, Wisconsin, Tennessee, and Pennsylvania.

Also on the briefs were representatives of oil companies, including Amoco of Tulsa, Getty of Houston, Texaco Corp. of Houston, Exxon Corp. of Houston, Mobil Oil of Houston, Chevron, Western Division, Marathon Oil of Ohio, Phillips Petroleum of Oklahoma and, Union Oil of California, and literally dozens of smaller oil companies all over the country, including Massachusetts and Wisconsin.

Also included were two Washington-based trade associations representing nationwide interests, the Interstate Natural Gas Association and the Independent Petroleum Association of America. There was only one Washington-based consumer group.

In that situation the court concluded that the convenience of the parties is furthered by retention of these cases in the District of Columbia circuit.

The Commission is situated in Washington. Parties before us often come to Washington, at least by counsel, to participate in judicial proceedings, as they have done in proceedings with which we are presently concerned.

Much of the specialized oil and gas bar is concentrated here. Consumer groups are organized and represented here. Convenience of the parties could hardly be well served by venue elsewhere.

The other critical problem I wish to point out to you today is the likelihood of considerable threshold litigation under either of these bills which would exacerbate the problem of court congestion. The question of where to litigate would result in inconveniencing the parties, adding to litigation costs, and burdening the already overcrowded court situation. This is a likely prospect under both proposals.

Under S. 1472 litigation is likely to occur over where the issue is raised, where the impact or injury occurs, and whether it is "less than nationwide in scope."

Under S. 739 there may have to be a determination, and in fact, the issue of whether such a determination or when such a determination is necessary is itself likely to be litigated, so there might have to be a determination as to where the substantial portion of the impact or injury of Government action lies.

An examination of one recent case illustrates the types of problems that could occur under these proposals and that would occur under these proposals.

I refer to *Hercules v. Environmental Protection Agency* 598 F. 2d 91. In that case the Environmental Protection Agency issued regulations governing discharges of two toxic chemicals into the Nation's water wastes.

As it turned out, one of the chemicals was manufactured by only one firm in Memphis. Arguably the impact of the EPA action would be only in Tennessee.

However, discharges of the chemical flow into the Nation's largest waterway, the Mississippi River, and travel through many States and impact on them.

Given this situation one could easily envision under S. 739 situations leading to protracted litigation as to where the substantial portion of the injury occurred.

Suppose a Mississippi-based group challenged EPA regulations in Mississippi and could demonstrate sufficient injury. How would a court deal with the Environmental Protection Agency's claim that venue is proper only in Tennessee? Would the Mississippi group have to make a factual showing as to the action portion of the total nationwide impact affecting Mississippi? Such a showing could conceivably become the most costly and complicated issue to be resolved in the case.

In reality, in the *Hercules* case, that was a hypothetical I gave, the challenges to the EPA regulations were brought by the Tennessee firm and raised procedural issues involving obligations to assess economic and technological feasibility issues of law under the Water Pollution Control Act and issues of law regarding ex parte contacts.

It is a striking weakness in each bill that neither deals with such procedural challenges to Agency actions.

Arguably, in a challenge to Agency procedures the only injury alleged occurred in Washington, D.C. and venue would be obtainable only in the District of Columbia.

Again, one easily envisions protracted litigation over the issue, perhaps with some absurd results, over the issue of where the substantial impact or injury of Agency procedures occurs.

Turning to the issue of local review, we can certainly appreciate the problem identified by the distinguished sponsors of the bill and distinguished witnesses testifying in favor of the bill. We would like to make three brief points.

First, as Senator Laxalt and others stated, a judge's familiarity with local issues should not affect the outcome of a particular case. The case must be decided on the basis of the evidence presented. It would actually be improper for a Federal judge to take into account local opinion or sentiment.

This is of course particularly true for most reviews of agency Actions. They are typically limited to review of the record below. No witness is required.

Much of the discussion we heard this morning on convenience of witnesses really does not apply to a major target of both these bills. There are no witnesses required. In many cases there is not even an oral argument. Certainly trend is away from oral argument.

Second, review anywhere in the circuit affected is not necessarily local in any meaningful sense of the term because the circuits are just too big. A court of appeals judge in the ninth circuit sitting in San Francisco is not likely to have much greater familiarity with local issues affecting Nevada than one in the District of Columbia. It would not be any easier for citizens affected in Nevada to observe or participate in the litigation. It would not be considerably easier in any case.

Finally, local review does not mean local input into either the court or agency proceeding. Just because a suit is litigated in a nearby district or circuit does not mean local interests will be aware of the suit or have the opportunity to participate meaningfully in the suit.

If input in agency decisions is the goal, it would seem that a remedy more narrowly tailored to that would be to open up agency hearings in areas affected by agency regulation, more field hearings, as they are called, and currently there is a commendable trend in that direction.

In conclusion, the institute opposes each of these bills. They are inconsistent with the underlying premise of venue and convenience of parties. They reduce the number of convenient forums available, and in some cases preclude cases in the District of Columbia when it would be a convenient forum for litigation. It would result in considerable threshold litigation.

The result of these bills would be that suits challenging agency action would become more expensive and problematical. Agency accountability would actually be lessened if they were adopted.

Senator DECONCINI. Thank you, Mr. Halpern and Mr. Sacks. We appreciate your testimony. Let me address a couple questions.

Mr. Sacks, you point out a couple things of interest. One is that the ninth circuit might not have any better understanding of what the problem in Nevada or Arizona might be.

As you may not know, the ninth circuit is composed of judges from those States as well as the other States within the ninth circuit. It would seem to me that this might have some bearing from the standpoint of representation—not that he would represent the area in the decision per se.

The other question bothering me is your observation that no greater notice would be given if the case were filed in the District of Columbia versus the State of Arizona. I would dare say that my experience is that when cases are filed in the district court in Arizona they receive far more attention publicity wise than they do when filed here, unless they are of such a national nature relating to some impoundment, which would affect Arizona as well.

As to notice, do you agree that if it were filed in the area that you might have more notice, at least as to those people who are involved in as well as people outside of the geographical area who have a public interest? Would you not have more likelihood of better notice if the case were filed in the local district?

Mr. SACKS. Let me respond to the notice point first. There are two points here. First of all there is not—my point is that it would not—necessarily have notice to affected interests.

I think more importantly, even if there were notice, there is no guarantee there is any meaningful opportunity to participate in the litigation.

Senator DECONCINI. You mean from the point of view of intervention?

Mr. SACKS. That is right. Whether or not you have notice, and there may well be cases where you have notice of a suit in Washington, you don't want to fly out there to try to intervene.

Senator DECONCINI. Right.

Mr. SACKS. It seems to me that really is not a problem of venue but a problem of intervention. If that is the problem here it would make more sense to focus on rules of intervention.

Senator DECONCINI. If you do not get notice—let's take that, that you do not have notice—won't you have a lot more difficulty in attempting to intervene?

Mr. SACKS. I can agree with that. Again, if notice is the problem, it would seem notice should be the problem addressed and not venue.

It would seem many of the prepared statements I have read have discussed perhaps possible requirements of notice in these types of suits. It would seem that considering a modification to the rules of civil procedure requiring notice in these cases rather than a drastic alteration of Federal venue law would be more appropriate.

On the point about local judges, earlier it was stated that in these cases it is not just being from the region that makes you an expert. There are differences on the part of experts on western water law. The fact that one of three judges on a panel is from Nevada does not give him any more expertise in hearing a case when they are sitting, say, in San Francisco and are far removed. They would not have familiarity with the local issues involved.

Senator DECONCINI. Professor Halpern, consider the philosophical approach of getting or permitting these decisions to occur where the actual impact occurs, vis-a-vis the case we heard before about the

three utilities in northern Arizona which supply 50 percent of the power to Arizona and 50 percent to other States. What is your reaction to the philosophical approach which calls for hearing the case where the occurrence is taking place and where the impact is liable to have more influence on the lives of the people and the utilities? Why should the case not at least originate in, say, the district court of Arizona versus going first to the district court of the District of Columbia?

Mr. HALPERN. I think you would have to know more about the issues at stake in the case. If, for example, you are talking about a case involving nothing but the question of whether there was an improper ex parte communication to the decisionmakers in Washington, D.C., if that were the issue being litigated, I can see no particular philosophical merit to the idea of having that issue tried in the Far West.

If, on the other hand, the matter is one which would turn on the impact of factual issues involving local environmental concerns, I can see much more—

Senator DECONCINI. As to the Friends of the Earth filing a suit against EPA for nonenforcement of visibility protection standards as a result of emissions from coal-fired plants which affect primarily, at least on the first threshold, the people who will receive that power and the industries which have an economic interest and a responsibility to furnish that power. Now the EPA, I realize, has a national standard and law affecting people in all other States.

Given that case and the facts we have, what philosophical objection, if any, is there to that case beginning and originating, say, in the district court of Arizona?

Mr. HALPERN. It seems to me section 1404(a) relating to transfer provides an appropriate forum and framework for deciding where that case should be heard.

I have been involved in my own practice in a couple motions to transfer situations. In those cases, both in the district court and the District of Columbia, the district judge looked at all factors. In one case he denied transfer even though the impact of the Federal decision was highly localized.

In the other case, involving the Rainbow Bridge National Monument, he transferred the case. It was heard in the Federal District Court in Utah.

Senator DECONCINI. So there are instances where it has been transferred back to the local geographic area.

Mr. HALPERN. Yes.

Senator DECONCINI. You find no objection to those instances that you know of?

Mr. HALPERN. No. I think we are concerned about the scope of the proposed changes in venue rule. If an effort were made to clarify the terms of 1404(a) so that judges had clear guidance in the exercise of their discretion to transfer motion, that might well be a very productive issue.

Again, we are equally concerned with broad public participation.

Senator DECONCINI. Very well.

Mr. HALPERN. Again, the District of Columbia courts are special kinds of courts.

Senator DECONCINI. Under the history of the venue statute it has been testified to here that the Senate Judiciary Report is quite clear with regard to its desire to move cases out of the District of Columbia.

In your opinion is that what occurs? Is the congressional mandate being followed?

Mr. HALPERN. In fact, Senator, in introducing this legislation you noted the fact that only 7 percent of environmental cases which were filed in 1978 were filed in the District of Columbia. The remaining 93 percent were outside the District.

At the court of appeals level only 21 percent of the cases were filed in the District of Columbia circuit.

Whether that meshes with congressional intent I cannot say, but it is certainly the case that the judicial review of environmental decision-making in the Federal court is not a system centralized in the District of Columbia courts.

Senator DECONCINI. Let me correct my statement. Our current statistics indicated that 95 out of 257 EPA appeal cases were filed in the Appellate Circuit Court of the District of Columbia, which is well over one-third, which at least as far as the appellate process is concerned would indicate to me it is being centralized in the District of Columbia Circuit Court.

Mr. HALPERN. I think the system of judicial review of these cases—I am not sure what statistics you are working from now and when you introduced the bill. However, we have a mixed system for the review of agency decisions. There is something of a concentration in the District of Columbia circuit.

Yet by no means is there a total concentration in the District of Columbia circuit. That is a very desirable mix. It does lead to an element of specialization and it also leads to the kind of decentralization and experimentation which a federal system properly fosters.

The District of Columbia circuit is a special court. It is a national court. It is made up of judges from all around the country. The two most recent judges appointed to this circuit have come from Illinois and Maryland. The appointee whose name is current under consideration is a long-time resident of Michigan.

The fact these judges come from around the country to the District of Columbia circuit gives it a special perspective. The fact it has a somewhat disproportionate level of review of agency decisions does give it some expertise. There is an element in the mixed system that is highly desirable.

Senator DECONCINI. The figures, for your information, 95 out of 257, are the 1979 figures. The figures that were filed with my statement introducing S. 1472 were the 1978 figures. It seems to be a growing situation, at least in the local circuit court.

One statute in question is 1391(e) which allows for venue in four locales, two of which are where the plaintiff or the defendant reside.

There seems to be no utilization of the other two which have equal weight, and they are where "the cause of action arose" or where many real property in the action is situated.

Why is this? Do you have any opinion, either you or Mr. Sacks?

Mr. SACKS. Is the question why?

Senator DECONCINI. Why are the other two not used?

Mr. SACKS. In terms of convenience for the parties——

Senator DECONCINI. Is that really it? Do Friends of the Earth or Sierra Club file it here merely for their convenience rather than where the cause of the action arose? Do you have an opinion?

Mr. SACKS. I cannot really speak for them. It seems to me intuitively that where the petitioner resides and where the defendant resides are the two most convenient forms. They may not always be that, but typically.

Second, there is no question as to where venue is. There is no danger of having to litigate over whether or not venue is proper.

If you feel aggrieved by agency action and you want to redress that claim, you don't want to be bothered by litigating the question of venue. This is one of our chief concerns with both of these proposals. Rather than getting to the substance of the merits of claims you will end up with protracted litigation over the issue of where to litigate.

Where a claim arose, where the claim arose provision, it is kept in S. 1472 and that is an alternative provision.

At least under that provision a body of case law has arisen as opposed to the substantial impact or injury provisions. I do not think it is as ambiguous, but there is danger under that provision of protracted litigation.

Senator DECONCINI. Joseph Brecher wrote an article in the Ecology Law Quarterly which I will be glad to share with you. I realize quoting from it is an interpretation out of context.

Let me cite something to you. He says:

A suit in Washington is certain to receive more extensive coverage by the media than one in the District of Utah, for example.

Do you think that plays an important factor in deciding it, that publicity is an important element in all environmental campaigns and that might have something to do with filing it in the District? Would you agree with Mr. Brecher or not?

Mr. HALPERN. I am not sure Mr. Brecher is correct as an imperical matter that there is more attention to cases here. I am not sure which way that cuts in terms of a persuasive argument.

I think having media coverage on litigation covering public policy is desirable. It goes back to the notice point you raised earlier. The best way to get out notice is to have stories of environmental disputes on television, in the newspapers. In these ways ordinary people whose lives will be affected will be aware of it. It is highly desirable to get that kind of attention.

Senator DECONCINI. Do you think that is a proper criterion in deciding where to file suit, the publicity you can achieve from the actual finding of it? I find a real struggle as a lawyer accepting that as a proper criterion, not that I might not have done it in my practice of law and would not in the future.

However, I have to say I find it a real struggle ethically to really consider publicity as a trial lawyer in making a judgment.

Mr. HALPERN. As an imperical matter I cannot imagine that lawyers, whatever their interest, have made that the central element in their decision to choose a forum.

If you have two forums, on the other hand, in which both might be proper, that might be one of a dozen factors weighing in the balance,

assuming the interest of the client is well served by the choice of forum and assuming the venue would be correct in more than one forum.

Senator DeCONCINI. I have no further questions.

Mr. REGNERY. In the article you cited from the Ecology Law Quarterly, Senator, you mentioned the article contained advice for environmental lawyers on how to maintain venue in the District of Columbia because, as you quote in your statement, the question of venue can spell the difference between victory and defeat in an environmental case.

In his opening remarks, Senator Laxalt mentioned it is not our intent in 739 to change the outcome in any of these cases but to read the article in the Ecology Law Quarterly it sounds, at least from the environmentalist's viewpoint, there is a question of changing the outcome.

I wondered, Professor Halpren if you might comment on that and if you think passage of either of these bills would in fact change the outcome in these cases.

Mr. HALPERN. A change of venue provision can certainly change the outcome of cases. Different judges approach regulatory matters differently. If you are moving, for example, from one-judge district to another one-judge district you are very likely to see a change in outcome if the case is transferred from one of those districts to the other. That is clearly true.

Whether venue provisions should be designed to encourage particular outcomes, which is really the underlying question, is one on which I have strong feelings.

I think it would be a great mistake to redesign venue provisions to change substantive outcomes rather than stick to the present approach to venue, which is to focus primarily on the convenience of the parties.

I don't think a case has been made for abandoning or modifying the basic approach of looking to the convenience of the parties in deciding where a case should be heard.

Senator DeCONCINI. Thank you very much, gentlemen.

[The prepared statement of Messrs. Sacks and Halpern follows:]

PREPARED STATEMENT OF ANDREW SACKS AND CHARLES HALPERN

My name is Andrew Sacks. I am a graduate law fellow at the Institute for Public Representation, Georgetown University Law Center. I am presenting this testimony on behalf of the Institute and Charles Halpern, Director of the Institute. We were assisted in preparing this testimony by Randy Rabinowitz, a 3d year law student at Georgetown Law School. Thank you for inviting us to testify on S. 1472 and S. 739.

The Institute for Public Representation, a public interest law firm affiliated with Georgetown University Law Center, opposes both of these venue bills. The Institute engages in representation of unrepresented and underrepresented interests before the federal courts and administrative agencies, and is particularly concerned with insuring citizen access and input into the administrative and judicial processes.

Senator DeConcini's bill, S. 1472, proposes the addition of two new venue provisions, one dealing with all federal litigation relating to the environment in District Court, the other with all challenges in federal appellate courts to agency actions relating to the environment. The bill would adopt a venue rule providing that when "the issue raised or the impact or injury alleged is less than nationwide in scope," venue can be obtained "only in a judicial district in which such issue arises or in which a substantial portion of the alleged impact or injury occurs."

Senator Laxalt's bill, S. 739, would amend three existing provisions relating to venue: (1) 28 U.S.C. 1391(e), applicable to suits against federal government officials or agencies in District Court; (2) 28 U.S.C. 2343, a venue provision for review in the Courts of Appeals of certain federal agency orders, and (3) 28 U.S.C. 2112(a), as it relates to multiple filings for review in the Courts of Appeals of agency orders. The venue rule proposed for all three statutes is: "In any . . . action in which it is determined that a substantial portion of the impact or injury is in one or more judicial districts [or circuits,] such action shall be brought in one of such judicial districts, [or circuits]".¹

The reasoning behind S. 1472 is that: (1) local courts are better equipped to determine environmental issues impacting local areas, (2) local courts are usually the most convenient forums in these cases, and (3) the need for uniformity in venue law.² See Cong. Rec. S. 9126 (July 10, 1979). The stated concern underlying S. 739 is that citizens affected by agency actions are unable to observe or participate in lawsuits challenging that action. (Cong. Rec. S. 3188 (March 22, 1979).)

Each bill is intended³ to preclude or limit opportunity for judicial review of administrative agency action in the District of Columbia.⁴ Both bills would, to a great extent, accomplish that goal. Neither bill, however, is limited solely to judicial review of agency action. In fact, each bill would affect a great many cases outside the scope of regulatory review. For example, S. 1472 would apply to citizen suits in District Court under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. and the Clean Air Act, 42 U.S.C. § 7523; S. 739 could apply to *any* suit against a government official or agency, apparently even including a civil rights action brought under 28 U.S.C. 1343.⁵

The Institute opposes each bill for the following reasons:

(1) The bills are inconsistent with the underlying premise of venue: convenience to the parties. The current system adequately protects litigants' convenience. By reducing the available number of forums in which claims may be litigated, the likelihood that litigants will be forced into inconvenient forums would increase.

(2) The proposed amendments would needlessly create costly and time-consuming threshold litigation.

(3) Local forums are not necessary or desirable in most federal litigation. This is particularly true for appellate review of agency action.

(4) The proposed reforms drastically overstep the problem meant to be addressed: a classic example of legislative "overkill."

(5) The increase in inconvenience, cost, and time of litigation would effectively preclude access to the federal courts by many citizens. As a result, many citizens aggrieved by federal agency action would be unable to redress their injuries in court. The ironic result of these bills, which intend to open agency action to citizen input, would be to reduce agency's accountability to citizens.

I. OVERVIEW

"[T]he underlying function of a venue statute is to afford convenience of trial to the parties." (Moore's Manual of Federal Practice and Procedure, § 7.01, p. 381. See also, Wright, Law of Federal Courts, 2nd ed., 1970, at 149.) Presently, venue statutes for District Court afford lawyer and client considerable freedom in selecting the most convenient forum. Typically, venue can be obtained where the plaintiff or defendant resides, or where the cause of action arose. One such statute is 28 U.S.C. 1391(e), which applies to actions against the federal government and

¹ Neither bill, as drafted, insures that government action will be challenged only in the district or circuit where it will have the most significant impact. Under S. 1472, a claim with less than nationwide impact may be litigated in any district where a substantial impact or injury has been alleged by the claimant. S. 739 would apparently allow venue to be established in any judicial district where an impact or injury is felt, even if the impact on that area is de minimus.

² The proposal, however, would not lead to uniformity, but rather would create a system of venue for environmental cases entirely separate and dramatically different from the rest of the venue scheme.

³ The Senators introducing the bills have stated this intention explicitly. See Cong. Record S. 9126, (July 10, 1978); Cong. Record S. 1388 (March 22, 1979).

⁴ As discussed *infra*, under the current rules, venue for review of agency action can typically be obtained in the District.

⁵ See, *Buhl v. Jeffes*, 435 F. Supp. 1149 (D.C. Pa., 1977), applying the venue provisions of 28 U.S.C. 1391 to a § 1343 civil rights action; and *NAACP v. Levi*, 418 F. Supp. 1109 (D.C.D.C., 1976), holding that doctrine of sovereign immunity did not bar § 1343 suit against the United States Attorney General, director of the FBI, and certain FBI agents.

is the target of S. 739.⁶ Under that section, venue can be obtained either where the defendant resides or has his principal place of business, where the cause of action arose, where real property involved in the dispute is located, or, if no real property is involved, where the plaintiff resides or has his principal place of business. Although the initial choice of forum belongs to the plaintiff, 28 U.S.C. § 1404(a) allows suits to be transferred to a more accessible forum "for the convenience of the parties and witnesses, in the interest of justice." Under § 1404(a), when the selected forum is inconvenient for either defendants or witnesses, the trial court has "broad discretion" to transfer to a more convenient forum "in light of all the relevant facts." Moores Manual of Federal Practice and Procedure, § 7.12(1), p. 404. The current liberal venue rules coupled with the broad transfer provision result in an effective, flexible scheme for insuring convenient forums in District Court litigation.

The doctrine of venue is inapplicable when a Court of Appeals exercises its appellate jurisdiction. An appeal from a district court order may be had only in the circuit court for the district in which the case was tried. Where the Court of Appeals is empowered by statute to directly review administrative action, venue is determined by the jurisdictional stature. Typically, these statutes provide that review may be obtained where the petitioner resides, or in the D.C. Circuit, at the petitioner's choice. See, e.g., 29 U.S.C. 2343 (applicable to orders of the Federal Communication Commission, Secretary of Agriculture, Federal Maritime Commission, Atomic Energy Commission, Interstate Commerce Commission, and Merit System Protection Board). See also, 29 U.S.C. 655(f) (review of Occupational Safety and Health Standards). Like the District Courts, the Courts of Appeals may transfer proceedings to another circuit when the convenience of the parties so dictates. 28 U.S.C. 2112(a).

II. CONVENIENCE TO PARTIES

As is clear from the discussion above, the current venue scheme intends to insure maximum convenience to parties in federal litigation. In both District Courts and Courts of Appeals, the venue rules provide freedom and flexibility in allowing plaintiff a broad choice of forums subject to general principles of convenience. The liberal transfer provisions allow the courts broad discretion to protect the convenience of defendants and witnesses. The proposals under consideration would greatly reduce the convenience and flexibility this system affords. They would greatly reduce the trial court's discretion to transfer cases for the convenience 1404(a), as transfer can only be made into a forum where venue would have been proper initially. In addition, the proposals would foreclose venue in many potentially convenient forums. In fact, in suits against government agencies or officials, the proposals are designed to foreclose venue in what is often the most convenient forum: the District of Columbia.

In one such case, the District of Columbia was found to be the most convenient forum for a challenge to Federal Power Commission action affecting and involving diverse parties and interests from all parts of the country. On the issue of convenience to parties, the court concluded that:

[t]he convenience of the parties is furthered by retention of these cases in the District of Columbia Circuit. The Commission is situated in Washington. The parties before us often come to Washington, at least by counsel, to participate in Commission proceedings, as they have done in the proceedings with which we are presently concerned. Much of the specialized oil and gas bar is concentrated here, consumer groups are well represented here, and industry representatives not based here are continually in attendance . . . The convenience of the parties could hardly be well served by venue elsewhere. (*American Gas Association v. FPC*, 555 F. 2d 852, at 857. (D.C. Cir. 1976) Accord, *United Steel Workers of America v. Marshall*, 592 F. 2d (3rd Cir. 1979).)

⁶ Prior to 1962, venue in federal court in suits against the Federal government could be obtained only in the District of Columbia. The 1962 amendments were designed to add flexibility by allowing such suits where the plaintiff resides, thus making it easier and more convenient for aggrieved citizens to challenge governmental action and thereby increasing access to the federal judiciary. The proposed amendments would restrict this flexibility, making it more difficult for citizens to redress injury caused by government regulation.

As the above case makes clear, the District of Columbia is not just a convenient forum for "public interest" groups wishing to challenge agency action. Numerous other groups find it convenient to litigate in the District, including industry representatives, trade associations, state and local government representatives, and, of course, federal agencies. The proposals are particularly troublesome when their effect on the federal government is considered. The government would be forced to relegate a substantially greater portion of its litigative responsibilities to the already understaffed offices of the U.S. Attorney. This costly decentralization would exacerbate the government's efforts to establish consistent defense positions and litigation strategies.⁷ The only remaining mechanism for coordinating federal litigation policy would be to transport government lawyers, documents and administrators from forum to forum, thereby increasing the costs of litigation in a dramatic but unnecessary way.

The proposed amendments, which clearly intend to make it more difficult to obtain venue in the District of Columbia, would not only burden residents or businesses in the District wishing to challenge government action. Potential litigants in all parts of the country would be likely to suffer under these proposals.

For example, an Nevada company is directly affected by certain EPA standards. The company may wish to challenge the EPA standards in court as arbitrary and capricious. Under the current scheme, venue would without question be available in Nevada. However, under S. 1472, if the issue was "less than nationwide," venue in Nevada would only be obtainable if the issue arose in, or a "substantial portion" of the impact of the regulation was upon, Nevada. If the regulation primarily impacted New England, apparently, under the DeConcini proposal, the Nevada corporation could only challenge the EPA rule in the Circuit Court of Appeals for the First Circuit.

The proposed amendments would reduce the availability of convenient forums and result in inconvenience to a great many litigants. The proposals are thus irrational and plainly incongruous with the simple premise underlying the venue doctrine: convenience to the parties.

III. INCREASED THRESHOLD LITIGATION

The sole purpose of venue is to protect parties from being forced to litigate, in inconvenient forums. Litigating the question of where to litigate, a likely prospect under both proposals, would result in inconveniencing the parties, adding to litigation costs, and burdening the already overcrowded federal court system.⁸ Thus, it is crucial that venue determinations remain simple. Both proposals fail the simplicity test.

Under S. 1472, controversies will arise as to where an "issue [is] raised" or an "impact or injury occurs" and whether it is "less than nationwide in scope." Under S. 739, it will have to be "determined," presumably by a federal judge, where the "substantial portion of the impact or injury" of government action will lie. Both bills contemplate an evaluation as to the ultimate effect of government action (under S. 1472, of any action "relating to environmental quality"), upon geographical areas of the country. It is conceivable that in many cases something resembling a full-blown trial would be necessary to make these complex factual determinations. It would be irrational to force federal litigants through such a costly and time consuming process merely to determine this procedural, ancillary question of venue.

Even if the factual base for making a venue determination under the proposals was easily ascertainable, the statutory standards proposed are vague and ambiguous, and do not give the judge adequate direction. For example, how is a judge to decide if the issue raised is "nationwide in scope?" Need the action affect every village or town in the nation, every state, every region, or something more or less than any of these? In calculating the impact on an area, should the judge consider the economic impact of the regulation and, if so, to what region

⁷ The executive branch has already begun a systematic study aimed at identifying and relocating throughout the nation those divisions of the federal government which needn't remain in the Washington area. Such a survey is commendable, since its effect would be to transplant many administrative proceedings now held in D.C. across the country where local sentiment can be brought to bear on regulations during their formulation, rather than after their promulgation. Such a course would achieve Senators Laxalt and DeConcini's goals—citizen input into regulatory action which impacts their area—without restricting access to the federal courts or altering the current venue scheme.

⁸ "[Venue] statutes make rough determinations as to the suitable forum in broad categories of cases, on the basis that a perfect allocation of individual cases to the best court is not worth the cost on litigating over what is, after all, an ancillary question." (Currie, *Environmental Judicial Review*, 62 *Iowa Law Review* 1221, 1266 (1977).)

can economic or inflationary costs be attributed? Incorporating such ambiguous standards into venue analysis would result in arbitrary and unpredictable venue decisions, at least until a body of case law emerges from the flood of litigation virtually certain to ensue.

An examination of one recent case illustrates the types of problems that would occur under these proposals. In *Hercules v. EPA*, 598 F. 2d 91 (D.C. Cir. 1979), EPA had issued regulations governing discharges of 2 toxic chemicals into the nation's waterways. One of the chemicals is only manufactured by one firm in Memphis, Tennessee. Since implementation of the rules would require pollution controls to be installed only at this facility, the impact of the action is arguably only in Tennessee. However, discharges of the chemical flow into the nation's largest waterway, the Mississippi, and travel through many states. Given this fact situation, one can easily envision, under S. 739, situations leading to protracted litigation over where the "substantial portion" of the impact or injury occurs. Suppose a Mississippi based group challenged the EPA regulations in Mississippi, how would a court deal with EPA's claim that venue is only proper in Tennessee? Need the Mississippi group make a factual showing as to the portion of the nationwide impact of the chemical flow actually impacting on Mississippi waters? Such a showing could, quite conceivably, become the most costly and complicated issue to be resolved in the case.

In reality, the challenges to the EPA regulations were brought by the Tennessee firm, and raised legal or procedural issues: (1) does the Water Pollution Control Act require that EPA assess the economic and technological feasibility of its regulations?; and (2) were contacts between EPA's rulemaking staff and the decisionmaker improper as ex parte? It is a striking weakness of each bill that neither can sensibly deal with such procedural challenges to agency action. Arguably, in a challenge to agency procedures, the only impact or injury alleged occurred in Washington, D.C., and thus venue would only be obtainable in D.C. Again, one can easily envision protracted litigation over the issue of where the substantial impact or injury of agency procedures occurs.

In sum, nothing is certain about these bills except for the fact that they would lead to considerable threshold litigation. Placing such an unnecessary burden on litigants and courts in the name of convenience would be clearly irrational.

IV. THE ISSUE OF LOCAL REVIEW

The sponsors of these bills seemingly believe that removing regulatory challenges from the District of Columbia and transferring them to local forums would, as a result of the judge's familiarity with local issues or sentiment, yield court decisions more responsive to groups having the greatest stake in the matter. As a technical matter, however, it is clear that the choice of forum should not determine the result in a particular case. The same legal criteria must be applied to a particular claim regardless of the forum. At trial, the decision of the judge or jury is required to be based on the evidence presented. Similarly, appellate review is limited either to the trial or administrative record. Thus, contrary to the apparent assumptions of these bills' sponsors, the judge's familiarity with the impacted area should not affect the outcome of a law suit. In fact, it would be improper for a federal judge, in resolving questions of federal law, to be influenced by local sentiment, or by pressure designed to make him or her feel "accountable" to local interests. See Cong. Rec. S. 3188, *supra*.

The suggestion that local input is necessary or desirable in order to resolve federal questions is particularly incompatible with a common administrative scheme—direct review of agency action in the Courts of Appeals. Appellate tribunals rarely engage in de novo review. In many instances, their task is limited by statute to determining whether agency action comports with the evidence adduced during the administrative proceedings. See, 5 U.S.C. 706(2).⁹ Typically, no witnesses are permitted, and parties are not even present at oral argument. Thus, in appellate litigation, there is even less reason to require local review than in District Court litigation. The proposed amendments, by forcing litigation into an area of "impact or injury", quite conceivably could force a challenge to administrative action into a forum where none of the parties reside, none of the lawyers have their offices, and none of the administrative proceedings have taken place.

⁹ With regard to administrative action which is directly reviewable in the Courts of Appeals, a more effective method for insuring local input into governmental activity—the expressed objective of both S. 1472 and S. 739—would be statutorily mandated funding for citizen participation during administrative proceedings.

V. LEGISLATIVE "OVERKILL"

Both bills propose drastic, sweeping procedural reforms reaching far beyond the narrow problem to be addressed.

As mentioned above, neither bill is confined to review of regulatory action. S. 1472 applies to all civil actions "relating to the environment." S. 739 applies to any civil action in which a government agency or official is a defendant. Both bills propose unique new tests for venue, dramatically different than most current venue statutes.

Of particular concern is proposed § 1295 of Senator DeConcini's bill. That section provides that "Appeals from reviewable agency action, decisions or orders . . . shall be taken" to a specified court of appeals. Thus, by its terms, the statute appears to be jurisdictional, rather than a mere venue provision. When coupled with section 2 of proposed § 1295, which states that the proposed amendments supercede existing laws, § 1295 of the DeConcini bill effectively repeals all inconsistent grants of jurisdiction.¹⁰ For example, past grants of jurisdiction to review agency action to the District Courts¹¹ would apparently be overruled by this section, which mandates that appeals from agency action relating to the environment be taken to the Courts of Appeals.

The Institute is not convinced that the problem raised by Senators DeConcini and Laxalt is a real one. As discussed above, we believe the current venue scheme is adequate, and are skeptical of the need for or desirability of local review of regulatory action. If, however, some reform is deemed necessary, the sweeping proposals before this committee are unacceptable. A more moderate approach, one narrowly tailored to the problem, would be more appropriate.

For example, perhaps a modification of the transfer provisions, 28 U.S.C. 1404(a), 2112(a), supra, could address the problem. Under the transfer provision, the court is directed to allow transfer "for the convenience of parties and witnesses" in the interests of justice. The court could additionally be directed to consider the alleged impact or injury on an area as one factor in considering the interests of Justice. Alternatively, or perhaps additionally, a requirement could be adopted that notice be given, in all areas likely to be affected, of court challenges to agency action. Either or both of these more moderate proposals would directly deal with the problems at issue without working a drastic alteration of federal venue law.

CONCLUSION

Both proposed amendments are inconsistent with the central notion of the venue doctrine: convenience to the parties. Each bill would: (1) limit the available number of forums (2) remove venue from D.C. in many instances where the District is the most convenient forum for litigation, and (3) burden litigants in all parts of the country with considerable, unnecessary threshold litigation. The net result of these bills would be that agency action would be more difficult to challenge in federal court by aggrieved citizens: citizen suits challenging regulatory action would be less convenient, more costly, and more problematical. Agency accountability—the purported motive behind the proposed reforms—would actually be lessened if they were adopted.

The last panel of witnesses consists of Peter J. Herzberg, staff attorney, Sierra Club Legal Defense Fund, Washington, D.C.; Joel T. Thomas, counsel, National Wildlife Federation, Washington, D.C.; and William Butler, Environmental Defense Fund, Washington, D.C.

Welcome to the subcommittee. If you would give us your full statements they will appear in the record in full following your oral testimony. You may proceed with highlighting them.

¹⁰ Such action would be particularly troubling when it is considered that in several regulatory statutes, Congress has placed exclusive jurisdiction for review of agency action in the D.C. Circuit. See, e.g. 30 U.S.C. 953(d) ("Coal Mine Health and Safety"), 15 U.S.C. 719(h)(c) ("Alaska Natural Gas Transportation Act"), 42 U.S.C. § 300j-7 ("Safe Drinking Water Act"), 42 U.S.C. 4915 ("Noise Control Act"); 42 U.S.C. 7607(b)(1) ("Clean Air Act"). It is unclear what the intended effect of the proposals is vis a vis those statutes. As drafted, however, at least S. 1472 would effectively preclude any judicial review of agency action, by removing venue from the one forum that has jurisdiction to hear the claim.

¹¹ See, 16 U.S.C. § 1361 et. seq., Marine Mammal Protection Act of 1972, 16 U.S.C. § 1374(d)(b).

¹² In district court. 28 U.S.C. 1404(a).

PANEL OF LEGAL EXPERTS:

STATEMENTS OF WILLIAM BUTLER, REPRESENTING THE ENVIRONMENTAL DEFENSE FUND, AND THE NATURAL RESOURCES DEFENSE COUNCIL; PETER J. HERZBERG, ATTORNEY, SIERRA CLUB LEGAL DEFENSE FUND, AND JOEL T. THOMAS, COUNSEL, NATIONAL WILDLIFE FEDERATION

Mr. BUTLER. Thank you very much. I am William Butler, general counsel of the Environmental Defense Fund. My statement is being given on behalf of the Environmental Defense Fund and the Natural Resources Defense Council.

I will try to hit only the high points of the written testimony to permit oral questioning. I might say that I personally have litigated environmental cases for 10 years. I have represented in various cases most of the major national and many local environmental groups over that 10-year period.

The Environmental Defense Fund, of which I am general counsel, along with the Natural Resources Defense Council for whom I speak today too, are among the two largest environmental litigating organizations in the country.

It is also significant that EDF and NRDC not only have offices in the District of Columbia, but also in the San Francisco area, in the New York area, and EDF also has an office in Denver. Therefore, our cases are brought in widely scattered districts throughout the country, and by no means are restricted to the District of Columbia.

Both of these organizations are strongly opposed to each of the bills. Each bill would add special venue provisions, and both are designed to preclude plaintiffs from bringing environmental suits in the District of Columbia, as well as in other venues currently available. The effect of these two bills will be to reduce the flexibility within the Federal court system for EDF and NRDC to bring cases in their choice of forum. They will generally eliminate the plaintiff's traditional right to choose the location of his suit from among the courts having jurisdiction. They might also create great inconvenience and injustice for parties. In fact, because of the vague and imprecise language of the bills, parties will have to litigate a lawsuit on venue before they may begin the real lawsuit, thus creating great expense and delay.

Moreover, the reasons given for this radical change in the law are apparently based on erroneous views of the nature and function of the Federal courts, particularly the U.S. court of appeals here and the district court for the District of Columbia.

Finally, each bill creates a host of specific problems, making it unwise for the Senate to pass them.

The existing venue rules are found in title 28, United States Code, sections 1391(e) and 1404. If we are talking about the court of appeals, we need to focus on 2112(a). I have not heard a good deal of discussion of that here today.

The legislative history I can skip over because you have heard something about it. However, by and large the changes made by this committee, the full committee, in 1962 and since that time were to broaden the potential venue of civil actions, that is to say not to require either the District of Columbia or any other particular circuit to be the only circuit where a case could be brought.

It strikes us that these bills would move back in a direction which was rejected in 1962, that is to say, again to restrict venue.

The forum non conveniens provision has been interpreted by courts on a case-by-case basis in accord with the congressional policy of balancing the plaintiff's right to choose a forum against the defendant's right not to defend in an unreasonable location; indeed, what intervenors, if they are important intervenors, have to say about venue is important too.

On page 3 we cite various transfer cases of a general nature from the District of Columbia. There could have been a host of others.

On page 4 we cite an illustrative handful of environmental cases where we ourselves have been involved which have been transferred to other districts from the District of Columbia for the reasons that are set forth in 1404(a).

I suppose this list could be four or five times longer. There is nothing different in the way courts have examined the transfer of venue provisions in regard to environmental cases in comparison with any other cases.

By and large the judges in these cases in which I have been personally involved have looked at the facts. Intervenor as well as defendants have made arguments that for one reason or another the case would be more convenient in other places, and they have been transferred.

We have won some of those transferred cases and lost some of them ultimately, so transfer has not been outcome-determinative in itself.

The two bills now under consideration, however, would radically change existing law by destroying the plaintiff's traditional right to choose the venue of his or her lawsuit, and by eliminating the discretion of the district court to transfer a case to a more convenient forum. They would create an arbitrary per se rule declaring all environmental suits in the District of Columbia to be inconvenient.

Such a per se rule destroys the flexibility which past Congresses have worked long and hard to build into the judicial system. Moreover, it will create inconvenience and injustice for all parties—both industrial as well as environmental—without vesting any discretion in the district court to remedy the problems.

A per se rule banning environmental suits in the District of Columbia will force the transfer of cases from what may be the most convenient and sensible forum to hear them.

There are other legal and practical reasons why plaintiffs and defendants, including business, government, and environmental organizations, may want to sue in the District of Columbia. In many cases private parties, both environmental groups and industry, want access to lawyers living in the Washington, D.C., area who specialize in complex environmental regulations or who have appeared before a Federal agency such as EPA and thus are most familiar with the facts before that agency in prior proceedings. A private party may also use the District of Columbia courts because they have previously dealt with a particularly complex environmental statute or problem. Such a choice of forum promotes judicial efficiency.

A range of different considerations is involved in 1404(a) or, to a similar extent, 2112(a) for appellate cases.

A question was asked earlier on whether either of these bills can be outcome-determinative. I would answer that question yes, in one way. To the extent that litigation is discouraged by the expense of the litigation's geographical locality and the litigation therefore is not brought, the legislation is likely to be outcome-determinative.

We have been involved in cases requiring an impact statement for various actions affecting American Micronesia. If we had had to litigate that case in American Samoa, for example, or some place in the far Pacific rather than Washington, D.C., within approximately 10 blocks of the Interior Department where the decisions had all been made, we undoubtedly would not have been able to do it. We could not afford to litigate in Micronesia. There was no real reason to do that inasmuch as a decision was made right here in the Department of the Interior not to issue an impact statement.

We have also been involved in various cases involving animals in Alaska. The policy of the Federal Government in managing the animals of Alaska was involved. At issue was the Federal Government's management of an endangered species. There was no reason why—when the Interior Department and the National Oceanographic Administration deal with these issues, and the laws were made here, and at issue was a Federal question under Federal control—both the Government and the environmental groups in this case should have to go to Alaska to litigate something which was of marginal State interest perhaps, but where the State had no power over the particular issue involved.

To the extent we would be forced to litigate where we could not afford to litigate, and I speak now not just for NRDC or EDF but any small citizens' groups, where cost is a consideration, these bills might well be outcome-determinative.

Certainly all parties will face additional litigation costs and delays because of the vague and imprecise language of the bills which require threshold litigation on the issue of venue.

In our statement, we next go into some specific analysis of how difficult it would really be to determine if a particular case was an environmental lawsuit.

I would be interested in the standards which you or your staff applied to determine how many environmental appeals were brought in the District of Columbia last year. What do you determine to be an environmental appeal? I find the question very difficult, and I am not confident in reading the statements prepared on this legislation that anyone else has the answer either. At one point, where the bills were first put in the Congressional Record, there is a list of 50 statutes which could be environmental under certain circumstances.

This leads to a range of value judgments which would be very difficult and which would involve unnecessary litigation.

There are other legal problems. Under the DeConcini bill it would be difficult to determine where a case should be tried if it contains a number of issues, some of which are nationwide in scope and others which are local. One effect of the two bills might be to keep cases from Federal courts or to split causes of action, since in many cases an issue involves interpretation of two or more statutes.

A situation could arise where one of the statutes has its own venue provisions which are in conflict with one or another of the bill's

criteria. There could be a host of additional removal problems involved in this regard too.

The bills' sponsors claim restricting venue to districts in which an affected project is located would insure consideration by courts that are more familiar with the issues and more accountable for their decisions. This claim is based upon an erroneous view of the nature of the issues involved and a misconception of the function of Federal courts.

As discussed above, a large proportion of cases against the Federal Government deal with governmental procedures under the Administrative Procedure Act and a multitude of other statutes.

In many cases it is the District of Columbia circuit that is most knowledgeable, or at least equally familiar, with the complicated cases involved, and not necessarily another district court having any greater expertise in this area.

To eliminate the District of Columbia circuit as a venue choice would deprive litigants of the benefit of that court's decades of experience in grappling with similar issues of procedure and statutory construction, a result opposite from that intended by these bills professed purpose.

At the appellate level various environmental statutes require appeals to be brought in the District of Columbia circuit because they are so complicated that some specialization should develop among the circuits, hence it is advisable to have one circuit deal with these appeals. This has apparently been the congressional view in passing those statutes.

Nor can these bills be justified by the claim that they will increase judicial accountability and enable judges better to serve public policy. This claim assumes that Federal judges pay more attention to their decisions when they affect a nearby geographical area than when the effects are less tangible, an assumption that is both speculative and likely erroneous. Federal judges are not politicians. They are appointed on merit, and are accountable to the Nation and its system of laws as a whole rather than to any particular district or electorate.

Moreover, there is no evidence that the District of Columbia circuit performs this function to any lesser degree than any other circuit. In fact, it has been our experience with the District of Columbia circuit that it is no more liberal, or otherwise political, than any other. Certainly the District of Columbia circuit is not unduly friendly to environmental plaintiffs. EDF, NRDC, and other similar groups have lost as many cases in the District of Columbia circuit as they have won.

I would be interested to see in your figures on "environmental" cases brought in the District of Columbia circuit last year, how many were brought by industries and how many of them were brought by environmental groups. The overwhelming percentage was brought by industries, I think. What is the reason for this? Did they think it was more convenient? Did they think they would get a better shot at overturning or upholding an administrative decision?

The answer is not clear, certainly from our perspective, to a question asked before: How do we determine where to bring cases?

There are a number of different criteria, but in our offices across the country by and large we decide to bring the cases where the offices

are, which is generally speaking the geographical area in which the interest is, and there is no attempt to forum-shop other than that occasionally one circuit will have a series of precedents which hold x , while another circuit will have a series of precedents which hold y . If what you want is y , you will go to y circuit rather than x circuit. You find this right now in a number of areas where the Supreme Court has not finally decided the issue.

Senator DECONCINI. Mr. Butler, is it safe to conclude that one of the reasons the district court is preferred is because x is what you want to achieve and you know it already has been decided here?

Mr. BUTLER. I can perhaps count on the thumbs of two hands the numbers of instances in the last 10 years where that has been a consideration. However, I can cite specific examples if you want.

Currently the fifth circuit has a series of precedents involving the Occupational Safety and Health Administration, holding that cost-benefit analysis is required before issuing a major carcinogenicity standard.

The District of Columbia circuit for better or worse either has said nothing about that, or seems to lean in the other direction.

The cases have been argued before the Supreme Court. We are awaiting a determination.

Last year or the year before I was involved in a case where I wanted to uphold a carcinogenicity standard which did not involve a cost-benefit analysis, and if I had had the choice between the fifth circuit and the District of Columbia circuit, I would perhaps have brought it here. However, the number of instances where the circuits are opposed on precedents in the sorts of cases we are likely to bring are very few. Generally there is no greater or lesser incentive to forum-shop on the part of an environmental lawyer than any other lawyer.

I am sure when you were practicing that if you found a comparable circumstance on behalf of your client you would go into the circuit, be it a business case, antitrust case, criminal case, whatever it is, if there were stark differences in the precedents in the circuits, where your client would be most likely to pressure. Until the Supreme Court resolution took place, if you had the choice you would go to the circuit where you are likely to get a favorable precedent, rather than unfavorable. That is just lawyering. That has nothing uniquely to do with environmental lawyering.

Senator DECONCINI. It does not make any difference to this Senator whether it is industry or environmental groups, citizens, or anyone else.

Mr. BUTLER. It does not to me, either.

Senator DECONCINI. It seems to me the question is what is accessible justice. Are the people who are going to have an influence in the determination those who should have the courts more accessible to them?

Granted that the case you gave involving Micronesia will not impact as greatly there as in many other cases. What do you do about Utah or Arizona in a BLM case? The records are in the BLM office in Phoenix and it is filed here.

What will you do with the case which was filed by the Friends of the Earth here regarding EPA visibility protection standards relating to coal-fired plants?

I have a philosophical problem with requiring that the people in the utilities have to come all the way to Washington to participate in that litigation.

I am not interested in hometown decisions because I think the law has to be interpreted as the judge sees it. I find a problem of disenfranchising or making it difficult for those people who will be affected in the two examples I give.

How do you respond philosophically to not giving those people a better chance to participate?

Mr. BUTLER. I will answer at two levels. One is at the district court level, and the other the court of appeals. At either, current law adequately protects court access for interim parties.

At the district court level where a suit is originally filed one has got 1040(a). Speaking specifically of power plants in Arizona, for example, or Utah, or New Mexico, I have been involved in three cases, specifically involving powerplants of that nature.

In two of those cases the case was originally brought in the District of Columbia by us with the philosophy behind that choice being that the decision had been made by the administrative agency here, where the records were.

In one of those two cases it was transferred out to Arizona, to Tucson. In the other case it was left here. In both instances it was heavily litigated as to where it was most convenient for the interest of the parties and witnesses.

The case which had a lot of local witnesses was transferred to Tucson. The case which was a pure case of law, in other words, where it was a summary judgment action, was kept here. In both instances I think probably upon reflection the judge made the right determination.

If we can approach it from the appellate level, a disproportionate number of environmental cases come to the appellate level after a decision by an administrative agency. At the appellate level you have no witnesses, as you know. You have a record which has been created below during administrative agency proceedings. The local participation has taken place by and large through field hearings of the administrative agency, such as the Department of Energy, Interior, or EPA. If it is a regulatory rulemaking agency they have a wide range of different field hearing options. A record is created and a decision rendered.

Then at the appellate level the only issues are issues of law, by and large, or at least whether the agency has been arbitrary and capricious in its interpretation of the facts.

At the appellate level the issue of where the case is brought does not involve, I think, the notice and convenience of the witnesses' issues you are talking about, and everyone already is on notice of the appeal by virtue of the Federal Rules of Appellate Procedure.

Where an appeal is taken, the party taking appeal has to notify participants in the agency proceeding below.

Senator DECONCINI. I give you that—

Mr. BUTLER. Everyone already knows about the appeal. The case for a "Locke Resolution" is not as strong.

The case is strongest for your concern and ours in District court cases to be tried on the facts. Occasionally we have been involved in cases where we have had a major interest, and have wanted to inter-

vene, and which have been remote from where we have offices and witnesses. There we have been the ones bringing the 1404(a) actions.

However, it strikes me that the fairest system and the one which has worked under the common law for years is that which has been codified since 1962 in 28 U.S.C. 1404(a) and also 2112(a) for appeals—I might say some appeals are also transferred for these reasons. We have been involved in a couple of transfers of appeals.

When the parties all come together and make specific arguments as to what are the relative conveniences and inconveniences of parties and witnesses, the facts are right there before the judge.

If I can interpret a little bit of what is your concern, it is as to initial notice. How do you notify people so they can get into the ball game in the first instance?

Senator DECONCINI. That is No. 1.

Mr. BUTLER. And not get cut out.

Senator DECONCINI. That is part of No. 1. However, No. 2 is this: I have a philosophical problem involved here. I understand the procedural route and the distinction.

Why should it not be in the ninth circuit versus the District of Columbia circuit? That seems to me more a convenience for perhaps your clients than it is for the people in Arizona or Utah who have to come here and argue the case.

Mr. BUTLER. Are we talking now about the appellate level?

Senator DECONCINI. Yes. Unless you go back to your principle and you want to achieve "Y" and its it more likely to be achieved. Dismissing that it is a matter of convenience for your client to be able to file it here where it may be—and I underline may be—very inconvenient for the people affected in Utah, for example.

Mr. BUTLER. By and large, the argument is not as strong, if I may argue your case for you, at the appellate level as the district court level. At the appellate level, you have one personal appearance, which is the argument. The inconvenience of any attorney having to fly once to another place to argue a case is not really that great.

We involve ourselves in many appeals where we waive oral argument and mail the briefs. That is done in a large number of appellate cases. In various circuits, like the fifth, you don't automatically get oral argument. The court decides which cases get oral arguments.

We have been involved in appeals there where I was looking forward to a trip to New Orleans and was deprived of it by the court of appeals denying oral argument and deciding they would decide it on the papers.

The better argument you might make is that at the district court level, there, by and large, you find the most cautious and scholarly approaches by judges to exactly what you are talking about. They want to know who are the parties here? Who are the witnesses? How is this case going to proceed? Who will be inconvenienced and who will not be?

Senator DECONCINI. Going to that argument—and thank you for arguing that point for me, I appreciate it—why not file first in the local district court rather than filing in the District of Columbia district court? Why not make the determination there where the district judge would say, "This has a national purpose. This has

witnesses in Washington. I think it should be moved there," rather than the other way?

Mr. BUTLER. You are assuming that every district court case is going to involve a trail where facts and witnesses will be important. There are a significant number of cases in the environmental area where it is not that at all. It may simply be whether there was an ex parte contact on the part of the decisionmaker, or whether an impact statement was required in this case.

By and large, where it is a question of law, the locality is less important than the plaintiff's choice of what is convenient for him for whatever reason. That has been the traditional view to encourage court challenges by citizens to Government action.

Where there are trails, and witnesses will be called in from a local area, and where it will be a long proceeding, that is the instance where, usually under 1404(a), the judges right now will transfer the case to that area.

I guess the heart of my argument is that "when it ain't broke, don't fix it"; 28 U.S.C. 1404 and 2112a and 1391 are not "broke." I know I have heard this morning of a couple of instances where people have come forward and have pointed out that from their perspective, 1404(a) had not worked in a particular case.

I suggest in most of those instances it was where they had not gotten notice soon enough to get into the case, so if what you are concerned about is notice, don't fool around with venue per se where, by and large, it works about 90 to 95 percent of the time. Rather focus on the question of notice to be sure that anybody who has an interest in this question can get involved in it as soon as he or she wants. If they think it is inconvenient, as the power companies could and have in our cases if we filed them here and not where they were, they can come in and make the same equitable arguments to the judge they made to you here this morning.

Nine times out of 10, they will win that case. We know that, so we are not so stupid as to bring a case in the District of Columbia, waste a lot of time, and have it transferred out there. We would bring the case out there originally because chances are our witnesses are out there, too, and we do not want the expense of bringing them here.

Senator DECONCINI. I cannot tell you that I agree with the fact that this is what you do if I take at face value some of the witnesses' testimony this morning.

I need to let these other gentlemen testify.

Are there any other remarks you care to prepare? We will include them in the record. I have some time constraints. I am sorry to have taken so much time.

Mr. Herzberg?

Mr. HERZBERG. Senator, I am Peter Herzberg from the Sierra Club Legal Defense Fund. We support the analysis of the Environmental Defense Fund and Natural Resources Defense Council.

I would like to concentrate on some of the factual cases brought to your attention this morning. From my perspective, they did not accurately reflect what the facts are.

The one example about the power companies in Arizona and regulations impacting only power companies in Arizona, that was

not true. The Friends of the Earth suit was against national regulations; failure to promulgate national regulations on visibility protection sections of the Clean Air Act.

Those regulations affected the Great Smokies in the Eastern United States as well as areas in the western part of the United States, as well as Northern United States. I would submit that particular example that was brought to you this morning was particularly an example of an issue nationwide in scope. It would still remain in the District of Columbia under your statute and under any fair reading of where venue should be laid.

Senator DECONCINI. In that case, why do you object to 1472?

Mr. HERZBERG. In that particular instance, 1472 would be fine. S. 1472 reflects the actual law under the Clean Air Act. In that situation, it was argued in the District of Columbia.

In *Sierra Club v. Andrus*, a case on water rights in Western United States, while I am not the attorney in that case, my information is that Mountain States Legal Foundation is a party in that suit. They did not move for change of venue from the District of Columbia.

That suit is being decided here on rejudgment motion but there was no venue motion. They could have made that motion if they were inconvenienced.

Right now, issues are particularly a matter of law. There has not been a movement to get it out of the District of Columbia.

Finally, in regard to the 92 out of 300 cases you cite as being presently litigated here in the District of Columbia, I suspect that most of the increase in litigation in the District of Columbia involve appeals of national regulations once again where, in the last year or two, EPA has promulgated a number of regulations under the 1977 amendments and 1978 amendments. Those issues are now being heard by the District of Columbia in its venue statutes on that law.

Once again, under your venue provision those nationwide issues, those national regulations, would still be heard in the District of Columbia and the congestion would not be reduced in the District of Columbia circuits as I think you would suspect.

Finally I would like to talk about this: This morning there was conversation about the sweetheart deals between environmental groups and a number of people in Government. I would like to say Mr. Moorman was used as an example.

In any case I have ever had, Mr. Moorman never has been signed off, never reviewed any of the cases. He has disqualified himself from those cases. I find it somewhat regrettable his name was used or that implications were drawn that there were sweetheart deals between various former environmental lawyers and people in Government now.

Senator DECONCINI. The record will show also that Senator Hatch, upon questioning, indicated Mr. Moorman, to his knowledge, did not actually defend the case.

Mr. HERZBERG. I would like to broaden that and say any public interest lawyer I know who worked on a case while he was a public interest lawyer and I was a member of Government did not, at least to my knowledge in my cases, in any way act in cases when they were litigated—

Senator DECONCINI. Nor should they.

Mr. HERZBERG. Nor should they.

I would like to conclude by saying the Sierra Club brings many cases in local areas. We will continue to bring cases in local areas. We have been successful in many cases in local areas, as you know. We believe flexibility in the venue statutes needs to be preserved. There are certain circumstances where it is most convenient for everybody to litigate in the District of Columbia.

I suspect in the water rights case that case was brought in the District of Columbia because it was felt that would be the most convenient forum.

I feel the reason it was not moved out to a local forum was that most of the parties doing the litigation realized the District of Columbia was the most convenient place to bring the suit.

The changes in the venue statutes would preclude such litigation from being brought in the District of Columbia. That would be a very regrettable result.

We feel changes should not be made in the venue statute but perhaps a greater sensitivity be shown, or continued sensitivity shown, to get local cases out to the local districts, and we feel the venue statute should be changed.

Senator DECONCINI. Mr. Thomas?

Mr. THOMAS. I am Joel T. Thomas. I am general counsel for the National Wildlife Federation.

I would like to express the federation's appreciation for your invitation to us to testify at these hearings today.

We are the largest nongovernmental conservation organization. Individual members of clubs affiliated with the federation's State affiliate organizations in each of the 50 States as well as Guam, Puerto Rico, and the Virgin Islands together with the federation's own associate membership and supporters total more than 4.1 million persons.

In addition to the federation's many other activities, it maintains a staff of 10 attorneys engaged in the practice of environmental law. As a consequence, NWF is a major environmental litigant. We are here today to testify on the two bills now before this committee, S. 739 and S. 1472, because we believe that the enactment of either of these bills would impair the access of the National Wildlife Federation, its State affiliate organizations and its individual members and supporters to the Federal courts.

After a review of both bills, NWF has concluded that the primary effect of the enactment of either of these proposals would be wasteful, time-consuming, expensive and nonproductive litigation simply to determine what is nationwide in scope, what laws are environmental laws, what is to be done when a complaint alleges injury under an environmental statute and a nonenvironmental statute or the U.S. Constitution, or whether a particular issue arose in or a substantial portion of the alleged impact or injury will occur in a given judicial district.

None of this litigation will, in NWF's opinion, be productive. It will not resolve the real conflict between parties. It is merely procedural litigation which will not help resolve the real issue.

The arguments put forward in relationship to the convenience of witnesses, I think, are particularly fallacious. In the last 5 years the federation has had only two full-blown trials. Both of those occurred

in Nebraska and Mississippi, the original sites of the litigation. Most of the witnesses in both of those cases came from outside the judicial districts in question. They had to be brought in for the purpose of that case because they are not local. They are often scientists.

I was involved in litigation in Oregon. The case involved ducks colliding with high voltage transmission lines. The expert was from the University of Wisconsin.

It is not true that the witnesses called in many environmental cases are in fact local witnesses. They are experts and these experts may be from anywhere in the country.

Senator DECONCINI. Excuse me, but you talk about your Oregon case. The transmission lines and the ducks were in Oregon. Is that right? The experts were from Minnesota?

Mr. THOMAS. Yes.

Senator DECONCINI. I compliment the federation for filing that case because that seems to me to be the logical place to make a determination as to whether or not something should be done about ducks flying into powerlines when you can see the powerlines, see the ducks, and see the damage rather than filing it in the District of Columbia.

I compliment the federation for doing just that as well as the cases you mentioned in Nebraska and Mississippi. That gets to the root of the situation.

If all cases were done on that basis we would not be here today. Complaints we get state that if you file that case in Washington and the power company or the farmer or whoever had the powerlines there had to come here with his photographs, and if it were a trial they had to have the people go there, look at it, and make an effort to do all that. That is where we are. I am glad you raised that because I want to express to the federation my appreciation for doing just that sort of thing.

Mr. THOMAS. The majority of our cases are filed outside the District. I think that is in part because of our view that 1404 works. These cases, if they involve basic local questions, will in fact be transferred out of the local district.

The one case cited in someone else's testimony, it was the subject of a motion to transfer. It was transferred.

It is interesting that case was brought here only because local pro bono counsel in Washington chose to bring it here. The original draft I prepared had at the top of the page the District Court for the District of South Carolina where it wound up; 1404 is working. I do not think there is a need to change that statute, particularly if the change is going to result in endless rounds of litigation over whether or not this case in fact had to be transferred.

I think the most important thing for purposes of public interest in this situation is some degree of certainty that, when a case is brought, rather than extensive litigation on whether you are in the right courthouse with the possibility temporary orders will be issued, bounce from court to court, additional time will be consumed before a final resolution of merits, I am afraid that would be the result.

Mr. REGNER. Do any of you know whether or not the intervenors may, under 1404 move for change of venue or, if they may, they ever successfully do under case law?

Mr. THOMAS. Yes.

Mr. BUTLER. Yes.

Mr. THOMAS. They can and do and are successful.

In the case involving Mr. Moorman, it is clear that litigation commenced regarding a statute that was enacted after Mr. Moorman left the Sierra Club, so there was no involvement in that litigation prior to his entry into government.

Again, I think the overwhelming need here in terms of public interest litigation is some degree of certainty so a case can proceed and not waddle in the throes of procedural resolutions endlessly.

Senator DECONCINI. Do you gentlemen, all of you or any of you, subscribe to the strategies outlined in the Ecology Law Quarterly article wherein the author lists several tactics to be used to avoid transfer to another forum? At one point in his list he states that the complaint "should emphasize the Government's improper administrative activities, not the environmental damage * * *."

Can you comment on that?

Mr. HERZBERG. I don't agree with that tactic. If you are effective you want to go after the environmental impact.

Mr. BUTLER. If you want to convince the court you are talking about something important on the environment you had better focus on that rather than government.

Mr. THOMAS. I don't agree with that tactic. I read the article some time ago. At the time my general impression was I didn't agree with very much of it. I also thought it overstated the case, the importance of the venue question.

Over the long run I don't believe it will turn out to be outcome determinative regarding the courthouse you are in.

Senator DECONCINI. It is the unanimous conclusion, then, the environmental community, at least as much of it as you represent, does not follow those tactics recommended. I thought that was important to have on the record because I did not think you did. I wanted to be sure.

Further questions?

[No response.]

Senator DECONCINI. Thank you very much, gentlemen. We appreciate your testimony.

[The prepared statements of Messrs. Butler, Herzberg, and Thomas follow:]

PREPARED STATEMENT OF WILLIAM A. BUTLER

The Environmental Defense Fund (EDF) is a private non-profit national membership organization of more than 45,000 members. It is dedicated to finding scientifically sound solutions to the nation's environmental problems. Among other activities, it provides legal services for its members to litigate environmental issues, frequently in the federal courts. The Natural Resources Defense Council (NRDC), a national non-profit organization with offices in Washington, D.C., New York City and San Francisco, is dedicated to the protection and wise use of the nation's natural resources. NRDC also litigates, among other activities, in federal courts on behalf of its tens of thousands of members.

Both organizations are strongly opposed to Senator DeConcini's bill, S. 1472, and Senator Laxalt's bill, S. 739. Each bill would add special venue provisions to Title 28 of the United States Code, and both are designed to preclude plaintiffs from bringing environmental suits in the District of Columbia, as well as other venues currently available. The effect of these two bills will be to reduce the flexibility within the federal court system for EDF and NRDC to bring cases in their choice of forum. They will also generally eliminate the plaintiff's traditional right to choose the location of his suit among the courts having jurisdiction; they

may well also create great inconvenience and injustice for parties. In fact, because of the vague and imprecise language of the bills, parties will have to litigate a law suit on venue before they may begin the real law suit, thus creating great expense and delay.

Moreover, the reasons given for this radical change in the law are apparently based on erroneous views of the nature and function of the federal courts, particularly the United States Court of Appeals and District Court for the District of Columbia.

Finally, each bill creates a host of specific problems, making it unwise for the Senate to pass them.

I. GENERAL POSITION ON THE TWO BILLS

The special venue provisions in S. 1472 and S. 739 will modify existing venue rules where the federal government or its officers are named as defendants. The ostensible purpose is to insure that suits against the federal government be brought in the location "most convenient" for all concerned. However, by sharply limiting the number of districts in which a particular suit can be brought, they achieve precisely the opposite result and are a repudiation of Congress' policy of balancing the plaintiff's right to choose the place to bring litigation and the defendant's right not to litigate in an unreasonably inconvenient forum.

The existing venue rules for federal defense suits are found in 28 U.S.C. § 1391(e) and 28 U.S.C. § 1404. By giving the federal courts great flexibility in balancing the interests of the plaintiff and defendant, previous Congresses sought to insure that cases would be tried in the most convenient forum. Specifically, 28 U.S.C. § 1391(e) allows a plaintiff to sue "within any judicial district" in which "(1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action."

This broad venue provision has existed only since 1962. Prior to that time, suits against the federal government could in many cases be brought only in the D.C. Circuit. Congress amended the venue law in 1962 to "broaden the venue of civil actions," leaving the initial choice up to the plaintiff. (See, 1962 United States Code and Administrative News, p. 2784.) In revising the statute, Congress could have eliminated the D.C. Circuit as a venue choice, but did not do so. It probably realized that the D.C. Circuit, as discussed later, is often the most knowledgeable and convenient court for many cases and should remain a potential venue as long as the relevant criteria were met. Instead, Congress added the other venue choices so that in cases where the cause of action is related to a particular site or project, the case could alternatively be heard in that district.

In order to prevent the plaintiff from choosing unreasonable forums in a particular situation, Congress enacted 28 U.S.C. § 1404. This provision allows a district court to transfer any civil action to any other district "for the convenience of parties and witnesses and in the interests of justice." This provision, based on the common law doctrine of *forum non conveniens*, has been interpreted by the courts on a case-by-case basis in accord with the congressional policy of balancing the plaintiff's right to choose a forum against the defendant's right not to defend in an unreasonable location. For example, the District of Columbia courts have transferred numerous cases where a majority of the witnesses are living in another locale. (E.g., *Starnes v. McGuire*, 512 F.2d 918 (D.C. Cir. 1974); and *Wren v. Carlson*, 506 F.2d 131 (D.C. Cir. 1974); and where the controversy involved is local in nature, e.g., *Municipal Distributors' Group v. FPC*, 459 F.2d 1367 (D.C. Cir. 1972); *Preuss v. Udall*, 359 F.2d 615, (D.C. Cir. 1963); *Southern California Ass'n of Governments v. Kleppe*, 413 F.Supp. 563 (D.D.C. 1973); *Norair Engineering Associates v. Noland Co.*, 365 F.Supp. 740 (D.D.C. 1973); and in the interests of judicial economy, e.g., *Celanese Corp. v. FEA*, 410 F.Supp. (D.C.C. 1976).)

Moreover, courts have specifically transferred environmental suits out of the District of Columbia where "inconvenience" or "local interest" in a case was felt to outweigh the benefits of allowing plaintiff his choice of forum. For example, the District Court for the District of Columbia transferred the litigation on the Tennessee-Tombigbee waterway on the motion of an intervenor to the Northern District of Mississippi under 28 U.S.C. § 1404 because it was in the "interest of justice," and the District of Columbia was inconvenient for the parties and witnesses.¹

¹ *EDF v. Hoffman*, begun in D.C. D.C. Civil Action 76-2204 (Nov. 30, 1976), transferred to N.D. Miss., Civil Action 77-53-K (Sept. 7, 1977).

Similar transfers have been made in cases involving the Wando River port terminal in South Carolina,² federal oil and gas leases in California,³ the Cross Florida Barge Canal,⁴ the Tellico dam project in Tennessee,⁵ and the application of NEPA to TVA stripmining.⁶ Thus, it can be seen that the venue provision in 28 U.S.C. § 1404 already provides the federal judiciary with the flexibility needed to accommodate a wide variety of cases and situations, and that the District of Columbia courts have been sensitive to the needs of litigants and used that provision to transfer cases to the district which is most convenient.

The two bills now under consideration, however, would radically change existing law by destroying the plaintiff's traditional right to choose the venue of his or her lawsuit, and by eliminating the discretion of the district court to transfer a case to a more convenient forum. They would create an arbitrary per se rule declaring all environmental suits in the District of Columbia to be inconvenient.

Such a per se rule destroys the flexibility which past Congresses have worked long and hard to build into the judicial system. Moreover, it will create inconvenience and injustice for all parties—both industrial as well as environmental—without vesting any discretion in the district court to remedy the problems.

A per se rule banning environmental suits in the District of Columbia will force the transfer of cases from what may be the most convenient and sensible forum to hear them. In many cases plaintiffs challenge administrative procedures rather than substantive decisions. In these cases the actual location of a project is irrelevant to the court's determination of the legal sufficiency of the governmental decision-making procedures. Moreover, in most of these cases the defendants, witnesses and usually the plaintiffs are all located in the District of Columbia, where federal agencies are headquartered. All the records concerning the procedural questions at issue may well be in the District of Columbia also. To require all the parties and witnesses to travel at considerable expense to a different part of the country with all the necessary records in order to resolve a procedural question which in no way depends on site-specific facts makes a mockery of the venue laws and their goal of avoiding inconvenience and harassment.

There are other legal and practical reasons why plaintiffs and defendants, including business, government and environmental organizations, may want to sue in the District of Columbia. In many cases private parties, both environmental groups and industry, want access to lawyers living in the Washington, D.C., area who specialize in complex environmental regulations or who have appeared before a federal agency such as EPA and thus are most familiar with the facts before that agency. A private party may also use the D.C. courts because they have previously dealt with a particularly complex environmental statute or problem. Such a choice of forum promotes judicial efficiency. Because the D.C. courts have a great deal of experience in handling administrative cases, for example, private parties may feel that their case will be decided more quickly in that circuit and would be less likely to be overruled, if appealed. These are among the reasons why in some environmental statutes Congress has provided for jurisdiction only in the District of Columbia Circuit. Finally, because transportation costs and travel time for witnesses and experts may be less, especially in cases arising from administrative decisions made in Washington, private litigants file suit in the District of Columbia in order to keep their litigation expenses down. However, a per se rule banning a select group of lawsuits from the D.C. courts will prevent parties from enjoying these legal and practical benefits.

Furthermore, the likelihood of increased costs threatens the ability of groups like EDF and NRDC to conduct litigation. These bills as a practical matter would impose a great expense of time and money on these groups least able to pay. Citizens groups, which are clustered in major metropolitan areas, especially the Nation's Capital, are much less able to afford the considerable expense required for travel to distant sites than are state governments and the federal government, the former of which frequently have D.C. offices with lawyers, and the latter of which has U.S. attorneys located around the country. These economic realities

² *NWF v. Alexander*, 458 F. Supp. (D.C.D.C. 1978) (in the interests of justice and for convenience of witnesses case was transferred to D.C. South Carolina).

³ *Southern California Ass'n of Governments v. Kleppe*, 413 F. Supp. 563 (D.C.D.C. 1976) (challenge to oil and gas leasing transferred to California because California law was required to decide issues of res judicata and collateral estoppel).

⁴ *Canal Authority of State of Florida v. Callaway*, 489 F. 2d 567 (5th Cir. 1974) (case transferred to M.D. Tenn.).

⁵ *EDF v. TVA*, 468 F. 2d 1164 (6th Cir. 1972) (Case dismissed in D.C., transferred to N.D. Alabama, then transferred to E.D. Tenn.).

⁶ *NRDC v. TVA*, 459 F. 2d 252 (2d Cir. 1972) (venue denied in S.D. N.Y.); case brought in E.D. Tenn., 367 F. Supp. 128 (E.D. Tenn. 1973).

might force citizen groups to curtail severely their monitoring and oversight of the federal government functions which are crucial to our national democratic tradition.

All parties will face additional litigation costs and delays because the vague and imprecise language of the bills will require needless threshold litigation on the issue of venue. As a result, parties will be forced to litigate a lawsuit on the issue of where to litigate the merits of their case. This is an irrational and wasteful use of precious judicial resources, particularly at a time when all federal courts are jammed with cases and the costs of litigating are constantly rising.

Under both bills, courts will have to determine the meaning of "substantial portion," "impact," and "injury." Does substantial mean just over 50 percent, or must it be 60 percent, 70 percent or even 80 to 90 percent? What kind of impacts or injuries must a judge consider: only economic, or environmental, social, aesthetic, and political too? Are all of these to be weighed together, and if so, how are they to be balanced?

Passage of the Laxalt bill will also require courts to decide in which district or districts the impact or injury lies. What happens in a situation where no impact or injury is immediately felt or can be estimated as a result of the promulgation of national environmental regulations? Where does one sue? What happens if the impact is about the same everywhere in the country, and no substantial portion of the impact can be located? Should District of Columbia suits be allowed in such a situation?

The DeConcini bill will produce extensive threshold litigation over the meaning of the word "issue"; the phrase "less than nationwide in scope"; and the location of the judicial district in which the issue "arise" or the impact "occurs." Even a seemingly simple case will raise complex venue questions. For example, Congress passes a bill to build a dam in Nevada. Construction of the dam creates jobs in Nevada, but will flood precious farm land in Utah. If the "issue" in the case is the siting of the dam, then it could be argued that the District of Columbia has venue because that is where Congress enacted the law creating the dam. However, if the dam is not built, the loss of jobs will impact Nevada, in which case the suit should be heard in Nevada. On the other hand, if the dam is built, Utah farm and/or park land will be destroyed, thus indicating that the case must be tried in the Utah district court. Finally, because federal money was used to build the dam and purchase the farm land, it could be argued that the issue really raised is nationwide in scope, allowing suit to be brought anywhere.

Under the DeConcini bill, it will also be difficult to determine where a case should be tried if it contains a number of issues, some of which are nationwide in scope and others which are local. Does the judge rule that because the primary issue is nationwide in scope, the case should be heard in the District of Columbia? Should he weigh the severity of the various issues, and if so, what weight should be given to each issue? Or must he split the case and have the national issues tried in the District of Columbia, and the "local" issues tried in the appropriate district court?

Finally, the effect of the two bills may be to keep cases from being litigated in federal courts, or to split causes of action. In many cases, an issue involves the interpretation of two statutes. A situation could arise where one of the statutes has its own venue provisions which are in conflict with those in the Laxalt bill; or cannot be classified as a statute relating to the environment for purposes of the DeConcini bill. Either a federal court could not hear the case because it would have to be dismissed on grounds of improper venue, or plaintiff would have to split his cause of action.

The bill's sponsors claim that restricting venue to districts in which an affected project is located would insure consideration by courts that are more "familiar" with the issues and more "accountable" for their decisions. This claim is based upon an erroneous view of the nature of the issues involved and a misconception of the function of federal courts. As discussed above, a large proportion of cases against the federal government deal with governmental procedures under the Administrative Procedure Act and a multitude of other statutes. In many cases, it is the D.C. Circuit that is most knowledgeable and familiar with the complicated procedural issues involved in these cases, not the district court in which an affected project happens to be located. To eliminate the D.C. Circuit as a venue choice would deprive litigants of the benefit of that court's decades of experience in grappling with similar issues of procedure and statutory construction, a result opposite from that intended by these bills.

Nor can these bills be justified by the claim that they will increase judicial "accountability" and enable judges better to serve public policy. This claim

assumes that federal judges pay more attention to their decisions when they affect a nearby geographical area than when the effects are less tangible, an assumption that is both speculative and likely erroneous. Federal judges are not politicians. They are appointed on merit, and are accountable to the nation and its system of laws as a whole rather than to any particular district or electorate. Nor are the legal questions decided by these judges political referenda; the questions are decided by reference to the Constitution and to relevant statutes, not by taking an opinion poll. The function of the federal judge is a specialized one which should not be confused with the role of a federal legislator. The judicial role is not, as has been stated by Senator DeConcini,⁷ to serve the public interest by balancing various social, economic, and environmental factors, but rather to judge whether the actions of legislatures in balancing these factors is in accordance with recognized constitutional, statutory and procedural requirements.

Moreover, there is no evidence that the D.C. Circuit performs this function to any lesser degree than any other circuit. In fact, it has been our experience with the D.C. Circuit that it is no more liberal, or otherwise political, than any other. Certainly the D.C. Circuit is not unduly "friendly" to environmental plaintiffs. EDF, NRDC, and other similar groups have lost as many cases in the D.C. Circuit as they have won. It might also be noted that eliminating the D.C. Circuit would do little if anything to increase the speed with which such cases are brought. In fact, the U.S. Court of Appeals for the District of Columbia hears cases more quickly than several other circuits, notably the 5th and 9th circuits, and the D.C. District Court hears civil cases more quickly than any other district court in the country. (Administrative Office of U.S. Courts, 1978 Annual Report of the Director, Tables B-4, C-5).

II. PARTICULAR PROBLEMS WITH EACH BILL

In addition to the general problems we find with the two bills, each of them contains specific defects which make it unwise for the Senate to pass them.

S. 1472

1. S. 1472 only deals with environmental cases and does not affect litigation on other federal defense suits. However, if, as stated in the Congressional Record, one purpose of the bill is to restrict the hearing of such cases to areas where an impact is felt, the bill is inexplicably narrow. There are dozens of other statutes, dealing with such matters as economic regulation, labor law, housing, and urban or rural matters, to mention only a few, in which the "issue raised or the impact or injury alleged is less than nationwide in scope." Presumably the same arguments for restricting venue would apply to cases arising under these statutes, but they are nowhere mentioned in the DeConcini bill. Why should environmental plaintiffs be treated any differently with regard to venue than other plaintiffs attacking federal administrative action? Is the equal protection clause of the First Amendment violated by such legislation? Moreover, it is significant to note in this regard that it has been held that requiring a litigant to travel thousands of miles to prosecute a legal claim is not only unjust and highly inequitable but virtually a denial of the litigant's right to bring the action. (*Ragini v. Butterfield*, 115 F.Supp. 953 (D. Mich. 1953).) In other words, both equal protection and due process issues lurk here.

2. The DeConcini bill has a serious flaw in its definition of the meaning of "environmental" legislation. The bill lists eight statutes which the courts have considered to be environmental legislation, but then proceeds to list no less than 53 other statutes which "might" be considered environmental regulation, including the Federal Aviation Act, the Federal Energy Administration Act, and the Department of Transportation Act. The enormous problems that would be involved in fashioning a precise definition of "environmental" regulation, including the generation of a great deal of threshold litigation, seems to indicate that this attempt at classification would in itself result in more unnecessary expense and inconvenience than the bills are supposedly designed to remedy.

3. Taxpayers would also be put to needless expense by this bill. For instance, present Department of Justice practice requires close coordination on all environmental cases between headquarters in Washington, D.C., and the United States Attorney's offices. In situations where there is no local interest, but where Department of Justice attorneys are involved, this proposed bill would require

⁷ 125 Cong. Rec. 59,126 (daily ed. July 10, 1979).

needless trips by them from D.C. to local venues. Moreover, witnesses from agencies located in the District of Columbia would have to spend extra travel time and expense to get to distant localities. This expense will be unnecessarily burdensome where there is no particular local interest in the suit.

S. 739

1. This bill eliminates "national" lawsuits from consideration by courts in Washington, D.C. Thus, a corporation in Seattle with exactly the same problem with a national regulation as corporations in Miami or Dallas or Chicago or New York might have to file in four separate districts to get resolution of the same issue. As a result, trade associations, one of whose functions is pooling the resources of many corporation resources in fighting national issues, would not be able to file in the District of Columbia on behalf of all constituent corporations. Additionally, judicial resources would be severely strained by suits in many different districts, where now one suit in one district suffices. Moreover the caseload at the Department of Justice will be increased needlessly by being forced to litigate the same issue in several forums. Further, with the same issue moving through district courts to courts of appeals in different circuits, the probability of conflicting decisions is increased, resulting in legal chaos and a greater load for the Supreme Court.

2. S. 739 has impacts far beyond environmental suits. What if an FBI agent headquartered in Washington, D.C., is speciously accused of illegally wiretapping radical groups all around the country? Should he have to travel to every district courthouse in the country or should he be able to consolidate all the matters and transfer the cases to the District of Columbia? In other words, the potential created by this bill for harassment of federal officers with personal monetary liability is a veritable Pandora's Box. Also, the impact of this provision should be discussed with civil rights groups, consumer and health organizations, and labor unions, to name but a few of the groups which will be affected.

III. CONCLUSION

EDF and NRDC strongly oppose passage of S. 1472 and S. 739. The bills create an arbitrary per se rule which declares all environmental suits in the District of Columbia to be inconvenient. Such a rule will destroy the flexibility which the existing venue laws provide the federal courts for solving the problems of inconvenience and injustice that can arise between litigants. Instead of making venue determinations simpler and easier, the language of the bills will create tremendous threshold litigation, forcing parties to engage in prolonged litigation to determine the place where the case may be tried. As a result, lawsuits will become more costly, and national projects and programs will be delayed while courts sort out the venue issues.

In general the bills will also eliminate the plaintiff's traditional right to choose the location of his suit. Specifically, they will prevent both environmental and industrial plaintiffs from bringing suits in the District of Columbia even though it may be the most logical forum for financial, strategic, or convenience reasons. The only "benefit" from the two bills is that a handful of environmental cases otherwise brought in the District of Columbia would automatically be transferred to other forums. But these cases could be transferred now under existing venue law if the Court is presented with a strong 28 U.S.C. § 1404(a) argument. Thus, there is no reason for changing the venue laws, and the present statutory framework should be kept intact.

We thank the Committee for the opportunity to make our views known, and hope they will seriously considered.

PREPARED STATEMENT OF PETER J. HERZBERG

Mr. Chairman, members of the Committee, my name is Peter Herzberg. I am pleased to appear at your invitation to present the views of the Sierra Club Legal Defense Fund with regard to S. 1472 and S. 739, both of which seek to add special venue provisions to Title 28 of the United States Code.

The Sierra Club Legal Defense Fund is a nonprofit, public interest law firm providing legal services regarding environmental matters to its clients, Sierra Club and other environmental organizations. In the course of this environmental practice, we oftentimes find ourselves litigating in federal courts. In fact,

Sierra Club Legal Defense Fund, which currently has 4 offices in Alaska, California, Colorado, and the District of Columbia, has been involved in legal actions in every circuit of this country. We therefore feel particularly qualified to comment on these venue bills.

We oppose both S. 739 and S. 1472. Our opposition not only stems from the arbitrary result that the District of Columbia will be precluded per se as a forum for "local environmental litigation," but also that both bills can only result in greater expense, inconvenience, and delay to all litigants in environmental suits, including industry, the United States government and environmental groups. It is also our position that to change the existing venue rules (which prevent suits in forums inconvenient to the party or witness, or inconsistent with the interests of justice) for environmental suits is unacceptable, since it would provide inflexible rules in a situation where flexibility is mandated and will unnecessarily target environmental suits for different venue treatment than the venue process for suits under other statutes.

I. ANALYSIS OF S. 739 AND S. 1472

Either S. 739 or S. 1472, if passed, would have the ironic and unintended result of increasing both expense and inconvenience for all parties in environmental litigation. This is due to each bill's vagueness of definition and guidance. For both bills only allow courts in the District of Columbia to hear issues of a "nationwide scope." But what does "nationwide scope" mean? Needless to say, court resolution of such vague language will require needless, costly and time-consuming threshold litigation on this issue. As a court cannot even consider the merits of any party's contentions until the venue issue is resolved, a project may be held up for longer periods pursuant to these bills than would occur under existing environmental law procedures.

For example, under S.1472, a court—by necessity—will have to hear prolonged and lengthy argument by the parties on whether the subject of litigation is "nationwide in scope"; whether the Act of Congress that is in controversy relates to "environmental quality"; whether the issue arises in "one or more jurisdictions"; and whether a "substantial portion of the alleged impact or injury occurs in a given judicial district." What are the "issues," what is a "substantial portion," where does the "impact" or "injury" or both occur? For example, is pollution impacting a national park or national wildlife refuge "nationwide in scope" in that all citizens of this country contribute to the upkeep of these federally designated areas and in that all citizens have the potential to enjoy or support the objectives for these areas? Is a National Environmental Policy Act issue that may legally impact federal action all over the country—although it happens to be raised with regard to one project—"nationwide in scope?" As another example, consider the schedule of a job-producing dam project planned to be constructed in one district which would substantially flood precious land in another district—say a dam in Arizona impacting land in Nevada. In which jurisdiction has the "issue" arisen? In which jurisdiction has a "substantial portion" of the alleged "impact" occurred? Where has the alleged "injury" occurred? Who is to decide?¹

Thus, these bills will only exacerbate the major problems facing our judicial system today: court delay and the expense of litigation. Additionally, these bills would create uncertainty for all plaintiff parties—industrial, governmental, environmental—as to where suits are to be filed, when certainty with regard to venue is required.

Moreover, we feel these bills are simply unnecessary. We are, in fact, unable to understand why Congress would wish to replace the existing, flexible rules of venue that have existed for over 100 years with a rule that ignores the needs, convenience and desires of industry, government and environmental groups. For both S. 739 and S. 1472 are premised on the inflexible notion that the importance of having a case tried locally outweighs all considerations of convenience and fairness to the litigants, no matter how convincing those considerations are in an individual case. But defendants—like the government—may welcome litigation of a local case in a non-local court. For example, the federal government may wish to litigate a citizens suit about a pollution problem in Wisconsin in District of Columbia courts where the federal government's environmental experts and decisionmakers are located.

¹ Note that these definitional problems are not limited to S. 1472, for S. 739 also requires determination of whether "substantial portion of the impact or injury occurs in one or more judicial districts." As can be readily seen from the brief examples above, it is difficult to determine what is a "substantial portion," an "injury" or an "impact."

Additionally, many environmental cases involve only issues of law that can be decided by summary judgment; the government may welcome a District of Columbia forum, since its environmental lawyers—the only persons involved in these cases—are located here. Additionally, industry often prefers to sue in the District of Columbia, for, in point of fact, it is not uncommon for local cases to generate no local interest (as where a local industry or a subsidiary of a major corporation sues on the application of complex environmental regulations to its particular pollution control efforts); nor is it uncommon for both the government and industry to prefer to litigate in the District of Columbia since leading lawyers specializing in complex environmental regulations may be located here. Furthermore, industrial plaintiffs may wish to bring suit in the District of Columbia in those situations where all records and witnesses are in the District of Columbia, where District of Columbia counsel appeared before the federal administrative agency and thus is most familiar with the facts before the administrative agency, where costs of litigation to the plaintiffs in the District of Columbia are significantly less (due to lower transportation costs and less traveling time for experts), where the legal issue is one in which the District of Columbia courts have experience and thus could expedite a decision, or where the local litigation would be coordinated with national litigation and conducted by the same counsel using the same strategy. But all plaintiffs—industrial and environmental—would be precluded from bringing a suit in the District of Columbia under the two bills being considered.

Finally, most environmental suits against the federal government by industry and environmentalists challenge government procedures rather than substantive action. In these matters, most of the defendants, witnesses, and often the plaintiffs are located in the District of Columbia. Additionally, the action location of the project in issue is irrelevant to the procedural issue to be resolved. It takes little imagination, then, to realize that the disruption of an agency's daily activities—as Secretaries and members of the agency's expert staff are torn away from their Washington headquarters to defend an action required to be brought in a local court—may cause long delay on other important environmental decisions required prior to undertaking an industrial project. Thus, the result of these bills could increase the delay and costs already experienced by industry under current environmental laws.

The justification for these bills, then, cannot fairly rest upon the inflexible notion that bringing a case in a local forum always outweighs the convenience or fairness to the parties. Nor can a justification for these bills be that the local judicial district is more accountable or perhaps more familiar with the issue in controversy. For to state the proposition that a nonlocal judicial district is less accountable than a local one in rendering a decision is to fundamentally misunderstand our entire judicial system. Judges decide questions by reference to the Constitution and to relevant statutes. Their job is not a political one; rather it is to construe the law in accordance with recognized constitutional, statutory, and procedural requirements. Judges perform their tasks regardless of whether their decision affects only a nearby area or is nationwide in scope.

And it cannot be said that a local judge is more familiar with a particular controversy. If anything, the inherent complexity of environmental issues in combination with that portion of a case dealing with governmental procedures and statutory construction—the very type of issues that the D.C. Circuit has had years of experience in resolving—require the conclusion that the proposed bills would often preclude the very judicial circuit that is most familiar with the issues and most capable of issuing a well reasoned and informed judgment in the matter in controversy. Finally, as few cases go to trial and as few cases involve local witnesses (as opposed to expert witnesses), there is little need for mandatory review by the local judiciary.

Thus, there is a sound reason in allowing local cases to be heard either in the locale or, if preferred, the District of Columbia. Existing venue statutes allow for this flexibility: cases can be heard in the District of Columbia and yet transfer of appropriate litigation is allowed to locales in appropriate cases—i.e., where a particular case warrants that a case be resolved in the interest of fairness by the judicial circuit closest to the alleged impact (be it for local understanding of a particular problem, for the convenience of the witnesses, or simply in the interest of justice), the current law provides a mechanism to transfer to local jurisdictions. For example, pursuant to the existing venue provision in 28 U.S.C. 1404, District of Columbia courts have transferred numerous cases where the controversy involved is local in nature, e.g. *Southern California Ass'n of Government v. Kleppe*,

413 F. Supp. 563 (D.D.C. 1976); *Municipal Distributors Group v. F.P.C.*, 459 F. 2d 1367 (D.C. Cir. 1972); *Norair Engineering Associates v. Noland Co.*, 365 F. Supp. 740 (D.D.C. 1973); *Pruess v. Udall*, 359 F. 2d 615 (D.C. Cir. 1963); where a majority of the witnesses are located in a specific locale, e.g., *Starnes v. McGuire*, 512 F. 2d 918 (D.C. Cir. 1974), and *Wren v. Carlson*, 506 F. 2d 131 (D.C. Cir. 1974); and in the interests of judicial economy, e.g. *Celanese Corp. v. F.E.A.*, 410 F. Supp. (D.C. Cir. 1976). So too in environmental matters, courts have recently transferred environmental suits out of the District of Columbia where "inconvenience" or "local interest" pertain. In the matter involving the Tennessee-Tombigbee Waterway, the District Court for the District of Columbia moved this significant environmental matter on the motion of the intervenor to the Northern District of Mississippi pursuant to 28 U.S.C. 1404, because the District of Columbia was inconvenient for the parties and witnesses. Also transfers were made in cases involving the Russell Dam in South Carolina and the Cross Florida Barge Canal.

Accordingly, the District of Columbia courts have been sensitive to transferring cases out to the district where the project is located by using the special venue provision in 28 U.S.C. 1404. Thus, we find the current law satisfactory to deal with venue problems.

In summary, the two bills would only make the existing venue system worse in that they could increase expense, delay and inconvenience for all of the parties concerned—including industry and government—in those cases where a District of Columbia forum is appropriate. Furthermore, the two bills provide inflexible rules in situations where judgments need to be made according to the particular situation before the court. Finally, as written these bills would create excessive delay and unnecessary costs while the parties litigated threshold issues of venue.²

II. CONCLUSION

For the foregoing reasons, the Sierra Club Legal Defense Fund does not advise passage of S. 1472 or S. 739. Nor do we believe it wise to legislate any other inflexible venue rule mandating that cases be moved out to locales when there is intervention by local citizens. For instance, in an interstate pollution case where impacts and injury are felt in many states all in different judicial districts (e.g., a suit over sulfur dioxide pollution from Ohio causing acid rain in West Virginia, Pennsylvania, New York, Massachusetts and provinces in Canada), venue may be appropriately and most conveniently in the District of Columbia; a citizen in Massachusetts should not inconvenience all parties by being able to move the case to the citizen's residence, let's say Springfield. Accordingly, flexibility to be exercised on a case-by-case basis must be the key in venue decisions so that abuses do not occur.

We therefore believe that the venue laws should not be tinkered with at all. They have worked for over 100 years and are adaptable to today's litigation environment. Moreover, environmental laws should not be targeted for these venue changes, the reasons for limiting sites for bringing a suit in an environmental case are no different than those in an antitrust or welfare or labor case. No action therefore should be taken on these bills or any other proposal to limit venue in environmental cases. It simply makes no sense.

PREPARED STATEMENT OF JOEL T. THOMAS

Mr. Chairman, members of the Committee, my name is Joel T. Thomas. I am General Counsel to the National Wildlife Federation. I would like to begin by expressing the National Wildlife Federation's appreciation of your invitation to us to testify at these hearings today. By way of introduction, I would like to point out that the National Wildlife Federation is the nation's largest non-governmental conservation organization. Originally organized in 1936 and subsequently incorporated in 1939 under the Non-Profit Corporation Law of the District of Columbia, NWF is today a nationwide conservation-education organization dedicated to the wise use and perpetuation of the natural resources of North America. Individual

² One final comment which applies most directly to S. 1472: why single out environmental litigation for special treatment? If the purpose of this bill reflects a Congressional intent to decentralize government by restricting the hearing of cases to areas where the impact of a project is felt, why should such Congressional intent not apply to labor cases, tax cases, welfare cases, or cases where plaintiffs attack and Federal administrative action?

members of clubs affiliated with NWF's state affiliate organizations in each of the fifty states, as well as Guam, Puerto Rico and the Virgin Islands together with the Federation's own associate members and supporters total more than 4.1 million persons.

In addition to the Federation's many other activities, it maintains a staff of ten attorneys who are actively engaged in the practice of environmental law. As a consequence, NWF is a major environmental litigant. We are here today to testify on the two bills now before this Committee, S. 739 and S. 1472 because we believe that the enactment of either of these bills would impair the access of the National Wildlife Federation, its state affiliate organizations and its individual members and supporters to the federal courts.

After a review of both bills, NWF has concluded that the primary effect of the enactment of either of these proposals would be wasteful, time-consuming, expensive and non-productive litigation simply to determine what is "nationwide in scope," what laws are "environmental" laws, what is to be done when a complaint alleges injury under an "environmental" statute and a "non-environmental" statute or the United States Constitution, or whether a particular issue arose in or a substantial portion of the alleged impact or injury will occur in a given judicial district.

None of this litigation will, in NWF's opinion, be productive. It will not resolve the real conflict between parties. It is merely procedural litigation which will not help resolve the real issue.

Both bill presuppose or imply a lack of faith in blind justice. At the least they evidence a desire to make sure that justice is not, in fact, blind. In this connection, we are particularly disturbed by Senator Laxalt's description of the Ruby Lake litigation which apparently prompted him to introduce S. 739.

What disturbs us about Senator Laxalt's description of the Ruby Lake litigation is his failure to even allege that the Court was wrong on the merits. If the court was right, then who cares if the judge was sitting here in Washington, D.C. or in the state of Utah? In any event, the facts or considerations reiterated by Senator Laxalt are clearly irrelevant to the resolution of the issue presented to the court in that litigation.

The arguments related to the convenience of witnesses and litigants put forward in support of both of these measures lack merit. In the first place, the United States government is the most common defendant in environmental litigation. Because the decisions are made by officials here in Washington, actions are commenced here.

In the second place, the "record," the only thing the Department of Justice claims is relevant in most environmental cases, is usually located in whole or in part here in Washington.

Thirdly, it has been the National Wildlife Federation's experience that local witnesses are not very common in environmental litigation. Indeed, the vast majority of the environmental cases are disposed of on motions for summary judgment which means that there are no live witnesses. In those cases in which witnesses are necessary they are often expert witnesses who are not from the judicial district in which the action would be brought under these bills. Thus, they would, have to travel anyway. Finally, in the last five years NWF has had only two cases to full-blown trials. Both of these cases it should be noted, were tried in federal district court in the district in which they would have to have been filed had this legislation been in effect. In view of this, NWF sincerely questions the need for this legislation.

In the statement he files when he introduced S. 1472, Senator DeConcini noted that of the 519 environmental cases commenced in district courts during the 12-month period which ended June 30, 1978, only 37 were brought in the District of Columbia. He also pointed out that, of the 155 cases filed in the U.S. Court of Appeals for review of orders of the Environmental Protection Agency during the same 12-month period, 33 were filed in the District of Columbia. Unfortunately, the Senator did not go on to explain how many, if any, of those would, in fact, have been filed elsewhere and most, if not all, of those which would have to have been filed elsewhere had this legislation been enacted, would have been transferred anyway under the forum non conveniens doctrine. Indeed, it has been the Federation's experience that it is difficult, if not impossible, to retain a case in the federal courts in the District of Columbia over a motion to transfer by a defendant or an intervening defendant if the conditions which would have required its filing elsewhere under this legislation are, in fact, present. Thus, we do not believe that this legislation is needed to attain its claimed results.

In the Federation's view, Section 1404 of Title 28 of the U.S. Code, which provides statutory authority for the forum non conveniens doctrine, already provides for the transfer of cases where "the interests of justice" would be served. It has been our experience that the courts of the District of Columbia can and will transfer cases which are not national in scope when the issue arose outside the District of Columbia or the major impacts or consequences of the decision would be felt outside of the District of Columbia. Just last year, the U.S. District Courts for the District of Columbia transferred a case which the Federation brought against the Secretary of the Army and others in the District of Columbia to the District of South Carolina, since in the court's opinion, the action was primarily concerned with the proposed expansion of the Port of Charleston and did not present an issue which was national in scope. In short, it appears to the Federation that the doctrine of forum non conveniens incorporated in Section 1404 of Title 28 of the U.S. Code is entirely adequate to handle the problem this legislation addresses. Because of this, we believe that the primary effect of the enactment of either of the measures now under consideration would be the fostering of useless litigation over whether or not a particular case had to be transferred, not in the interest of justice, but in order to comply mechanically with a venue statute. We believe, therefore, that the flexibility under Section 1404 should be continued unimpaired unless there is substantial evidence of abuse which we have not seen.

The Federation fails to understand why environmental cases should be chosen for special venue treatment. We see no reason why labor cases, tax cases, welfare cases and many other types of cases are not equally appropriate candidates for transfer to local venues. In short, if the Congress believes that justice should be decentralized, then it seems to the Federation that all cases should be decentralized, not just environmental cases.

Finally, the Federation sees no reason to reject wholesale and without careful individual analysis the many specific venue provisions of various "environmental" laws which would be superceded by the proposed legislation. Does this committee believe that all of the Senators on those other committees were mistaken when they took the time and the trouble to write specific venue provisions? The Federation thinks not. Indeed, the Federation thinks that those various venue provisions were, in general, the result of careful and prolonged analysis of a type which these bills intend to short-circuit and were responsive to specific needs and to a careful balancing of the various interests at stake. For example, the Surface Mining Act of 1977 provides that suits involving state implementation plans are to be brought in the state whose plan is at issue. Under the proposed legislation, a suit challenging Ohio's implementation plan could be brought in Kentucky if the plan would result in pollution of the Ohio River which is in Kentucky.

Similarly, under the citizen suit provision challenges involving the operation of a particular mine are to be brought in the district where the mine is located. Under S. 739 or S. 1472 such actions could be brought in an adjacent district if impacts from the mine would be experienced there. Similar results could occur under the Clear Water Act as well. In other cases, where the impacts of some activity would be spread over several states forum shopping could be far greater under the proposed legislation than under current law since the case could be brought in any judicial district where substantial injury or impact would occur. In short, these proposals could increase, not decrease forum shopping.

In conclusion, the National Wildlife Federation believes that the present venue provisions of the U.S. Code and particularly Section 1404 of Title 28 are completely adequate to handle the problem which S. 739 and S. 1472 are aimed at and sees no reason for the enactment of new legislation in this area, especially since the legislation would, in all probability, do little other than to result in useless procedural litigation over whether or a suit had been commenced in the right district. In view of this, the Federation strongly recommends that no further action be taken on these proposals.

The last witness will be John Vance Hughes, representing James Moorman, Assistant Attorney General, Department of Justice.

Mr. Hughes, please introduce your colleagues.

PANEL OF GOVERNMENT OFFICIALS:

STATEMENT OF JOHN VANCE HUGHES, REPRESENTING JAMES MOORMAN, ASSISTANT ATTORNEY GENERAL, LANDS AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY RICHARD STOLL, ENVIRONMENTAL PROTECTION AGENCY, AND ANNE SHIELDS, DOJ

Mr. HUGHES. Jim Moorman, Assistant Attorney General, intended to be here. Your staff was courteous enough to let us push him to the end because we had a conflict. The conflict continues. Unless he walks in while I am talking, I don't expect he will make it.

Dick Stoll is with the Environmental Protection Agency. He will answer questions as they pertain to EPA.

On my left is Anne Shields, a member of the staff of the Land and Natural Resources Division, Department of Justice.

Mr. Chairman, let me thank you for the opportunity to express the Department of Justice's views on S. 739 and S. 1472. These bills would modify the venue provisions of title 28 of the United States Code for certain actions brought against Federal agencies and officials in both the Federal district courts and the courts of appeal.

The present venue statute provides a wide choice of Federal courts in which a plaintiff may bring civil action against a Federal agency, officer, or employee. The plaintiff, under section 1391(e), may choose to bring his case either in the district in which the action arose, the district in which the defendant resides, the district in which real property involved in the case is located, or, if no real property is involved, the district in which the plaintiff resides.

We can understand that there is an intense "local" interest in some cases whose effects are elsewhere than in the District of Columbia, and we are aware of a few instances, such as the Ruby Lake case, *Defenders of Wildlife v. Andrus*, in which such intense local interest might have been better satisfied had the case been tried in the area where the impact occurred. As the Supreme Court stated in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 510, 509, 1947:

In some cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

We agree with you that there is a problem. We have given some thought as to how to solve it. We think the problem is a limited one which can be addressed by measures less sweeping than either S. 739 or S. 1472 encompasses. But we believe that certain actions could be taken which would help to meet your concerns, and I will make an alternative suggestion toward the end of my testimony in that regard.

S. 739, Senator Laxalt's bill, would supersede the present venue rule if it is determined that a substantial portion of the impact or injury is in one or more judicial districts. In such a case, the action must be brought in one of such judicial districts.

S. 1472, your bill, requires that any civil action—whether or not a Federal agency is the defendant—relating to environmental quality

in which the issue raised or injury alleged is less than nationwide in scope must be brought in a judicial district in which the issue arises or in which a substantial portion of the alleged injury or impact occurs.

In the interest of time I will go to the portion of the testimony in which we raise specific concerns.

The Department of Justice is concerned about the effects this legislation would have for several reasons: First, the language of both proposals is too vague to afford a speedy interpretation. A judge, faced with the question of deciding where "substantial injury or impact" occurs, may be required to spend a great deal of time on what should be and under the present statute is a threshold, easily resolved question. This new language could lead to long delays. S. 1472 exempts from coverage issues that are "nationwide in scope" and applies only to "environmental" matters; this language is also vague and subject to various interpretations. There will undoubtedly be much litigation before the meaning of "nationwide in scope" or "environmental" is made clear.

Second, we believe that both bills could have a deleterious effect on convenient forum provisions and result in forcing cases into inconvenient forums.

Third, there are many special venue provisions in environmental and other laws. This legislation would override many of these provisions without taking a close look at why they are there in the first place.

Fourth, it is possible that both these bills may force venue in a district which would not have jurisdiction.

And finally, we believe that the present venue statute is working in an adequate and just manner. There are not an inordinate number of cases tried in the District of Columbia and the Department of Justice makes an effort to transfer cases to a local forum when the issues are ones which could be better handled there.

With your permission I will put the rest of the statement in the record and proceed to the portion of the testimony dealing with alternatives we have been considering.

Senator DECONCINI. Without objection, the balance of your statement will appear in the record at the conclusion of your oral testimony.

Mr. HUGHES. We have given some thought to your purpose which, as we see it, is to let people know about and have a chance to be part of litigation which affects them. We think this could be accomplished short of what we feel to be too broad a remedy contained in this legislation.

Our best suggestion is a combination of a new notice requirement and an amendment to the transfer section, section 1404(a), to establish a presumption in favor of transferring cases in which the impact is primarily local.

Briefly our idea is as follows: There would be an additional notice requirement on plaintiffs who file suit against the United States or an officer of the United States in the Federal District Court for the District of Columbia. If that plaintiff determines that his suit's impact would be primarily local—defined in law as affecting fewer than, for instance, five States—then he would have a duty to notify the attorneys general of those States when the complaint is filed. Notice could be accomplished by sending a short form naming the case, all the parties,

the court, and the statute or rule involved or by sending a copy of the complaint. The plaintiff would have to file a certificate with the court listing those attorneys general he has notified, if any. This notification procedure should accomplish one of our purposes—namely, to let the States know about litigation which affects them in time to intervene and move to transfer the case, if they so desire.

As for the transfer section, 28 U.S.C. 1404(a), at the present time a judge has wide discretion in deciding on a transfer motion. He is to consider the convenience of the parties in the interest of justice but as a practical matter his discretion is almost unlimited. There have been many times when the Department of Justice, in defending a Federal agency in the District Court for the District of Columbia, has moved to transfer a case out of District of Columbia and into the area where the injury occurred or was felt.

Our suggestion is to amend section 1404(a) to create a presumption in favor of transferring cases filed against Federal agencies in which the impact is primarily local—possibly with the same five-State test as above. The burden would then be on the nonmoving party to show such a transfer would cause a substantial hardship.

I hope these comments are helpful to you in your review of this legislation. For the reasons stated, the Department of Justice cannot support passage of either of these bills in their present form. While understanding the concerns which your legislation addressed, we believe that current venue provisions are operating in a fairly effective, swift and just manner and that their operation is largely in line with what the bills' sponsors would require. To correct any miscarriage of justice which may have occurred in a few isolated cases, we believe it would be far preferable to accept our notice and transfer suggestions, or something similar, and leave special venue and general venue statutes as they are at the present time.

Senator DECONCINI. Mr. Hughes, thank you very much for your testimony. I wish you would express my thanks to Mr. Moorman.

Let me also express to Mr. Moorman, if he cares to make any statement regarding the *Hughes* case which was brought up earlier in the testimony this morning, we would be glad to receive it. I am under the impression, unless I hear otherwise, and I will continue to be under the impression, he did not participate in any of the defense of that case in any way because I recall very distinctly he said he would not when he was up for confirmation.

I do not want to raise the issue. I comment only that I feel Mr. Moorman has complied with his commitment to the Judiciary Committee that he would not participate. Only this morning was there any reference otherwise. I think upon questioning that was clarified.

The figures on environmental cases for the period of June 1978 to June 1979 show 30 out of 559 district court cases were brought in the District of Columbia and 95 out of 257 appeals from the EPA decisions were brought in the District of Columbia Circuit.

Are the appellate review figures that high because of specific District of Columbia review statutes or are there perhaps other reasons?

Mr. HUGHES. Perhaps I should let Dick Stoll respond to that.

I think it is a combination of factors as to why the figures are as you stated them. There are plaintiffs of several different kinds. There are plaintiffs of the type that were on the panel before me, the environ-

mental groups who bring some suits. A substantial number of the suits brought under the environmental statutes are brought by industry groups, and they choose for one reason or another to bring their suits here, either because of counsel or because of convenience to them in their corporate offices, and that sort of thing.

As to the specific requirements of the law that may be pushing the cases in that direction under the special venue provisions, Dick Stoll can speak more directly.

Mr. STOLL. I have not looked at the statistics. I am quite confident one reason that number is so high is that the Clean Air Act, Safe Drinking Water Act, the Noise Act, and the Resource Conservation and Recovery Act all do provide that review of national regulations must be in the District of Columbia Circuit.

We have had a lot of litigation on some recent national regulations like the significant deterioration regulations under the Clean Air Act, for instance. That accounts for a large number.

As I read your amendment, you would not apply it to cases of less than national scope. I don't think that would be affected by your amendment or Senator Laxalt's amendment.

Senator DECONCINI. The testimony we had this morning involved a case where the EPA entered into an agreement settling the case regarding the coal-fired plants in Arizona with regard to visibility protection standards. An interesting objection was raised; that is, that some of the parties who were involved, or might have been involved, really didn't have time to even intervene before some settlement was made.

What is the position of the EPA or the Justice Department when you have a case brought by an environmental group or a citizens group and you were there defending the Government? Do you attempt to make any contact with the industry or with the business or with the State which might be involved?

My question would refer to the air quality standards of a State plant which might not be approved by the EPA or might be approved by the EPA, and then a suit is brought by a citizen group. What do you do to try to involve what I call the real parties, but at least the other parties that have cause, perhaps, to litigation in the first instance?

Mr. HUGHES. It varies from situation to situation. Frequently the Justice Department lawyers and the Environmental Protection Agency, at least when I worked there, do have a lot of dialog with the State.

Senator DECONCINI. Mr. Moorman, feel free to join us. Mr. Hughes has done a fine job.

Mr. MOORMAN. I apologize. The Attorney General would not let me go.

Senator DECONCINI. I understand that. Mr. Hughes has completed your testimony. I want to thank you, Mr. Moorman, for making it available and offering constructive suggestions, particularly as to sec-

tion 1404 which might be offered to correct some of the problems we have here.

I gathered from your testimony, Mr. Hughes—and, Mr. Moorman, I suggest you would agree—that without a change in 1404 a moving party has a far heavier burden in transferring any case today.

Mr. MOORMAN. Yes, and there are no standards in the act to guide the judge, so it is essentially his discretion. We sometimes suspect whether or not he transfers the case depends on whether his interest is aroused. I wouldn't want to be taken too seriously but it is a feeling lawyers have sometimes.

Senator DECONCINI. Is there a departmentwide policy on transferring cases or is each division solely responsible for such motions?

Mr. MOORMAN. I know of no departmentwide policy. I am confident it does not exist. It is ad hoc in the lands division, depending on what we view as the most convenient forum and most likely to lead to success in the case. Lawyers tend to make the decision at the trial attorney level in consultation with their section chief. We have not so far even established a firm divisionwide policy, which is something we perhaps should do, especially in light of the fact there appears to be some controversy in the area.

Senator DECONCINI. Philosophically, Mr. Moorman, I find it very difficult, from the standpoint of representing a section of the country or State, not to have the first instance of such actions against the Government or even by the Government not to originate in the jurisdictional area. It seems to me to be far more in line with the purpose of justice to be in the locale where the offense is taken.

The environmental defense fund and others have pointed out some examples which really do not deal very much with the people in Alaska or in Micronesia on impact statements.

Would you care to expound a little on your philosophy of why at least S. 1472 and perhaps S. 739 philosophically are not a better approach toward bringing justice closer to the people who will be affected by the decisions more than the total public?

Mr. MOORMAN. I agree, generally, that litigation should take place close to the area where people are affected by that litigation. I think venue statutes have been written with two ideas in mind. One is to create certainty as to where venue lies, and the other to provide rather liberal options for the parties as to venue; in other words, not to constrict the choice of courts.

It has been a general assumption of students of venue, law professors and what have you, that this was a good tendency. I think it is only with these hearings that anybody has begun to really take a close look and see whether or not we have gone too far.

I've studied your bill, which addressed what you saw as a problem, and I think there is a small problem in the area. But I think it may go too far in the other direction, too quickly without our having a full opportunity to really examine all the ramifications. There are questions of whether or not it might inadvertently at times place venue where there is no jurisdiction, leaving jurisdiction where there is no venue, or where people cannot be served.

I am not quite sure under your particular bill whether, if the bill is passed as it now stands, we will not find miscellaneous and unus-

pecting groups of people all of a sudden coming to you and saying, "We can't bring our lawsuit. Did you intend that?" You will say no.

My feeling, then, is that perhaps you should take an intermediate step first to determine whether or not a notice provision and a provision of putting standards into the transfer section work. If that does not work over the course of a few years, go further. That is my view.

Senator DECONCINI. Is it safe to say that philosophically you agree that some changes are needed? Isn't it the magnitude and the technical implementation of some of those changes which raise some questions?

Mr. MOORMAN. Yes. I do disagree with you over the actual magnitude of the problem. I think the venue statute has been working fairly well. Certainly it has been working the way its original authors intended from the standpoint of certainty and choice. That might have created a small problem.

We know the bulk of the litigation even under the existing system does remain out in the country. Whether or not a few cases which have created controversy are the cause of all this, or whether it is a broadly based problem, is what I am uncertain about.

I think there have been a few cases where transfer would have been more appropriate and did not occur and where the suit more appropriately would have been brought out there, which might have caused legitimate concern.

I do not think, however, that it is a problem where there are large numbers of cases here which should be out there, and therefore that this is an urgent and pressing problem.

Senator DECONCINI. Nothing further.

Mr. Moorman, for the record, there was raised this morning in an opening statement by one of the witnesses question regarding the possibility that you participated in the defense on the Government side of some of the cases you were involved in when you were with the Sierra Club legal defense fund.

For the record would you care to restate the case?

Mr. MOORMAN. I don't know exactly what the allegation was. As you will recall from my confirmation hearings, this was an issue. I agreed at that time that I would disqualify myself from all matters in which the Sierra Club or the Sierra Club legal defense fund, with which I had been associated, were party.

Senator DECONCINI. You have done that?

Mr. MOORMAN. I have done that. We have a notification system around the division. Indeed, matters are not brought to my attention and I only learn about them in odd ways. I am basically out of those cases completely.

We have recently been in consultation with the Judiciary Committee and the White House and have made one minor modification in that.

In a case that is brought subsequent to my leaving the Sierra Club legal defense fund and where the Sierra Club is on the same side as the Government, and in which I have rendered no advice in the past—

Senator DECONCINI. How many cases does that involve?

Mr. MOORMAN. There have been a couple of those. The most important one was *Alaska v. Carter*, an important litigation where the State challenges the action of the President and the Secretary of the

Interior concerning land orders. After we got into the case the Sierra Club intervened together with a long list of people. It caused us to examine whether it was appropriate for me to have no contact with the matter which was of personal importance to the President and which was principally a Department of the Interior matter.

After discussion at length with the White House and communicating with the Judiciary Committee we came up with a set of rules, which I believe are somewhere in the files of the committee.

Other than that I have no contact with those cases.

Periodically, especially early on in my first year here, in three or four matters which did not involve the Sierra legal defense fund but other environmental organizations, questions have been raised by counsel as to whether I should participate.

My standard operating procedure in those matters is to refer the inquiry to the Department's Office of Legal Counsel and to follow their advice, whatever it is, as to whether or not I should be involved in the case.

I have four or five matters in which they have reviewed the situation.

Senator DECONCINI. That is fine. If you care to look at the statement filed this morning and make any other response, that is all right with me. I am satisfied you complied with your testimony at the confirmation hearing. I wanted the record clear.

Mr. MOORMAN. Thank you.

Senator DECONCINI. I have nothing further. I thank you very much for being with us this morning. Thank you for coming in.

[The prepared statement of Mr. Moorman follows:]

PREPARED STATEMENT OF JAMES W. MOORMAN

Mr. Chairman, members of the Subcommittee, let me thank you for the opportunity to express the Department of Justice's views on S. 739 and S. 1472. These bills would modify the venue provisions of Title 28 of the United States Code for certain actions brought against federal agencies and officials in both the federal district courts and the courts of appeals.

The present venue statute provides a wide choice of federal courts in which a plaintiff may bring a civil action against a federal agency, officer, or employee. The plaintiff, under Section 1391(e), may choose to bring his case either in the district in which the action arose, the district in which the defendant resides, the district in which real property involved in the case is located, or, if no real property is involved, the district in which the plaintiff resides.

We can understand that there is an intense "local" interest in some cases whose effects are elsewhere than in D.C., and we are aware of a few instances, such as the Ruby Lake case, *Defenders of Wildlife v. Andrus*, in which such intense local interest might have been better satisfied had the case been tried in the area where the impact occurred. As the Supreme Court stated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947):

"In some cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."

We agree with you that there is a problem. We have given some thought as to how to solve it. We think the problem is a limited one which can be addressed by measures less sweeping than either S. 739 or S. 1472 encompasses. But we believe that certain actions could be taken which would help to meet your concerns, and I will make an alternative suggestion toward the end of my testimony in that regard.

S. 739, Senator Laxalt's bill, would supersede the present venue rule if it is determined that a substantial portion of the impact or injury is in one or more judicial districts. In such a case, the action must be brought in one of such judicial districts.

S. 1472, your bill, requires that any civil action (whether or not a federal agency is the defendant) relating to environmental quality in which the issue raised or injury alleged is less than nationwide in scope must be brought in a judicial district in which such issue arises or in which a substantial portion of the alleged injury or impact occurs.

Both bills would also affect appeals from agency decisions, but in somewhat different ways. S. 1472 requires that all appeals from agency actions, decisions, or orders relating to environmental quality, in which the issue or alleged injury is less than nationwide in scope, be taken to the court of appeals for the judicial circuit in which the issue arose or a substantial portion of the alleged impact or injury occurred. S. 739, on the other hand, by amending 28 U.S.C. 2343, would add a substantial injury test to the determination of venue in the review of decisions from six agencies: FCC, ICC, Department of Agriculture, the AEC (successor agencies), the Federal Maritime Commission, and the Maritime Administration (within the Commerce Department).

The Department of Justice is concerned about the effects this legislation would have for several reasons: First, the language of both proposals is too vague to afford a speedy interpretation. A judge, faced with the question of deciding where "substantial injury or impact" occurs, may be required to spend a great deal of time on what should be and under the present statute is a threshold, easily resolved question. This new language could lead to long delays. S. 1472 exempts from coverage issues that are "nationwide in scope" and applies only to "environmental" matters; this language is also vague and subject to various interpretations. There will undoubtedly be much litigation before the meaning of "nationwide in scope" or "environmental" is made clear.

Second, we believe that both bills could have a deleterious effect on convenient forum provisions and result in forcing cases into inconvenient forums.

Third, there are many special venue provisions in environmental and other laws. This legislation would override many of these provisions without taking a close look at why they are there in the first place.

Fourth, it is possible that both these bills may force venue in a district which would not have jurisdiction.

And finally, we believe that the present venue statute is working in an adequate and just manner. There are not an inordinate number of cases tried in the District of Columbia and the Department of Justice makes an effort to transfer cases to a local forum when the issues are ones which could be better handled there.

I will go into each of these concerns in more detail.

Venue is a threshold question which must be resolved at the initial stages of litigation. Uncertainty with respect to forum will delay resolution of the merits of the lawsuit; and such delays will increase litigation costs for all parties involved. Questions of statutory interpretation would surely delay decisions as to the choice of forum and the expeditious conduct of litigation.

Let me give you some examples. The Bureau of Land Management promulgates grazing rules that affect 15 states. Where should a case contesting the rule be tried? EPA publishes a regulation which affects air quality standards in 50 states. Where should a case be tried? Or a dam is planned in one state which would affect the water supply in at least six others. Where should the case be tried?

It is our belief that the great majority of civil cases against the government are presently tried where there has been impact or injury, and not in the District of Columbia, the location of the defendant in many instances. As Senator DeConcini stated when he introduced his bill, "Of the 519 environmental cases commenced in the district courts during the 12-month period which ended June 30, 1978, only 37 were brought in the District of Columbia." And similarly, "of the 155 cases filed in the U.S. Court of Appeals for review of orders of the environmental protection agency during the same 12 month period, 33 were in the District of Columbia."

As of last September, the General Litigation Section of the Land and Natural Resources Division had 339 NEPA cases pending; of those only 37 were filed in the U.S. District Court for the District of Columbia. And the Civil Division reports that of the 17,816 cases they are currently supervising or handling, only 1,896, or just over 10 percent are before the federal courts in the District of Columbia. Of the 649 cases in the Civil Division in areas relating to environmental matters, only 25 are in Washington. Although the nature of these suits cannot be determined without individual examination, it seems clear that the purpose of this legislation is being fulfilled by the existing statutory provisions.

Many statutes enacted by Congress have special venue provisions in them, and we believe that, before any overriding change is enacted, there should be a further study of special venue provisions to determine why they are there and what their effects are at the present time.

For example, the Torts Branch of the Civil Division defends claims filed against the government under the Federal Tort Claims Act. That Act's venue provision permits suits to be brought either where the plaintiff resides or "where the act or omission complained of occurred." The Laxalt bill could eliminate the plaintiff's place of residence as a possible situs for institution of the suit, thus requiring Tort Claims Act suits to be filed where the accident or injury occurred, regardless of whether that situs coincides with the plaintiff's place of residence.

We may find that one general venue rule, though attractive for its simplicity and scope, may not always contribute to placing litigation in the forum most suitable to handle it expeditiously and justly.

It is open to question whether S. 739 would override special venue statutes although S. 1472 specifically does so. It is generally accepted that the present venue provision in § 1391(e), which Senator Laxalt's bill amends, has no significance where special statutes fix the venue of particular actions. Whether the addition of this substantial impact test would have an overriding effect would be another question that would surely involve protracted litigation.

Both S. 739 and S. 1472 seek to require exclusive venue in a district in which the substantial injury occurred or impact is felt. It is possible that if this legislation were enacted, venue would lie, in some cases, only in a district which would not have jurisdiction. Let me give you an example. A company in State X produces a toxic air emission which is carried entirely into State Y. All the impact is in Y. Venue under either S. 739 or S. 1472 is there. But the company does no business in State Y. If State Y's long-arm statute were insufficient to bring the company under its jurisdiction, then the case could not be brought in either state because there would be no jurisdiction in State Y and no proper venue in State X.

At the present time Section 1404(a) of Title 28 allows for the transfer of any civil action to any other district in which it might have been brought if such a transfer is for the convenience of the parties and witnesses. The amendment will necessarily have a limiting effect on this transfer provision and may require large numbers of officials and employees situated in the District of Columbia to travel extensively to participate or testify in distant forums. It may also be inconvenient for plaintiffs, defendants and potential intervenors alike in that documents may be more easily available to the court in the District of Columbia. For instance, the Department of Energy may have a rule on gasoline pricing in the Midwest. Several corporations bring suit. Their headquarters are here; their trade association is here. Voluminous DOE records are here. And the most convenient forum, for all the parties and witnesses is here. Perhaps in that case the District of Columbia would be the preferable forum.

S. 739 would amend Sections 2343 and 2112 of Title 28 of the United States Code relating to venue in appeals from federal agency actions. Section 2343 presently gives petitioners from decisions of agencies enumerated in Section 2342 a choice of venue "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court or Appeals for the District of Columbia Circuit." The D.C. Circuit is, for many litigants, the most convenient forum, not only as the official home of many federal officers and employees but also as the location of many corporations and nonprofit organizations. The records in complicated rule-making cases are also located here. Section 2112(a) allows for the transfer of proceedings "for the convenience of the parties and in the interest of justice." The possible elimination of the court often regarded as the most convenient, particularly in the context of complex litigation involving many petitioners, could undercut the purpose of present law to allow for litigation in a forum which is convenient for the parties and in the interest of justice.

As I stated earlier in this testimony, we have given some thought to how your purpose—to let people know about and have a chance to be a part of litigation which affects them—could be accomplished short of what we feel to be too broad a remedy contained in this legislation. Our best suggestion is a combination of a new notice requirement and an amendment to the transfer section (§ 1404(a)) to establish a presumption in favor of transferring cases in which the impact is primarily local.

Briefly, our idea is as follows. There would be an additional notice requirement on plaintiffs who file suit against the United States or an officer of the United States

in the federal district court for the District of Columbia. If that plaintiff determines that his suit's impact would be primarily local (defined in law as affecting fewer than, for instance, five States) then he would have a duty to notify the Attorney General of those State(s) when the complaint is filed. Notice could be accomplished by sending a short form naming the case, all the parties, the court, and the statute or rules involved or by sending a copy of the complaint. The plaintiff would have to file a certificate with the court listing those Attorneys General he has notified, if any. This notification procedure should accomplish one of our purposes—namely, to let the States know about litigation which affects them in time to intervene and move to transfer the case, if they so desire.

As for the transfer section, 28 U.S.C. 1404(a) at the present time a judge has wide discretion in deciding on a transfer motion. He is to consider the convenience of the parties in the interest of justice but as a practical matter his discretion is almost unlimited. There have been many times when the Department of Justice, in defending a federal agency in the district court for the District of Columbia, has moved to transfer a case out of D.C. and into the area where the injury occurred or was felt. I will give you two examples:

EDF v. Costle. Civil Action 77-1436. Suit was brought to test the adequacy of certain salinity control and water quality plans adopted by the States of the Colorado River Basin. The Department of Justice, on behalf of EPA, moved to transfer the case to Colorado. The court refused, even though he found that venue would have been proper in Colorado.

National Wildlife Federation v. Andrus, the Foothills Case, concerned a water supply facility in Denver. The Bureau of Land Management placed several environmental conditions on the permit to the Denver Water Board and the latter filed suit against BLM in Denver. Then the National Wildlife Federation filed suit in the District of Columbia to stop the construction on NEPA grounds. The Department of Justice filed a motion in the D.C. Court to transfer that case to Denver to join the cases there on the basis that the Denver case was filed first and the judge was more knowledgeable on the issue. The motion was denied.

Our suggestion is to amend § 1404(a) to create a presumption in favor of transferring cases filed against federal agencies in which the impact is primarily local (possibly with the same five-State test as above). The burden would then be on the nonmoving party to show such a transfer would cause a substantial hardship.

I hope these comments are helpful to you in your review of this legislation. For the reasons stated, the Department of Justice cannot support passage of either of these bills in their present form. While understanding the concerns which your legislation addressed, we believe that current venue provisions, are operating in a fairly effective, swift and just manner and that their operation is largely in line with what the bills' sponsors would require. To correct any miscarriage of justice which may have occurred in a few isolated cases, we believe it would be far preferable to accept our notice and transfer suggestions, or something similar, and leave special venue and general venue statutes as they are at the present time.

The record for this hearing will remain open for 2 weeks. At this time, without objection, we will have a resolution of the Upper Colorado River Commission inserted.

[The resolution follows:]

UPPER COLORADO RIVER COMMISSION,
Salt Lake City, Utah, September 20, 1979.

HON. DENNIS DECONCINI,
U.S. Senate,
4104 Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR DECONCINI: At its Annual Meeting held in Grand Junction, Colorado on September 17, 1979, the Upper Colorado River Commission adopted a resolution which supports S. 1472, a bill which you recently introduced into the Senate.

We are enclosing that resolution indicating the position taken by the Upper Colorado River Commission.

Very truly yours,

PAUL L. BILLHYMER,
Acting Executive Director.

Enclosure.

RESOLUTION OF UPPER COLORADO RIVER COMMISSION—Re: S. 739 AND S. 1472

Whereas, Senator Laxalt has introduced S. 739, a bill "To amend certain provisions of title 28, United States Code, relating to venue in the district courts and the courts of appeals"; and

Whereas, S. 739 provides that the proper venue for litigation of civil action against the United States shall be in the United States District Court for the area in which the major impact of the litigation will be felt; and

Whereas, Senator DeConcini has introduced S. 1472, a bill "To amend title 28 of the United States Code to provide for special venue provisions in cases relating to the environment"; and

Whereas, S. 1472 has the same purpose as S. 739 but is limited to litigation raising environmental questions; and

Whereas, many actions filed against federal agencies in the Federal District Court for the District of Columbia have a particular "local area" impact far from Washington, D.C.; and

Whereas, the interests of the "local area" are often not adequately represented because local interests are unaware of the suit and do not participate in the suit; and

Whereas, even if the local interests are made aware of the suit, the burden of trying a suit in Washington, D.C. often overtaxes the resources of the impacted local interest; and

Whereas current philosophy of decisionmaking seems to call for widespread interest participation, it would seem that means should be provided in the judicial process whereby local interests impacted by suits against federal agencies could be adequately represented; and

Whereas, the member States of the Upper Colorado River Commission, namely, Colorado, New Mexico, Utah, and Wyoming, have experienced the difficulties of defending their State interests in legal actions filed in the Federal District Court for the District of Columbia: now, therefore, be it

Resolved, That the Upper Colorado River Commission does hereby support the principle set forth in S. 739 and S. 1472 whereby venue for actions against the United States which have a major impact on a local area will be in the United States District Court for the area so impacted; and be it further

Resolved, That the Upper Colorado River Commission urges the passage of legislation accomplishing the purpose of the principle set forth in S. 739 and S. 1472; and be it further

Resolved, That copies of this Resolution be sent to the Governors of the four Upper Colorado River Basin States, to all members of the Committee on the Judiciary of the United States Senate, and all members of the Congressional delegations of the Upper Colorado River Basin States.

CERTIFICATE

I, PAUL L. BILLHYMER, Acting Executive Director of the Upper Colorado River Commission, do hereby certify that support for the principle set forth in S. 739 and S. 1472 was adopted by said Commission at the Special Meeting held in Teton Village, Wyoming on August 1, 1979, and at the Annual Meeting of the Upper Colorado River Commission held in Grand Junction, Colorado on September 17, 1979 the above Resolution was adopted in final form.

WITNESS my hand this 19th day of September, 1979.

PAUL L. BILLHYMER,
Acting Executive Director.

The subcommittee will stand in recess subject to call of the chairman.
[Whereupon, at 1:10 p.m., the subcommittee recessed, to reconvene at the call of the chair.]

APPENDIX

Additional Submissions of
James W. Moorman



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAR 19 1980

Mr. Jonathan M. Topodas
Counsel
Subcommittee on Improvements in
Judicial Machinery
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Topodas:

Thank you for sending me the pertinent pages of the transcript of the February 20, 1980 hearing in which Senator Hatch made certain charges about my conduct after joining the Department of the Interior.

I regret that this matter has been dredged up once again; the allegation that I engaged in unethical behavior has been determined to be false by everyone who has looked into it. Moreover, the allegation that the Department relinquished its authority over coal leasing to the Natural Resources Defense Council (NRDC) is equally false. Finally, Senator Hatch's new allegations — that my "principal occupation" was preparation of the new environmental impact statement (EIS) required by the federal court deciding the *NRDC v. Hughes* case, and that I "rewrote what was to become the formulation for the Federal coal leasing policy" — are even more ridiculous. I have never even read the EIS in question, and was not involved in any significant way in the formulation of the new coal leasing program.

To set the record straight on these points, I request that the enclosed materials be included in the hearing record, along with this letter:

1. Memorandum entitled "My Conflicts of Interest" which I prepared and signed on April 27, 1977, a few days after joining the Department, which set out my self-disqualification from certain matters I participated in during my previous employment with NRDC, along with the reasons underlying my decision.
2. An Affidavit I prepared and executed on March 27, 1978, which was submitted to the court in the *Hughes* case, in response to objections made by Utah Power and Light to court approval of the proposed settlement between the Department and the plaintiff because of my alleged role in it; the court dismissed the objection as frivolous.

3. Two letters I sent to Dr. H. Peter Metzger, an employee of the Public Service Company of Colorado, who was largely responsible for wide circulation of the false allegations against me through articles, speeches and a pamphlet he wrote. An example was the publication of his charges in Electrical World magazine; I enclose a letter I sent dated June 4, 1979 to that publication, which was never responded to.

4. A letter from the Department's Inspector General dated February 26, 1980, exonerating me of any improper behavior.

5. On the Department's settlement of the Hughes case, I enclose the following letters which explain the settlement terms, and my lack of involvement in the settlement negotiations:

a. Letter from the Solicitor to Congressman Regula dated October 12, 1978;

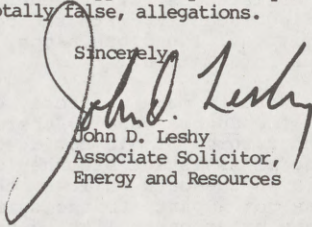
b. Letter from Solicitor to Senator Stone, same date;

c. Letter from Solicitor to Senator Weicker dated November 1, 1978.

6. Finally, on the point of the settlement, I enclose relevant findings made by the federal district court in Utah (and therefore not one of the "naive" eastern judges of whom Senator Hatch spoke) in response to Utah International Inc.'s allegations that the Hughes settlement was improper. The court finds itself "disturbed" by counsel's "serious lack of candor" in describing the situation. The enclosure is page 22 of the court's memorandum opinion of June 15, 1979, in Utah International v. Andrus (D. Utah).

I appreciate your giving me the opportunity to respond for the record to these serious, and totally false, allegations.

Sincerely,


John D. Leshy
Associate Solicitor,
Energy and Resources

Enclosures

P.S. Senator Hatch's statement describes the Hughes case as still pending on appeal. In fact, the Court of Appeals dismissed the appeal by per curiam order dated October 1, 1979, and no party sought review in the Supreme Court. The case is now closed.



United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES
DIVISION

Washington, D.C. 20530

March 25, 1980

Honorable Dennis DeConcini
United States Senate
Washington, D. C. 20510

MAR 27 1980

Dear Senator DeConcini:

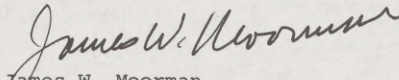
Upon further reflection and after seeing the transcript of the hearing on February 20th, I thought I should clarify my role in the NRDC v. Hughes case which Senator Hatch brought up in his testimony before your subcommittee.

Senator Hatch implied in his testimony that I had been involved in the above case both as a Sierra Club lawyer and then as Assistant Attorney General. You were kind enough to point out to Senator Hatch and the others at the hearing that I had pledged before being confirmed to disqualify myself from participation in any cases in which I was involved during my association with the Sierra Club. I have scrupulously abided by that promise during my service as Assistant Attorney General. That agreement had been modified recently, with the concurrence of the Judiciary Committee. I enclose a copy of the Committee's letter for your information.

I do want to make perfectly clear exactly what my role was in the Hughes case so there can be no misunderstanding in the future. I did not disqualify myself from the Hughes case as Assistant Attorney General because I had had no role in the case while at the Sierra Club. The Sierra Club was not a party to the suit and I was never consulted by any other party with respect to it. Therefore, I did participate in the Hughes case as a government lawyer but only because neither I nor the Sierra Club had any prior involvement with the litigation.

I appreciate having this further opportunity to comment on this matter. If I can be of further help, please feel free to contact me again.

Sincerely,

A handwritten signature in cursive script that reads "James W. Moorman".

James W. Moorman
Assistant Attorney General
Land and Natural Resources
Division

Enclosure

Additional Submission of
Administrative Office of U.S. Courts
**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS**
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

February 13, 1980

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

Honorable Dennis DeConcini
Chairman, Subcommittee on Improvements
in Judicial Machinery
6306 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

In a January 22 letter I advised you that I would inform the Court Administration Committee of your request for comment by the Judicial Conference on S. 739 and S. 1472 when the committee met on January 28. The committee had previously scheduled H.R. 5130 on its agenda at Mr. Rodino's request. Because S. 1472 is substantially similar to H.R. 5130, both Senate bills were considered in conjunction with H.R. 5130.

Following discussion of the bills, the committee authorized this transmission by letter of the comments and recommendations it would be presenting for the Judicial Conference's evaluation in March. It did so in order to be as responsive as possible to your January 16 request for comment by February 20. Until the Conference acts upon the committee's recommendations, no representative appearing before your subcommittee could realistically testify *on behalf of the Conference*. The chairman of the committee, Judge Elmo Hunter, has asked me to convey his hope that the following committee recommendations may be of value in spite of their "pending" status before the Conference.

In the committee's opinion, although proposals for special venue provisions in particular types of cases involve policy issues upon which the judicial branch should not express an opinion, the degree to which such proposals may impact case management, or inadvertently generate litigation over the meaning of phrases in the proposal, are appropriate matters for judicial comment. In that context the less-sweeping approach embodied in S. 1472 and H.R. 5130 is preferable to S. 739's very broad approach. At present there is no way to determine what effect a broad amendment of the general venue statutes, such as S. 739 would yield, would have upon caseloads and litigation processes. If action is taken now, enactment of S. 1472 or H.R. 5130 would provide an opportunity to assess such impact and effect in a limited area of case activity; that assessment, in turn, might be of value in later determinations of the desirable and undesirable results which would follow enactment of a bill as broad in scope as S. 739.

Honorable Dennis DeConcini
page two

After evaluating S. 1472 and H.R. 5130 the committee has recommended three revisions in those bills for congressional consideration:

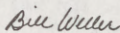
1. The words "in which the issue raised or the impact or injury alleged is less than nationwide in scope", S. 1472, page 2, at lines 4-6 [and the words "in which the impact or injury alleged is less than nationwide in scope", in H.R. 5130, page 2 at lines 8-9], should be deleted. In the committee's opinion, they do not serve a clarifying function, and they might invite contentions that a "district of impact" is not a proper venue because the injury is nationwide and that district does not satisfy general venue purposes for precisely that reason. If retained, the meaning of such language should be clarified.

2. The phrase "the judicial circuit", S. 1472, page 2, at line 23 [and the same phrase in H.R. 5130, at page 3, line 3], should be changed to "a judicial circuit", to avoid any implication that there can be only one such circuit.

3. The amendment of 28 U.S.C. §2343, an approach taken in S. 739, is preferable to adding a new section 1295 to title 28, for purposes of subsection (b) of section 1 of both S. 1472 and H.R. 5130.

The Court Administration Committee's recommended views will be considered by the Judicial Conference in early March. Although action at that time will be too late for your February 20 hearing, this office will notify you of the action taken expeditiously, in case it may be of assistance in later efforts by your subcommittee or the Senate Judiciary Committee. Thank you for providing the opportunity to comment to the extent we have been able to do so.

Sincerely,



William James Weller
Legislative Affairs Officer

Additional Prepared Statements

Prepared Statement of
Daniel J. Meador

UNIVERSITY OF VIRGINIA

CHARLOTTESVILLE - VIRGINIA - 22901

SCHOOL OF LAW

DANIEL J. MEADOR
JAMES MONROE PROFESSOR OF LAW
804/924-3947

February 20, 1980

Hon. Dennis DeConcini, Chairman
Subcommittee on Improvements in Judicial Machinery
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Re: S. 739 and S. 1472

Dear Senator DeConcini:

Persons interested in these two bills concerning venue in the federal courts have suggested that I submit to the Subcommittee my views. I have reviewed the two bills and herewith submit some observations for whatever use they may be to the Subcommittee.

As to district court venue, I favor the idea of placing litigation challenging governmental action in the federal district or districts where such action has a significant impact or inflicts significant injury. There is much to be said for the idea of having initial consideration of the matter, including the taking of evidence and developing of a record, in a district where such litigation is likely to be convenient and where witnesses or other interested persons are likely to be located. Also, having a district judge familiar with local law and conditions should make for sounder trial level treatment of such cases. In a country as large as this, it is generally desirable to keep litigation close to the people primarily involved rather than concentrating trials in a single or remote location. Thus in principle I think the adoption of the proposed amendment to 28 U.S.C. §1391(e) (as embodied in S. 739) would be a sound step, although it is possible that the wording of the amendment might be improved.*

In general I favor the broader approach of S. 739, rather than the approach of S. 1472 which would limit this venue change to environmental cases. The considerations underlying the placing of environmental cases in the districts chiefly concerned with the problem seem equally applicable to other kinds of governmental activity which might be the object of a lawsuit. Moreover, a more generalized venue provision could eliminate questions as to whether a particular action is within the venue statute.

There are two other ways in which procedures directed to this end might be improved. Section 1404(a) of Title 28 could be amended to specify that the location of "substantial impact" or injury should be a consideration for the district court where the action is filed in determining whether to transfer the action to another district. In addition, a statute could be enacted requiring that the district court in which an action is filed against a government officer or agency give notice, either publicly or to designated state officials, in the area where there is a substantial impact from the challenged governmental action; such notice could be coupled with an opportunity to intervene by persons or officials from the affected area.

As to venue in the courts of appeals, my views are somewhat mixed. The values of placing litigation against the government in the various district courts throughout the country, in the areas most concerned, do not have exactly the same force in relation to appellate review. There are only eleven courts of appeals in the country, and no one of them is necessarily located geographically in close relationship to the area of concern in governmental litigation, in the same way that a district court would be. Moreover, in the courts of appeals we are not concerned with the taking of evidence and developing a factual record about the impact of the governmental activity. Rather, at that level, the record has already been made, either in a district court or in an administrative agency. The task of the court is to review the record in relation to identified questions of law. There is something to be said for having few rather than many appellate courts dealing with a given type of question, especially since the Supreme Court, because of the volume of cases, is unable to resolve all conflicts or uncertainties in the law.

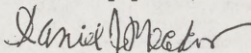
In environmental cases, in the minds of some who have studied these matters, there is a special need for a fairly high degree of national uniformity. As part of the background research and negotiations which led to the proposal for a new U.S. Court of Appeals for the Federal Circuit, now embodied in S. 1477, the Department of Justice circulated an idea for including within the jurisdiction of that proposed new court appeals in all environmental cases from the federal district courts throughout the country. Because of several objections or questions raised during the clearance process, the proposal for including these appeals was dropped. The arguments for it were set forth in an article which I co-authored with Charles Hayworth, entitled "A Proposed New Federal Intermediate Appellate Court," 12 U. Mich. J. of Law Reform 201 (1978).

Short of adopting a system of nationally centralized appeals in environmental cases, as described in that article, I would favor an adoption of the concept in these bills of placing court

of appeals review in governmental litigation in the judicial circuits where there is substantial impact from the challenged action. It seems to me that this is as rational a basis for channelling this appellate review as any other. In the agency review cases, where no district court action is under review, consideration might be given to amending 28 U.S.C. §1407 to authorize the multi-district panel to consolidate and transfer pending courts of appeals cases in order to locate the appellate review in the circuit of the most substantial impact or injury.

If I can be of further assistance to the Subcommittee, please let me know.

Sincerely yours,



Daniel J. Meador

DJM:cgw

HOWARD B. EISENBERG

Executive Director
JULIUS E. MENSAH
 Director, Civil Division

OFFICERS

President
C. LYONEL JONES
 Cleveland, OH

President Elect

JERROLD L. BECKER
 Knoxville, TN

Immediate Past President
WILLIAM R. SLAUS
 Philadelphia, PA

Treasurer
NORMAN P. METZGER
 Indianapolis, IN

BOARD OF DIRECTORS

ANN BAILEY
 Springfield, MA

CORDON BARANCO
 San Francisco, CA

JERROLD L. BECKER
 Knoxville, TN

MARY LOUISE K. BUTLER
 St. Louis, MO

JOHN J. CLEARY
 San Diego, CA

MARSHALL HARTMAN
 Evanston, IL

HON. SAM D. JOHNSON
 Austin, TX

C. E. JONES

Cl., Ind. OH
NORMAN LEFSTEIN
 Chapel Hill, NC

BENJAMIN LEENER
 Philadelphia, PA

NORMAN P. METZGER
 Indianapolis, IN

GEORGE W. MOORE
 New York, NY

ELLSWORTH MORCAN
 Newark, NJ

GERALDINE MOSES
 San Diego, CA

HON. BEVICUS ORTIQUE, JR.

New Orleans, LA

HON. CECIL F. POOLE
 San Francisco, CA

SHELDON PORTMAN
 San Jose, CA

JEROME J. SHESTACK
 Philadelphia, PA

MARTIE L. THOMPSON
 Philadelphia, PA

MARY WRIGHT
 Rapid City, SD

CIVIL COMMITTEE

JERROLD L. BECKER
 Knoxville, TN

LEROY CORDO

Fresno, CA

LALBA DE JESUS
 Fajardo, PR

LESLEE ETZWILER
 Los Angeles, CA

C. LYONEL JONES
 Cleveland, OH

NANCY L. BLANC
 Upper Jay, NY

NORMAN P. METZGER
 Indianapolis, IN

MELVILLE D. MILLER, JR.
 New Brunswick, NJ

GERALDINE MOSES
 San Diego, CA

MARTIE L. THOMPSON
 Philadelphia, PA

SALVADOR TIO

New York, NY

VALLERIE VANAMAN
 Los Angeles, CA

DEFENDER COMMITTEE
 NANCY ALBERT-COLDBERG
 Evanston, IL

JOHN J. CLEARY
 San Diego, CA

MARSHALL HARTMAN
 Evanston, IL

JAMES D. HENNING
 Portland, OR

NORMAN LEFSTEIN
 Chapel Hill, NC

BENJAMIN LEENER
 Philadelphia, PA

PAUL LIGDA

Fairfield, CA

FRANK MURPHY
 Tampa, FL

JAMES R. NEUHARD
 Detroit, MI

SHELDON PORTMAN
 San Jose, CA

MARY QUINN
 Houston, TX

NECD Liaison

DOROTHY RICHARDSON
 Pittsburgh, PA

MARY WRIGHT
 Rapid City, SD

JOHN M. YOUNG
 Columbia, SC

Prepared Statement of

nlada**National Legal Aid and Defender Association**

Suite 601, 2100 M Street, N.W./Washington, D.C. 20037/(202) 452-0620

February 21, 1980

Honorable Dennis DeConcini
 United States Senate
 3230 Dirksen Senate Office Building
 Washington, DC 20510

RE: Pending venue bills, S. 1472 and S. 739

Dear Senator DeConcini:

I am writing on behalf of the National Legal Aid and Defender Association to express our serious concern about the two venue bills, S. 739 and S. 1472, which are pending before the Subcommittee on Improvements in Judicial Machinery. NLADA is a private, non-profit organization devoted to the support and development of quality legal services for the poor. Our membership includes approximately 2,600 organizations which provide legal representation to indigent persons. NLADA members represent clients in the federal and state courts throughout the country and have participated in many actions against federal defendants in a wide variety of forums. Based on the experience of our members, NLADA strongly believes that the current federal venue scheme works well and should be left unchanged.

Having had the opportunity to attend the hearings which were held on the bills and hear the thoughtful and well-balanced discussion, I will not repeat the complicated history of the venue provisions or many of the points which were cogently made. However, as thoroughly as the issues regarding the impact of the environmental venue bill, S. 1472,

Honorable Dennis D. Jncini
February 21, 1980
Page Two

were raised, no mention at all was made of, or justification given for, the far broader sweep of S. 739 which would extend to virtually every lawsuit brought against a federal defendant. NLADA believes that, in fact, S. 739 is an ill-conceived measure which should not be reported out of the subcommittee.

The most basic flaw of S. 739 is a very simple one; it is designed to remedy a problem which does not exist. Regardless of the appropriateness of the proposed environmental venue provisions--NLADA has insufficient experience in that area of the law to meaningfully comment on them--not one example of a venue abuse in a non-environmental case was so much as cited to the committee. We submit that this is because the provisions of 28 U.S.C. §1391(e), 28 U.S.C. §1404 and the corresponding appellate venue statutes have worked well.

The overwhelming majority of federal court cases brought against federal defendants are brought outside of the D.C. Circuit. This is true of cases brought by our members as well as those litigated by the general bar. The explanation is readily apparent--it is usually far more expedient for a plaintiff to litigate in the district of his residence, wherever that is, than anywhere else.

Even so, in certain cases against federal defendants there can be no question that the District of Columbia Circuit is the most appropriate forum and its availability should be maintained. The witnesses at the hearing thoroughly developed the importance--and common sense--of being able to sue in the District where the plaintiff is challenging on procedural grounds a decision made by a Washington policy maker, represented by a Washington based attorney and where the entire record of the case is in Washington. Although U.S. Attorneys are, indeed, in every judicial district, they concentrate overwhelmingly on criminal matters. It is our experience that the Assistants are usually little more than errand boys in civil actions against the government and their presence in a case is of little impact or help.

An equally compelling reason for continuing venue in the District, which was not brought out at the hearings, is that very often the District of Columbia is the only forum where plaintiffs from several states who are challenging the same federal action can join together in a single lawsuit. The alternative raised by S. 739 is a wasteful multiplicity of litigation. For example, one of our member organizations is representing two women in an age discrimination suit challenging a regulation of the federal Bureau of Prisons which requires female guards to be under a certain age. One of the women is from Pennsylvania and the other from West Virginia. If §1391(e) were amended by S. 739, they would have to prosecute two separate actions because there would be no judicial district in which both of them could satisfy the venue requirements. The only other option would be for one to file and to seek certification of a nationwide class. This is a cumbersome approach which rarely serves the best interest of any party.

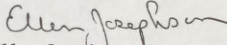
Honorable Dennis DeLoonini
February 21, 1980
Page Three

Further, the D.C. Circuit is an appropriate forum for the very reason that it is removed from many localized controversies and can provide an impartial forum. We find the argument that cases should be decided by judges familiar with "local customs" to be most curious. For it is our understanding that the constitutional role of a federal judge is to apply the law as enacted by Congress and interpreted by the higher courts in the most objective manner possible. An effort to politicize the judiciary is at odds with the concept of the separation of powers, one of the most basic tenets of our form of government.

Finally, S. 739 is a confusingly drawn bill which invites litigation to define its terms. As written it could conceivably keep many persons out of the courts altogether if, although they suffer injury, they live in a judicial district which is not substantially impacted by the complained of action. At the very least there will be routine battles over venue which will be time-consuming and costly.

For these reasons, the National Legal Aid and Defender Association urges you to take no further action on S. 739. We appreciate your consideration of our views.

Sincerely,



Ellen Josephson
Access to Justice Project

ej/ss

Prepared Statement of
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

EXECUTIVE COUNCIL
LANE KIRKLAND **THOMAS R. DONAHUE**
 PRESIDENT SECRETARY-TREASURER

GEORGE MEANY
 PRESIDENT EMERITUS

PAUL HALL
 THOMAS W. GLEASON
 S. FRANK RAPPERTY
 MARTIN J. WARD
 ALBERT SPANKER
 EDWARD J. HANLEY
 WILLIAM H. MACLENNAN
 DAVID J. FITZMAURICE
 ALVIN E. HESPP
 FRED J. KRULL
 WAYNE E. GLENN

JOHN H. LYONS
 FREDERICK O'NEAL
 GEORGE HANCOY
 WILLIAM SIDELL
 GLENN E. WATTS
 ANGELO FOSCO
 J. C. TURNER
 KENNETH T. BLAYLOCK
 Wm. W. WUNDERLICH
 JOHN J. O'DONNELL
 ROBERT F. COSE

PETER BOMMARITO
 JERRY WUFG
 AL H. CHESLER
 MURRAY H. FINLEY
 BOB C. CHAMBER
 CHARLES H. PILLARD
 LLOYD McBRIDE
 EMMET ANDREWS
 WILLIAM H. WYME
 JOHN D'CONCINI
 DANIEL V. MARMONY



815 SIXTEENTH STREET, N.W.
 WASHINGTON, D.C. 20006

(202) 637-5000

February 22, 1980

Honorable Dennis DeConcini
 Chairman of the Subcommittee on
 Judicial Machinery of the Committee
 on Judiciary
 United States Senate
 Room 3230, Dirksen Senate Office Bldg.
 Washington, D.C. 20510

Dear Senator DeConcini:

This is to register strong opposition to S.739 and S.1472 presently pending before the Judicial Machinery Subcommittee of the Committee on Judiciary.

These bills share a common design to cut into the ability of citizens aggrieved by federal government action to challenge such action in the federal courts in the District of Columbia. That objective is ill-conceived. Further, the bills as drafted would lead to massive amounts of unnecessary litigation.

By definition, whatever the direct impact of any particular case, decisions respecting the propriety of federal government action or regulation have nationwide implications. It has long been seen as important to provide a judicial forum for the resolution of such questions which is insulated from the parochial concerns and passions that may be brought to bear at a situs most affected by the disputed action or regulation. The federal courts of the District of Columbia have been given that role. And because of that role, it has been understood that the judges on those courts are to be selected on a nationwide, not a local, basis. Accordingly, it has historically been true, and is true now, that the overwhelming majority of judges on the United States Court of Appeals for the District of Columbia Circuit had established careers, prior to their appointment, in areas of the country outside of the District of Columbia. And, the role that the District of Columbia federal courts have played as national courts dealing with questions of federal regulation and administrative law has led to the establishment in those courts of a special expertise in such matters, an expertise acknowledged by other federal courts.

Honorable Dennis DeConcini
February 22, 1980
Page Two

The availability of the District of Columbia courts as a forum for citizens wishing to challenge federal government actions has thus been a positive feature of our judicial system. Only the barest parochialism could weigh against retention of that feature.

In addition to the lack of merit of the objectives of these bills, they are flawed in their design. Thus, for example, S.739 provides: "In any such action in which it is determined that a substantial portion of the impact or inquiry is in one or more judicial districts, such action shall be brought in one of such judicial districts." The bill contains a similar provision with respect to judicial circuits. Presumably, this language is meant to distinguish those cases where the direct impact of the decisions will particularly affect certain areas of the country from those where the direct impact will be more diffuse. But the line between those two types of cases is never in reality so clear. Suppose a federal regulation affecting the steel industry or the petrochemical industry is under challenge. The regulation would obviously have a "substantial portion of [its] impact ... in one or more," indeed in a great number of judicial districts or circuits, perhaps in all of the judicial circuits. Is the bill intended to remove venue in the District of Columbia federal courts as to such a challenge? In any event, the bill, as drafted, would insert complicated issues at the threshold of cases involving challenges to federal action. These issues would necessitate the resolution of potentially difficult factual questions: Is the impact of this regulation substantially located in certain districts or circuits, or is it more diffuse? If the former, is the district or circuit in which the action was brought one of the districts or circuits in which a "substantial portion of the impact or inquiry" occurred.

Similar defects inhere in the formulation used in S.1472: "A civil action ... in which the issue raised or the impact or inquiry alleged is less than nationwide in scope, may be brought only in a judicial district in which such issue arises or in which a substantial portion of the alleged impact or inquiry occurs." When is "the issue raised or the impact or inquiry alleged ... less than nationwide in scope"?

These two bills offer a significant step backwards from where the judicial system now stands. They both should be rejected.

Sincerely,

Laurence Gold

Laurence Gold
Special Counsel, American
Federation of Labor and
Congress of Industrial
Organization

Prepared Statement of
WASHINGTON COUNCIL OF LAWYERS

March 4, 1980

BOARD OF DIRECTORS

President: Len Simon*
Vice President: Linda E. Perle*
Secretary: David B. Brown*
Treasurer: Roger E. Warin*

Terry Michael Banks
Michael B. Barton
Roderic V. O. Boggs*
Sally Brown
Robert Catz
Erica L. Dolgin
Robert B. Fitzpatrick
Jan L. Flack
Eugene Goldman*
Steffen W. Graze
Michael Greenberger*
Charles E. Hill
Ted Hirt
Sherille Ismail*
Anita Johnson
Elaine R. Jones
Joan Kurlansky
Judy Lesser*
Judith L. Lichtman
Ann Macrory
Jane McGraw
Lawrence H. Mirel
Andre Oakes
Leonard Rubenstein*
Lois Schiffer
David Sellinger*
Allan R. Snyder
Girardeau A. Spann
Matthew S. Watson
Thomas S. Williamson, Jr.

*Members of Executive Committee

Senator Dennis DeConcini
c/o Mr. Jonathan Topodas
Subcommittee on Improvements in
Judicial Machinery
6303 New Senate Office Building
Washington, D.C.

Re: Venue Hearings

Dear Senator DeConcini:

The Washington Council of Lawyers wishes to make its views known on S. 739 and S. 1472 in connection with the February 20th hearings held by your subcommittee. */

*/ The Washington Council of Lawyers is an organization of attorneys with private firms, public interest organizations and the government, formed in the early 1970's to promote public interest activities by members of the Bar of the District of Columbia and to provide a progressive perspective on issues of particular interest or relevance to the legal community.

918 16th STREET, N. W. ■ SUITE 503 ■ WASHINGTON, D. C. 20008 ■ 202/466-3030

Page Two
March 4, 1980

Washington Council of Lawyers
Prepared Statement of

We think these bills are both inadvisable because of the increased litigation expense they would impose on public interest groups, and because of the increased cost to all litigants of adjudicating proper venue under new and uncertain standards.

- BOARD OF DIRECTORS
- President: Don Simon
- Vice President: John
- Secretary: Dean B. Brown
- Treasurer: Robert E. Wynn
- Tracy Mitchell Bank
- Michael R. Barton
- Richard V. C. Boggess
- John Brown
- Robert Calk
- Robert J. Doherty
- Robert B. Fritzsche
- Jan F. Pless
- Edward Robinson
- Sheldon W. Gaskes
- Richard Greenberger
- Charles E. Hill
- Ted Hunt
- George Johnson
- Anna Johnson
- Elaine R. Jones
- John Kuzniak
- John L. Korman
- John L. Korman
- Ann Mason
- Janet McGraw
- Lawrence N. Stein
- Ardis O'Connell
- Edward O'Connell
- Tom Schmitt
- Alan R. Snyder
- Gregory A. Spang
- Matthew S. Watson
- Thomas S. Williamson, Jr.

Both bills require cases to be litigated in the judicial district where a substantial portion of the impact or injury occurs. In S. 739, the Laxalt Bill, this requirement would apply to all lawsuits where the government was a defendant. In S. 1472, the DeConcini Bill, this requirement would apply to all environmental litigation between any parties. The intent of the bills appears to be to funnel litigation away from the federal courts in the District of Columbia. */

Litigation on environmental and other public interest issues has occurred in the District of Columbia for several reasons. First, the District of Columbia is a natural choice because it is the seat of government, and the repository of government records and expertise. Second, the judiciary in D.C. is sophisticated about government regulatory statutes, and is perceived by the bar to be capable of rendering fair decisions on the difficult, time-consuming, and highly technical disputes that arise from government regulation of environment and product safety. Third, a specialized bar has developed in D.C. that is knowledgeable about government regulation. This includes large law firms that represent business interests, and a handful of small groups that represent conservation and consumer interests.

Several lawsuits have been identified by you and others, that were litigated in the District of Columbia but affected only western states. We understand the concern about these lawsuits. However, the damage that the

*/ The DeConcini bill would go so far as to override all statutes, such as 42 U.S.C. § 300 j 7(a)(1) and 15 U.S.C. § 719(h)(c), which explicitly provide that actions or appeals may (or must) be brought in the District of Columbia.

* The Washington Council of Lawyers is an organization of attorneys with private firms, public interest organizations and the government, formed in the early 1970's to promote public interest activities by members of the Bar of the District of Columbia and to provide a progressive perspective on issues of particular interest or relevance to the legal community.

Page Three
March 4, 1980

Page Four
March 4, 1980

two bills would go to litigation generally far outweighs their benefit in a few individual cases. We suggest that a more tailored approach be adopted, perhaps by providing increased weight to local impact as a condition for transfer of cases under 28 U.S.C. 1404, or by amending the specific substantive statutes under which the subcommittee believes unfair or improper venues to occur.

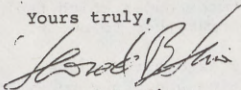
The bills as drafted raise numerous legal questions that will take time and money to work out through litigation. This expense will contribute nothing to a wise decision on the merits of the lawsuits. Some of the questions that we foresee are as follows: The DeConcini bill imposes the new venue requirement when the litigation is of less than nationwide impact. Who has the burden of proving less than nationwide impact? If the issue is not raised by the parties, might it be used by later intervenors to change venue mid-way through proceedings? Must a lawsuit have impact in every jurisdiction to be "nationwide" and therefore litigable in District of Columbia courts? Would a lawsuit have "nationwide impact" if it raised questions of statutory interpretation that may affect all future litigation under the statute? What if a lawsuit raised some questions of local and some of nationwide impact? How would the courts assess the locus of the impact as a factual matter? Would this require a full-scale trial to be conducted before the case ever gets started? Could the locus of the impact really be determined in every case before the merits of the case were decided? Would a lawsuit concerning a plant in Ohio that caused acid rain in Vermont be nationwide or local? A lawsuit about a plant in Ohio that discharged toxic wastes into the Ohio River that flows into the Mississippi River that flows into the Gulf of Mexico? Who bears the burden of proving in which district the impact is substantial? If the burden is not met, where is the case to be filed? Do the bills confer jurisdiction, or merely direct choice of venue?

These and many more questions would have to be worked out in the courts over a period of time. The bills would increase litigation expense at a time when there is public

Page Four
March 4, 1980

outcry for cheaper, expedited access to the courts. The bills would increase expense because many future litigants will have to pay for resolving these venue issues, and because the lawsuits may have to be litigated in forums that are inconvenient to all of the parties involved.

Yours truly,



Leonard B. Simon
President

Prepared Statement of Gov. Scott M. Matheson

I appreciate this opportunity to submit a statement in support of S. 739 and S. 1472 to the Senate Subcommittee on Improvements in Judicial Machinery. Both of these bills are designed to establish uniform venue requirements under Title 28 of the United States Code. Senator Laxalt's bill proposes amendments to 28 USC 1391, 2243 and 2112. I concur in the general intent of S.739 to require that proper venue is obtained in the judicial district where the substantial portion of the impact or injury occurred. I am particularly intrigued with your bill, S.1472, because of the immediate and positive impact it could have on the environmental issues in the State of Utah.

As Governor, of the State of Utah, I support S.739 and S.1472 for the following reasons:

- 1) Utah has many concerns that are not shared by other regions due to our unique environmental problems. Providing that only district courts in the area where the impact is felt have proper venue, guarantees that a familiarity with Utah's unique environmental situation and local precedents is present. Since the Washington, D.C. District Court will have proper venue over environmental issues of national concern, both national and local interests will be protected by this proposed legislation.
- 2) Both bills provide that interested parties, who are not necessary parties, can be joined to the action. These bills encourage interested parties to participate since the tremendous cost of participation is reduced because actions must be maintained where the injury of impact occurred. Further, interested parties will be able to easily discover actions in which they want to participate since information about local concerns is more readily disseminated at the local level than it is from Washington, D.C.

3) These bills encourage further state and federal cooperation and interaction. Local interests will be provided with an important opportunity to participate in matters that affect their everyday lives. Through this opportunity for participation and input, federal law makers would become more aware of local requirements and render their decisions based upon a complete understanding of the issues involved.

In the final analysis however, the purpose that is sought by these bills transcend legal nuances. However valid they may be their justification is grounded in fundamental values of fairness and common sense that distinguishes the American federal system of government.

As Governor of the State of Utah, I support S. 1472 and S. 1473, because of the immediate and positive impact it could have on the environmental issues in the State of Utah.

As Governor of the State of Utah, I support S. 1472 and S. 1473 for the following reasons:

1) Utah has many concerns that are not shared by other regions due to our unique environmental problems. Providing that only district courts in the areas where the impact is felt have proper venue, guarantees that a familiarity with Utah's unique environmental situation and local precedents is present. Since the Washington, D.C. District Court will have proper venue over environmental issues of national concern, both national and local interests will be protected by this proposed legislation.

2) Both bills provide that interested parties, who are not necessary parties, can be joined to the action. These bills encourage interested parties to participate since the tremendous cost of participation is reduced because actions must be maintained where the injury of impact occurred. Further, interested parties will be able to easily discover actions in which they want to participate since information about local concerns is more readily disseminated at the local level than it is from Washington, D.C.

Prepared for the Commission on the Environment and Public Resources by the National Academy of Sciences. Statement by

D. Michael Rappoport

The Salt River Project has been involved in environmental litigation in at least eight different federal courts in the last decade. While its customers, offices and the vast majority of its generating capacity are located in Arizona, it has been sued in the Washington, D.C. District Court, has initiated environmental actions in the Ninth Circuit Court of Appeals in San Francisco, California, and has spent thousands of dollars moving actions to Improvement and Power District.

The District, and agricultural improvement district organized under the laws of the State of Arizona, operates the Salt River Project, a federal reclamation project. Under contracts with the Salt River Valley Water User's Association, it has assumed the obligations of the Association to the United States of America for the care, operation and maintenance of the reclamation project. The District owns and operates an electric system which generates, purchases and distributes electric power and energy, and which provides electric service to approximately 300,000 residential, commercial, industrial and agricultural power users in a 2,900 square mile service territory in parts of Maricopa, Gila and Pinal Counties, plus wholesale and mine loads in an adjacent 2,400 square mile area in Gila and Pinal Counties.

The Project also provides water for municipal purposes to the seven central Arizona cities and towns of Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale and Tempe.

On behalf of the Salt River Project, I would like to express our appreciation for this opportunity to provide these comments in support of S. 1472. I would

also like to commend Senator DeConcini for his recognition of the critical problem of overlapping and duplicative judicial jurisdiction in environmental law and for the important remedial action he has proposed.

The Salt River Project has been involved in environmental litigation in at least eight different federal courts in the last decade. While its customers, offices and the vast majority of its generating capacity are located in Arizona, it has been sued in the Washington, D.C. District Court, has initiated environmental actions in the Ninth Circuit Court of Appeals in San Francisco, California, and has spent thousands of dollars moving actions to Arizona from non-Arizona federal courts.

In the early 1970's, for example, four separate suits were filed in the Washington, D.C. District Court, and only after months of costly and time-consuming legal wrangling, were they transferred to the Arizona Federal District Court. Two of the cases related to National Environmental Policy Act (NEPA) statements filed for several southwest power plants; ^{1/} one concerned invalidation of an Arizona generating station coal lease by the Hopi Tribe; ^{2/} and one involved challenges to provisions of a coal lease with the Navajo Tribe for the Four Corners Generating Station near Farmington, New Mexico.

In the first three cases, all relevant factors favored litigating the issues in Arizona. It was more convenient for the parties, it represented the situs of

1/ The Jicarilla Apache Tribe v. Morton & Salt River Project and National Wildlife Federation Environmental Defense Fund v. Morton.

2/ Lomayaktewa v. Morton and Salt River Project.

the dispute, and the witnesses, parties and judges had more familiarity with the facts. In the fourth case, either New Mexico or Arizona were proper forums. None of the cases should have been brought in Washington, D.C. -- a finding three different federal district judges in Washington reached independently. In the final case, Washington, D.C. Federal Judge Hart wondered why a dispute involving Southwest Indians and ecology should be decided in Washington. He expressed his reasons for granting removal to Arizona as follows:

"Isn't ecology an essential part of the suit? It certainly is. If there is any type of suit that ought to be heard in the neighborhood involved, it is this type of suit. What, in the name of Heaven, does somebody sitting in Washington know about the Navajo Indian and ecology of the Southwest? We couldn't be more ignorant. We have not known anything about the Indians here since 1620." 3/

And indeed, it does not make sense to litigate issues two thousand miles from the dispute and the people most directly affected. The current practice of forum shopping can result in litigation which is more costly, less convenient to all involved, and more susceptible to charges that governmental decisions, including those of the judicial branch, are becoming further removed from the people. This concern is especially acute in environmental suits because of the typical collision of interests and values within a locality. Always at issue is the nature of the environment in which a community of people live. Their way of life may also be impacted, as it frequently is when energy-producing companies like the Salt River Project are involved. Judges, juries and witnesses

3/ Morton v. Yazzie

who reside in the area are obviously better able to understand and evaluate the competing interests.

It has been said that the reason some environmental groups seek to litigate in Washington, D.C. rather than at the situs of the dispute is because they believe, probably correctly, that they receive a more favorable hearing there. A system which condones, indeed, fosters this artificial result, cannot have the confidence of the American people.

The Salt River Project favors S. 1472 because we believe it will help restore confidence in the judicial system and because it will be less costly and more equitable to the majority of litigants in environmental suits.

Thank you.

And indeed, it does not make sense to litigate issues two thousand miles from the dispute and the people most directly affected. The current practice of forum shopping can result in litigation which is more costly, less convenient to all involved, and more susceptible to charges that governmental decisions, including those of the judicial branch, are becoming further removed from the people. This concern is especially acute in environmental suits because of the typical collision of interests and values within a locality. Always at issue is the nature of the environment in which a community of people live. Their way of life may also be impacted, as it frequently is when energy-producing companies like the Salt River Project are involved. Judges, juries and witnesses

Morton v. Yazzie

Prepared Statement of
 EXECUTIVE OFFICE OF THE PRESIDENT
 COUNCIL ON ENVIRONMENTAL QUALITY

722 JACKSON PLACE, N. W.
 WASHINGTON, D. C. 20006

February 28, 1980

Honorable Dennis DeConcini

Chairman, Subcommittee on Improvement
 in Judicial Machinery
 Committee on the Judiciary
 United States Senate
 Washington, D. C. 20510

Re: S. 739 and S. 1472

Dear Senator DeConcini:

The Council on Environmental Quality desires to supplement the testimony submitted by the Department of Justice concerning the above bills. The Council supports the views expressed by Justice. We do not believe it is necessary to modify the existing venue provisions in Title 18 of the United States Code as proposed by S. 739 and S. 1472.

An underlying premise of both bills is that environmental lawsuits which should properly be brought in judicial districts where the impacts or injuries allegedly occur, are instead being brought improperly in the District of Columbia judicial district. S. 1472 requires that any civil action (whether or not a federal agency is the defendant) relating to environmental quality in which the issue raised or injury alleged is less than nationwide in scope must be brought in a judicial district in which such issue arises or in which a substantial portion of the alleged injury or impact occurs. S. 739 would supersede the present venue rule if it is determined that a substantial portion of the impact or injury is in one or more judicial districts. In such case the action must be brought in one of those judicial districts.

The Council disagrees with the premise underlying the need for S. 739 and S. 1472. The Council, which has oversight responsibility for the National Environmental Policy Act (NEPA), maintains a computerized file of all NEPA lawsuits (NEPALIT). A careful review of the NEPALIT file discloses that the vast majority of NEPA lawsuits are presently tried in judicial districts where the injury or impact occurs and not in the District of Columbia.

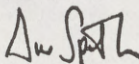
This conclusion is based on an analysis of 950 NEPA lawsuits brought during the 8-year period January, 1970 through December 31, 1977. During that period 131 NEPA lawsuits (or 13.7% of the total) were brought in the District of Columbia. Enclosed is a more detailed breakdown of the types of NEPA lawsuits brought in the District of Columbia. These figures demonstrate that 45 cases or less than 5% of all NEPA lawsuits filed involve issues or impacts occurring

in localities outside or unrelated to the District of Columbia, where the provisions of S. 739 and S. 1472 might arguably have resulted in a different venue. Significantly the figures indicate that the plaintiffs in these 45 cases are not all environmental groups but include a significant number of state and local government and business plaintiffs as well, suggesting that in selected cases there may be special circumstances justifying the bringing of NEPA lawsuits in the District of Columbia rather than in the judicial district where the impacts occur. It is apparent, in any event, that with respect to NEPA litigation the vast majority of cases are brought in the judicial district where the issues arise or impacts occur consistent with the goals of S. 739 and S. 1472. The present venue provisions are generally working well.

The Council also agrees with the Justice Department's concern that S. 739 and S. 1472 contain vague standards such as "substantial injury or impact", "nationwide in scope" and "environmental" which could well result in delaying the judicial machinery as the court grapples with these threshold terms to decide the proper venue. Balanced against the evidence that existing venue provisions are working adequately and justly, the Council therefore does not support the proposed legislation.

We hope the information we have provided on NEPA lawsuits and venue will be of use to the Subcommittee.

Sincerely,



Gus Speth
Chairman

Enclosure

cc: Members of the Subcommittee
Honorable James Moorman

NEPA Lawsuits And Venue
(January, 1970 -- December 31, 1977)

Total NEPA lawsuits -- 950

Total NEPA lawsuits in District of Columbia District Court - 131 (13.7% of total).

Breakdown of NEPA Lawsuits Brought In District of Columbia District Court

39 cases (4.1%)	involving rulemaking, regulatory standards and other programs of nationwide application
29 cases (3.0%)	involving federal actions or projects where the injury or impacts occur within the District of Columbia or in areas nearby the District
8 cases (0.9%)	filed in the District of Columbia which were later transferred to the judicial district in the locality principally affected (or resolved on the basis of cases pending or decided in other judicial districts)
6 cases (0.6%)	involving environmental issues affecting a number of different states or a large region of the United States
4 cases (0.4%)	involving federal actions outside the United States
45 cases (4.7%)	involving environmental issues or impacts occurring in localities outside and arguably unrelated to the District of Columbia
<u>131</u> (13.7%)	Total

Breakdown By Type of Plaintiff of 45 NEPA Cases Brought In District of Columbia That Could Have Been Brought In Judicial District Principally Affected

<u>Type of Plaintiff</u>	<u>Number of Cases</u>
Citizens/Environmental Groups	25
Business/Industry	9
State and local government	9
Union/Employees	<u>2</u>
	45

NEPA Lawsuits -- 930
Total NEPA Lawsuits -- 930
(January, 1970 - December 31, 1977)



RESOLUTION OF

UPPER COLORADO RIVER COMMISSION

355 South Fourth East Street

Salt Lake City, Utah 84111

Breakdown of NEPA Lawsuits Brought in District of Columbia District Court

February 14, 1980

39 cases involving rulemaking, regulatory standards and other programs of nationwide application (4.1%)

39 cases involving federal actions or projects where the injury or impacts occur within the District of Columbia or in areas nearby the District (3.0%)

8 cases filed in the District of Columbia which were later transferred to the judicial district in the locality principally affected (or resolved on the basis of cases pending or decided in other judicial districts) (0.9%)

Hon. Dennis DeConcini
Chairman

6 cases involving improvements in judicial machinery of a large region or the United States Senate (0.6%)

4 cases involving federal actions of the Dirksen Senate Office Building Washington, D. C. 20510 (0.4%)

45 cases involving litigation, lawsuits or impacts occurring in localities outside and arguably unrelated to the District of Columbia (4.7%)

In re: Hearings on S. 1472 and S. 739

Dear Senator DeConcini:

Total 131 (13.3%)

We have been informed that hearings will be held before your Subcommittee on the above numbered bills. The Upper Colorado River Commission, at its Annual Meeting held in Grand Junction, Colorado on September 17, 1979, approved a Resolution supporting this legislation.

We request that the Upper Colorado River Commission's Resolution be made a part of the hearing record on these two bills.

We are enclosing 25 copies of the Resolution.

Very truly yours,

Paul L. Billhymmer
Paul L. Billhymmer
Acting Executive Director

PLB:hiw

Enclosures

BE IT FURTHER RESOLVED that the Upper Colorado River Commission urges the passage of legislation accomplishing the purpose of the principle set forth in S. 739 and S. 1472; and

UPPER COLORADO RIVER COMMISSION

BE IT FURTHER RESOLVED that copies of this Resolution be sent to the Governors of the four Upper Basin States, to all members of the Committee on the Judiciary of the United States Senate, and all members of the Congressional delegations of the Upper Colorado River Basin States.

WHEREAS, Senator Laxalt has introduced S. 739, a bill "To amend certain provisions of title 28, United States Code, relating to venue in the district courts and the courts of appeals"; and

WHEREAS, S. 739 provides that the proper venue for litigation of civil action against the United States shall be in the United States District Court for the area in which the major impact of the litigation will be felt; and

WHEREAS, Senator DeConcini has introduced S. 1472, a bill "To amend title 28 of the United States Code to provide for special venue provisions in cases relating to the environment"; and

WHEREAS, S. 1472 has the same purpose as S. 739 but is limited to litigation raising environmental questions; and

WHEREAS, many actions filed against federal agencies in the Federal District Court for the District of Columbia have a particular "local area" impact far from Washington, D. C.; and

WHEREAS, the interests of the "local area" are often not adequately represented because local interests are unaware of the suit and do not participate in the suit; and

WHEREAS, even if the local interests are made aware of the suit, the burden of trying a suit in Washington, D. C. often overtaxes the resources of the impacted local interest; and

WHEREAS, current philosophy of decision-making seems to call for widespread interest participation, it would seem that means should be provided in the judicial process whereby local interests impacted by suits against federal agencies could be adequately represented; and

WHEREAS, the member States of the Upper Colorado River Commission, namely, Colorado, New Mexico, Utah, and Wyoming, have experienced the difficulties of defending their State interests in legal actions filed in the Federal District Court for the District of Columbia:

NOW, THEREFORE, BE IT RESOLVED that the Upper Colorado River Commission does hereby support the principle set forth in S. 739 and S. 1472 whereby venue for actions against the United States which have a major impact on a local area will be in the United States District Court for the area so impacted; and

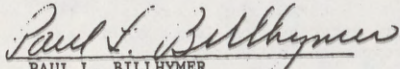
BE IT FURTHER RESOLVED that the Upper Colorado River Commission urges the passage of legislation accomplishing the purpose of the principle set forth in S. 739 and S. 1472; and

BE IT FURTHER RESOLVED that copies of this Resolution be sent to the Governors of the four Upper Colorado River Basin States, to all members of the Committee on the Judiciary of the United States Senate, and all members of the Congressional delegations of the Upper Colorado River Basin States.

CERTIFICATE

I, PAUL L. BILLHYMER, Acting Executive Director of the Upper Colorado River Commission, do hereby certify that support for the principle set forth in S. 739 and S. 1472 was adopted by said Commission at the Special Meeting held in Teton Village, Wyoming on August 1, 1979, and at the Annual Meeting of the Upper Colorado River Commission held in Grand Junction, Colorado on September 17, 1979 the above Resolution was adopted in final form.

WITNESS my hand this 19th day of September, 1979.


PAUL L. BILLHYMER
Acting Executive Director

87TH CONGRESS : : : : 2^D SESSION

JANUARY 10-OCTOBER 13, 1962

SENATE REPORTS

VOL. 4

**MISCELLANEOUS REPORTS ON
PUBLIC BILLS, IV**

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1962

Calendar No. 1953

87TH CONGRESS }
2d Session }

SENATE }

REPORT
No. 1992JURISDICTION AND VENUE OF THE U.S. DISTRICT COURTS
IN ACTIONS AGAINST GOVERNMENT OFFICIALS

AUGUST 31, 1962.—Ordered to be printed

Mr. CARROLL, from the Committee on the Judiciary, submitted the
following

REPORT

[To accompany H.R. 1960]

The Committee on the Judiciary, to which was referred the bill (H.R. 1960) to amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the U.S. district courts, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

AMENDMENTS

1. On page 2, line 5, strike the words "his duty", and insert in lieu thereof the following: "a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion."

2. On page 2, commencing with line 12, strike out all down to and including line 18, and insert in lieu thereof the following:

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

PURPOSE OF AMENDMENTS

The purpose of the amendments is to provide specifically that the jurisdiction conferred on the district courts by the bill is limited to compelling a Government official or agency to perform a duty owed

2 JURISDICTION OF THE U.S. DISTRICT COURTS

to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer or agency in the making of the decision; to provide that the bill does not supersede other specific statutory provision, and to provide that if real property is involved in the action, the action must be brought in the judicial district in which the real property is situated rather than where the plaintiff resides.

PURPOSE

The purpose of this bill, as amended, is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia.

STATEMENT

This legislation does not create new liabilities or new causes of action against the U.S. Government. The bill, as amended, is intended to facilitate review by the Federal courts of administrative actions. To attain this end, the bill does two things. First, it specifically grants jurisdiction to the district courts to issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision. Secondly, it broadens the venue provisions of title 28 of the United States Code to permit an action to be brought against a Government official in the judicial district (1) where a defendant resides, or (2) in which the cause of action arose, or (3) in which any real property involving the action is situated, or (4) if no real property is involved in the action, where the plaintiff resides. This bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia.

Where a statute does not specifically provide for review of the actions of a Government official, the aggrieved party may obtain judicial review through invoking one of several nonstatutory proceedings. Which of these he chooses turns upon the relief sought. In certain cases, the relief desired can be obtained only by compelling a Government official to perform an act which he is required to do by statute but which he has nevertheless failed to do. Traditionally, the appropriate remedy in that case has been a writ of mandamus. However, unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed jurisdiction to hear petitions for mandamus.

The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia. This court, in addition to being a Federal court, is also charged with the enforcement of domestic law. Its jurisdiction is derived not only from title 28 but also from the laws of the State of Maryland, which governed the area ceded to the District of Columbia in 1801. That body of law included jurisdiction to issue writs of mandamus in original proceedings.

The result of this historic accident has been that a person who seeks to have a Federal court compel a Federal official to perform a duty of his office must bring his action in the District Court for the District of Columbia. This the committee considers an unfair imposition upon

citizens who seek no more than lawful treatment from their Government.

The problem of venue in actions against Government officials for judicial review of official action arises when the action must be brought against supervisory officials or agency heads whose official residences are, with few exceptions, in the District of Columbia. The need to bring an action against an agency head rather than an official in the field may arise either because of a statute authorizing such a suit or because of the doctrine of indispensable parties. The question of when a superior officer is an indispensable party is not altogether clear from the cases. Suffice it to say that if it is determined that a superior officer whose official residence is in the District of Columbia is an indispensable party, that action must be brought in the U.S. District Court for the District of Columbia.

The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty.

The committee is of the view that the current state of the law respecting venue in actions against Government officials is contrary to the sound and equitable administration of justice. Frequently, the administrative determinations involved are made not in Washington but in the field. In either event, these are actions which are in essence against the United States. The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U.S. attorneys are present in every judicial district. Requiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition.

On the other hand, where a citizen lives thousands of miles from Washington, where the property involved is located outside of the District of Columbia, where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government.

However, disregarding considerations of convenience, broadening of the venue provisions of title 28 to permit these actions to be brought locally is desirable from the standpoint of efficient judicial administration. Frequently, these proceedings involve problems which are recurrent but peculiar to certain areas, such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently.

In addition, the present venue provision results in a concentration of these actions in the District Court for the District of Columbia, a court which is already heavily burdened. Court congestion is increased and substantial delays are incurred. The broadened venue provided in this bill will assist in achieving prompt administration of justice by making it possible to bring these actions in courts throughout the country, many of which are not nearly as burdened as the District Court for the District of Columbia.

To achieve these results, section 2 of this bill amends section 1391 of title 28 of the United States Code to provide that an action may be brought against an officer or an employee of the United States or any

agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, in any judicial district where a defendant resides, or in which the cause of action arose, or in which any real property involving the action is situated, or if no real property is involved in the action, where the plaintiff resides.

The Department of Justice in its report on the bill expressed concern that the bill might be interpreted to give the district courts jurisdiction to order a Government official to act in a manner contrary to his discretion. The committee, therefore, has adopted the amendment set forth to section 1 which specifies that the court can only compel the official or agency to act where there is a duty, which the committee construes as an obligation, to act or, where the official or agency has failed to make any decision in a matter involving the exercise of discretion, but only to order that a decision be made and with no control over the substance of the decision. The Department of Justice also expressed concern that where the plaintiff resides in a different judicial district than that in which real property involved in the action is situated, it would not be in the interest of an expeditious proceeding to have the action brought in the judicial district where the plaintiff resides. The committee considered this suggestion meritorious and approved the amendment set out to section 2 of the bill. The committee also approved an amendment to section 2 of the bill providing that the provision with respect to venue should apply only to the extent that it is not otherwise provided by law. Examples of such proceedings covered by this provision are proceedings brought with respect to Federal taxes and under section 5 of the act of September 26, 1961, relating to immigration.

The words "original jurisdiction" as used in section 1 of the bill are not intended to limit the existing powers of district courts to issue mandatory injunctions in aid of jurisdiction otherwise acquired. Likewise, there is no intent that the bill affect the doctrine of exhaustion of administrative remedies.

As stated in the House report, the bill does not define the term "agency," but the committee agrees that it should be taken to mean any department, independent establishment, commission, administration, authority, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest.

The report of the Judicial Conference of the United States, as incorporated in the letter from Warren Olney III, Director of the Administrative Office of the U.S. Courts, affirmatively recommending the enactment of H.R. 1960 is attached hereto and made a part hereof. The report from the Department of Justice to the Judiciary Committee of the U.S. Senate on H.R. 1960 and its companion Senate bill, S. 20, is also attached hereto and made a part hereof.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., June 14, 1961.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report on H.R. 1960, a bill which would permit a civil action to be brought against an officer of the United States in any judicial district

where any plaintiff in the action resides. H.R. 1960 is identical to H.R. 12622 which was approved by the House of Representatives during the 86th Congress.

This proposal for amending the venue statute was studied by the Committees on Court Administration and Revision of the Laws, and favorable action was taken by the Judicial Conference of the United States.

H.R. 1960 (a) confers upon the district courts original jurisdiction of actions to compel officers or employees of the United States or agencies thereof to perform their duty, (b) provides that civil actions in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides or in which the cause of action arose or in which any property in the action is situated, and (c) provides that the summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

The Judicial Conference approved the proposal at its session in September 1960, and in March 1961 specifically approved H.R. 1960, and the Conference recommends that the legislation be enacted.

Sincerely yours,

WARREN OLNEY III, *Director.*

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., February 28, 1962.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on identical bills S. 20 and H.R. 1960 (H.R. 1960 passed the House on July 10, 1961) to amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the U.S. district courts, and for other purposes, and related bill S. 717 to authorize civil actions for the review of administrative determinations as to the use of lands of the United States for grazing purposes to be instituted in judicial districts in which such lands are situated, and for other purposes.

The pending companion bills, H.R. 1960 and S. 20, are general in scope and as to purpose, similar to S. 717 which relates to determinations concerning the issuance of grazing permits only. If the companion bills, or modified versions thereof, are passed by the Congress, consideration of S. 717 would appear to be unnecessary because the problems it seeks to meet are adequately covered in the broader proposals.

Section 1 of the companion bills (H.R. 1960 and S. 20) would extend to all U.S. district courts jurisdiction to issue writs in the nature of mandamus.

This Department questions the wisdom of authorizing district courts generally to mandamus Cabinet officers and other Government officials who are presently suable, if at all, only in the District of Columbia. However, if either S. 20 or H.R. 1960 is to be given further consideration by the Congress, the provisions of the bills should be clarified.

While the stated purpose of section 1 is to extend the mandamus powers of the District Court for the District of Columbia to the several district courts throughout the Nation, the language of the section is dangerously broad. Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power intended than the existing mandamus power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. We think it essential that the section refer to the "mandamus" power and specifically limit its exercise to ministerial duties owed the plaintiff. Should the language be applied to discretionary acts of Federal officers, the judicial branch would be invading the executive or legislative function in violation of the doctrine of separation of powers. Clearly, the judiciary can compel executive action (or legislative action) only where there is an absolute obligation to act in connection with which no discretion exists.

The venue provision in section 2 covers an entirely different subject. Under present law, after one has exhausted his administrative remedies, the final decision is generally made by an official residing in the District of Columbia. To challenge the legality of that decision, the officer residing in Washington must be sued in Washington. The purpose of this section of the bill is to have officers who live in the Capital subject to suit throughout the country to the same extent that they can now be sued in the District. In effect, then, this venue provision would do away with the defense that a superior officer is an indispensable party because, with a grant of venue, a superior officer can be made a party.

The Administrative Procedure Act contains an expression of existing congressional purpose relating to review of the acts of Federal officers. For venue reasons, however, practically all proceedings for review under that act must be brought in the District of Columbia. We believe that less confusion will result by tying in this simple venue grant directly to the Administrative Procedure Act. This unquestionably eliminates suits for money judgments against officers, eliminates any question that a discretionary action can be reviewed, and requires an exhaustion of administrative remedies. It will do away with any possible future contention that the legislation was intended to add any additional substantive right of appeal. It would thus achieve what we understand to be the purpose of the sponsors within the framework of existing legislation.

The pending bill would place venue in any judicial district "wherein the plaintiff resides." We recommend that this be changed to grant venue in any judicial district "in which the cause of action arose, or in which any property involved in the action is situated." The principal demand for this proposed legislation comes from those who wish to seek review of decisions relating to public lands, such as the awarding of oil and gas leases, consideration of land patent applications and the granting of grazing rights or other interests in the public domain. The applicants may reside in any State, or several States of the Union, and it would be unwise to have the Secretary sued in Maine with re-

spect to an oil and gas lease in Wyoming. On the other hand, there is no objection to permitting one who has done business involving land in Wyoming to bring any suit concerning that land in the State where it is located.

Without recommending legislation in this field, we have drafted revised language to accomplish the purposes stated for the subject bills, which contains minimal safeguards to the national interest in management of the public domain, in maintenance of separation of powers, and to minimize fruitless litigation. As to the provision conferring mandamus jurisdiction, it is recommended that a new section 1361 of title 28 of the United States Code proposed to be added by section 1 of S. 20 and H.R. 1960 be revised to read as follows:

“§ 1361. Action in the nature of mandamus

“The district courts shall have jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or of any agency thereof to perform a ministerial duty owed to the plaintiff under a law of the United States.”

As to the provision for venue, it is recommended that the new subsection (e) proposed to be added to section 1391 of title 28 of the United States Code by section 2 of the bill be revised to read as follows:

“(e) Except where a special statutory proceeding for judicial review relevant to the subject matter is provided in any court specified by statute, a civil action for judicial review of agency action under section 10 of the Administrative Procedure Act (60 Stat. 243, § 10; 5 U.S.C. § 1009) may be brought in any judicial district as above provided or in any judicial district in which the cause of action arose, or in which any property involved in the action is situated.

“The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that delivery of the summons and complaint to the officer as required by the rules maybe made by certified mail beyond the territorial limits of the district in which the action is brought.”

In order that there may be no misunderstanding in connection with administration of the tax laws of the United States, it is recommended that an additional section be added to the bill as follows:

“§ 3. This Act shall not apply to proceedings brought with respect to Federal taxes.”

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

BYRON R. WHITE,
Deputy Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CHAPTER 85, TITLE 28, UNITED STATES CODE

Chapter 85.—DISTRICT COURTS; JURISDICTION

Sec.

* * *

§ 1361. *Action to compel an officer of the United States to perform his duty.*

* * * * *

§ 1361. *Action to compel an officer of the United States to perform his duty.*

The district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion.

* * * * *

CHAPTER 87, TITLE 28, UNITED STATES CODE

§ 1391. Venue generally.

* * *

(e) *A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.*

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

ECOLOGY LAW QUARTERLY WINTER 1972

Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers

Joseph J. Brecher*

The forum in which environmental lawsuits are tried is an element of increasing importance. For a number of reasons environmental attorneys prefer to bring suit in the District Court for the District of Columbia. Government defendants, however, are seeking to have such cases transferred to other forums with significantly increasing frequency. The resulting conflict over venue is the subject of this paper. The author draws extensively from his experience as an attorney for one of the parties to the "Four-Corners" Southwest power plant controversy, contributing valuable insights to the difficult issue of venue transfer. He calls attention to an emerging judicial interpretation of the venue statutes and advises environmental litigants on how to avoid the venue pitfall.

On July 21, 1971, the solicitor for the Department of Interior confirmed environmentalists' suspicions that the government had adopted a policy of seeking transfers of conservation cases brought in the District of Columbia Circuit to the district in which projects with environmental impact were located. "There is no delaying action," he said. "These cases ought to be tried in the areas where the problems have arisen."¹ The new policy imposes a severe hurdle to overcome; in many environmental law suits, the question of venue can spell the difference between victory and defeat.

The heads of all federal agencies with environmental responsibilities have their official residence in Washington, D.C., and may, therefore, be sued there under the general provisions of the federal venue statute.² There are a number of strategic reasons environmental lawyers prefer to bring suits in Washington, D.C.

* Staff Attorney, Native American Rights Fund, Boulder, Colorado. Co-author, *Environmental Law Handbook*, California Continuing Education of the Bar, Berkeley, California, 1970. B.A. 1962, Amherst College; J.D. 1966, New York University.

1. N.Y. Times, July 22, 1971, at 42, col. 7.

2. 28 U.S.C. § 1391(e) provides:

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1)

The District of Columbia Circuit is by far the most sophisticated and knowledgeable circuit on environmental matters. That court has written many landmark conservationist opinions in recent years: *Calvert Cliffs*,³ the *Three Sisters Bridge* case,⁴ the *Amchitka Atomic Test* case,⁵ *Friends of the Earth v. Federal Communications Comm'n.*,⁶ *Soucie v. David*,⁷ *Environmental Defense Fund v. Ruckelshaus*,⁸ *Wellford v. Ruckelshaus*,⁹ *Environmental Defense Fund v. Hardin*,¹⁰

a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

A major purpose of § 1391(e) is to make it more convenient for citizens to sue government agencies and their officials. Such suits keep the government responsive to its citizens and insure that agencies fulfill Congressional intent. *Natural Resources Defense Council v. TVA*, 3 ERC 1468, Civil No. 71-1719 (S.D.N.Y., decided Dec. 9, 1971).

3. *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n.*, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971). The court ordered the A.E.C. to revise its review procedures regarding, *inter alia*, the nonradiological environmental consequences of its actions, under the mandate of the National Environmental Policy Act (NEPA). The controversy arose from the proposed construction of an atomic power plant on the Chesapeake Bay in Maryland.

4. *D.C. Federation of Civic Associations, Inc. v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970), was a suit to enjoin the construction of a bridge over the Potomac River from Virginia to Washington. The case was remanded to determine whether the Department of Transportation had complied with those sections of the Federal-Aid Highway Act providing for public hearings and consideration of the environmental impact of proposed projects. The court recently held invalid the Secretary's determination that all possible planning had been done to minimize harm to parkland. 3 ERC 1143, Civil No. 24,834 (1971).

5. *Committee for Nuclear Responsibility v. Seaborg*, 3 ERC 1126, Civil No. 71-1732 (D.C. Cir., filed Oct. 5, 1971). The court reversed a summary judgment against the suit to enjoin the Amchitka Nuclear Test in Alaska. The allegation of violation of NEPA, resulting from the exclusion of all negative scientific opinions from the Environmental Impact Statement (EIS), was deemed not to be disposed of by the mere fact of Congressional appropriations for the project.

6. 449 F.2d 1164, 2 ERC 1900 (D.C. Cir. 1971). The F.C.C. was held to be obliged to apply the "fairness" doctrine to the issue of automobile and gasoline commercials in its review of a licensee's discharge of its public service obligations.

7. 448 F.2d 1067, 2 ERC 1626 (D.C. Cir. 1971). The court reversed the dismissal of a suit under the Freedom of Information Act to compel disclosure of the government's SST evaluation report.

8. 439 F.2d 584, 2 ERC 1114 (D.C. Cir. 1971). The Secretary of Agriculture was ordered to commence proceedings to determine whether DDT should be registered, which determination should contain an adequate explanation of the evidence considered and the factors contributing to the final decision.

9. 439 F.2d 598, 2 ERC 1123 (D.C. Cir. 1971). The court ordered the defendant to develop standards for the safe use of the herbicide 2,4,5-T with respect to farm workers, in compliance with the Federal Insecticide, Fungicide and Rodenticide Act.

10. 428 F.2d 1093, 1 ERC 1347 (D.C. Cir. 1970). The court affirmed that organizations devoted to environmental protection had standing to challenge the Secretary of Agriculture's failure to act on a request for interim suspension of registration of DDT.

and *Environmental Defense Fund v. H.E.W.*¹¹ are among them. These cases reflect a grasp of ecology, the legal structure of NEPA, and general administrative inadequacy that can result only from repeated exposure to the federal administrative process.

It is usually more convenient and less expensive to try environmental cases in Washington than at the scene of the problem. Most arise in very rural areas of the West, while experienced environmental lawyers usually have their offices in coastal cities. In an extreme case, such as the *Alaska Pipeline* case,¹² the added expenses of trying the case in Alaska probably would have required the plaintiffs to drop the case. These added expenses are not so crushing to the government and private proponents of a project, who stand to gain a substantial tactical advantage from transfer, and who are in a much better position to bear any added expense and inconvenience. The extra time needed to conduct litigation in remote areas also works against environmental lawyers, who are seldom in a position to redistribute their other work to other firm members; the large firms that usually represent industry have far more flexibility.

Publicity is an important element in all environmental campaigns. Often the lawsuit is of secondary importance, serving primarily to focus public attention on an issue. An executive or legislative solution is far more satisfactory than a judicial pronouncement in the long run,¹³ and political decisions in the conservation arena are largely a function of public pressure. A suit in Washington is certain to receive more extensive coverage by the media than one in the District of Utah, for example. All major newspapers, wire services, and broadcasting networks have Washington bureaus; this is rarely the case in rural areas.

Environmental lawyers are often handicapped when a trial is

11. 428 F.2d 1083, 1 ERC 1341 (D.C. Cir. 1970). The court ordered the defendant to publish in the Federal Register plaintiff's proposals for zero tolerance level of DDT in raw food products and to commence administrative proceedings on the proposal.

12. *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422, 1 ERC 1335 (D.D.C. 1970). The court enjoined issuance of a permit for a hauling road along the Trans-Alaska pipeline due to the insufficiency of the EIS submitted to satisfy NEPA.

13. For example, in *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1971), the court issued a preliminary injunction against further construction on the Cross-Florida Barge Canal until the Army Corps of Engineers complied with the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (1971). Ultimately, the defendants could have made the detailed study called for by NEPA and continued construction. Four days later, largely in response to public pressure, President Nixon ordered a permanent halt to the project in order to prevent "a past mistake from causing permanent damage." 1 ER—CURR DEV. 1010 (1971).

held in a rural problem area. Few circuits are as understanding of the conservationist cause and of the difficult issues raised in conservation cases as the D.C. Circuit. Many conservation battlegrounds lie in the Ninth Circuit, a court which has so far been distinctly unsympathetic to environmental concerns. That Circuit, for instance, ruled that the Sierra Club had no special interest in the Sierras.¹⁴

A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view. Local residents and newspapers are apt to favor projects in their locality, even at the cost of substantial environmental damage, for two reasons. First, large federal landholdings or depressed economic conditions often make the local tax base extremely small. Thus, residents see the construction of new projects in terms of upgraded schools, libraries, roads and other public facilities. Second, public leaders in the affected area often support such projects because of the new jobs and economic expansion associated with them.¹⁵ Judges and juries in the affected areas are likely, therefore, to feel that the public interest¹⁶ lies in building a project, rather than preserving the environment.

14. *Sierra Club v. Hickel*, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970), *aff'd sub nom. Sierra Club v. Morton*, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972). Similarly, in *Alameda Conservation Ass'n v. California*, 437 F.2d 1087, 2 ERC 1175 (9th Cir. 1971), *cert. denied*, 402 U.S. 908, 2 ERC 1910 (1971) the plaintiff conservation group was held not to have standing to challenge a California land transfer statute without supportive allegations of damage to its property rights or interests. For other examples, see *Union Oil Co. v. Minier*, 437 F.2d 408, 2 ERC 1067 (9th Cir. 1970), which upheld an injunction to prevent the Santa Barbara District Attorney from attempting to halt development of offshore oil leases; *County of Santa Barbara v. Malley*, 426 F.2d 171, 1 ERC 1285 (9th Cir. 1970) *cert. denied*, 396 U.S. 950, 2 ERC 1909 (1971), which upheld the denial of an injunction to prohibit the granting of further oil drilling permits for the Santa Barbara Channel where such denial was based on a finding that plaintiffs probably would not prevail on the merits as to their rights to an administrative hearing; and *Santa Barbara v. Hickel*, 426 F.2d 164, 1 ERC 1288 (9th Cir. 1970), which upheld the denial of an injunction to prohibit further oil production in the Santa Barbara Channel where a showing of irreparable damages was absent. It is ironic that under *Sierra Club v. Hickel*, the Ninth Circuit dismissed an action brought by a national conservation organization for lack of standing. But if the plaintiffs try to overcome this technical barrier by getting local residents to join them, the danger of transfer is greatly increased. See text accompanying note 77 *infra*.

15. See, e.g., the Draft Environmental Statement prepared by the Bureau of Reclamation for the Navajo power project, September, 1971, at 59:

Direct or long-range economic benefits from the jobs created by the station and the tax base in the energy produced will occur. Many proponents of the station see this as offsetting any risks involved from possible environmental defects.

NTIS Order No. PB-202 905D.

16. "Public interest" may be a crucial element in obtaining an injunction, the most frequently used environmental remedy. The general principle is announced in *Yakus v. United States*, 321 U.S. 414, 441 (1944). It has been applied to the area

There is also a logistical problem. Conservationists often must rely on experts who are motivated by commitment, and who are prepared to waive their usual fees. While such men can often find the time to testify in Washington, transportation to environmental problem areas is usually so time-consuming that it becomes a real sacrifice for them to appear. Industry experts are not called upon to exhibit such magnanimity—they receive their usual fees for transit time.

I

FORUM NON CONVENIENS

A court may refuse to hear a case under the doctrine of *forum non conveniens*, discussed in the leading case of *Gulf Oil Corp. v. Gilbert*.¹⁷ In that case *Gilbert*, the owner of a warehouse in Lynchburg, Virginia, sued *Gulf* for fire damage to his warehouse and customers' property stored inside. The fire allegedly was due to *Gulf's* negligence in delivering gasoline to warehouse tanks and pumps. *Gulf*, a Pennsylvania corporation, was licensed to do business in New York and jurisdiction was obtained in that state by serving a New York official designated by *Gulf* to receive service of process. The court conceded that the action could be commenced in New York under applicable federal venue statutes, but concluded that the district court in that state was correct when it declined to exercise jurisdiction under the doctrine of *forum non conveniens*.

The Court explained that doctrine as follows:

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.¹⁸

The Court acknowledged that a definite rule for granting a dismissal under the doctrine could not be formulated, due to the wide range of circumstances that could be involved. Therefore, it concluded, the trial court must exercise broad discretion. But the factors

of environmental protection in *National Helium Corp. v. Morton*, 326 F. Supp. 151, 2 ERC 1378 (D. Kan. 1971), *aff'd*, 3 ERC 1129, Civil No. 71-1369 (10th Cir., decided Oct. 4, 1971); *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1971); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 2 ERC 1422 (4th Cir. 1971). None of these cases defines "public interest," however, other than to say that it is different from "private interest."

17. 330 U.S. 501 (1947).

18. *Id.* at 507.

to be considered by the court are "easily identifiable": relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; the enforceability of a judgment, if one is obtained, and "all other practical problems that make the trial of a case easy, expeditious, and inexpensive."¹⁹

Although a plaintiff may not choose a forum so as to "vex," "harass," or "oppress" his opponent, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."²⁰ Several factors of public interest should also be weighed: the court congestion that can occur when cases are not handled at their place of origin; the unfairness of imposing jury duty on people of a community that has no relation to the litigation; the local interest in having a trial within the view and reach of citizens concerned with its outcome; and, in diversity cases, the appropriateness of having a case tried by a court familiar with the applicable state law, free from conflict-of-laws problems.²¹

Applying these principles to the facts in the *Gilbert* case, it was clear that the doctrine applied: the plaintiff and everyone on his side of the case (except his attorney and, possibly, some expert witnesses) resided outside New York; everyone who participated in the allegedly negligent delivery resided in or near Lynchburg; the defendant might need to interplead the Virginia independent contractor who delivered the gasoline; fact witnesses, such as warehouse customers, police, and firemen, were Lynchburg residents; compulsory process for these witnesses could not be obtained in New York; Virginia state law governed the case, and a local federal court would be more conversant with that law; and there would be potential conflict-of-laws problems if the case were tried in New York.

The only justification offered by the plaintiff for having the trial in New York was that Virginia jurors would be "staggered" by a claim for \$400,000 and might be reluctant to award such a large amount. The Court found this to be a "strange argument." The plaintiff also alleged undue local influences, but the Court noted "there is no specification of any local influence, other than accurate knowledge of local conditions, that would make a fair trial improbable."²²

19. *Id.* at 508.

20. *Id.* This dictum has been repeatedly quoted. See, e.g., *North Branch Products, Inc. v. Fisher*, 284 F.2d 611, 613 (D.C. Cir. 1960); *General Portland Cement Co. v. Perry*, 204 F.2d 316, 319 (7th Cir. 1953).

21. 330 U.S. at 508-09.

22. *Id.* at 510.

II

THE TRANSFER STATUTE AND JUDICIAL INTERPRETATION

The doctrine of *forum non conveniens* was codified in 1948.²³ The government (invariably joined enthusiastically by resource-user intervenors) has in most instances relied on this statute to seek the transfer of cases from Washington. 28 U.S.C. § 1404(a) provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.²⁴

A. General Judicial Interpretation

The factors enumerated in the *Gilbert* case²⁵ are still the ones to be considered on a motion to transfer under 28 U.S.C. § 1404(a).²⁶ But there is one major distinction between the common law and the statutory remedy. Under the doctrine of *forum non conveniens*, if the defendant prevails, the case is *dismissed*; under § 1404(a), it is merely transferred to another district or division. The consequences of the application of the former doctrine to the plaintiff are potentially far more severe, since the statute of limitations may run out before he can refile his case in the new forum.²⁷ Thus, transfer under § 1404(a) is a much less harsh action and may be granted more liberally. In the words of the Supreme Court, "We believe that Congress . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience."²⁸

Despite this apparent liberalization, the courts have repeatedly emphasized the defendant's heavy burden of showing inconvenience under § 1404(a) in order to upset judicial acceptance of the plaintiff's choice of forum. For example, in *Shutte v. Armco Steel Corp.*, the Third Circuit stated:

It is black letter law that a plaintiff's choice of a proper

23. 28 U.S.C. § 1404(a) (1971).

24. Other statutes can form a basis for transfer under special circumstances. See note 74 *infra*.

25. See text accompanying notes 19-21 *supra*.

26. See, e.g., *Blake v. Capitol Greyhound Lines*, 222 F.2d 25 (D.C. Cir. 1955).

27. *Norwood v. Kirkpatrick*, 349 U.S. 29, 30 (1955).

28. *Id.* at 32. There is some dispute between the circuits on the status of the common-law doctrine in federal practice. One circuit holds that a court may still grant dismissals on the ground of *forum non conveniens*. See e.g., *Gross v. Owen*, 221 F.2d 94 (D.C. Cir. 1955); *Altman v. Central of Georgia Ry.*, 363 F.2d 284 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 920 (1966). But at least one circuit concludes that § 1404(a) has completely superseded that common law doctrine, and that a dismissal may no longer be granted. See *Collins v. American Automobile Ins. Co.*, 230 F.2d 416, 418 (2d Cir. 1956), *petition for cert. dismissed*, 352 U.S. 802 (1956).

forum is a paramount consideration in any determination of a transfer request and that choice ". . . should not be lightly disturbed" The burden is on the moving party to establish that a balancing of proper interests weighs in favor of the transfer . . . and . . . "unless the balance of convenience of the parties is *strongly* in favor of the defendant, the plaintiff's choice of forum should prevail."²⁹

In a similar vein, a district court in *Crawford Transport Co. v. Chrysler Corp.* said:

The statute requires the moving party to show more than a limited degree of added convenience for trying the case in a different jurisdiction. It requires a strong and preponderant balance in favor of the defendant before the plaintiff's choice of a forum will be denied.³⁰

B. The District of Columbia Interpretation

Although a strict interpretation of the law may indicate that transfer under § 1404(a) should be granted sparingly, district judges in Washington, D.C. have been granting transfers frequently in conservation cases in response to the requests of the government and its industrial allies. The *Rainbow Bridge* case³¹ was the first conservation case which was transferred from Washington on the basis of § 1391 (c).³² In that case, two conservation organizations and an individual sued to enjoin the Secretary of the Interior and the Bureau of Reclamation from operating the Glen Canyon Dam in such a way that the waters of Lake Powell would back up into the Rainbow Bridge National Monument in Utah and under the bridge itself. Their case was based largely on the statutory language of Section 3 of the Act authorizing construction of the Glen Canyon Dam and Reservoir, which said, in part: "It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument."³³ The government moved to transfer or, in the alternative, to dismiss.

29. 431 F.2d 22, 25 (3d Cir. 1970).

30. 191 F. Supp. 223, 228 (E.D.Ky. 1961). Other cases that emphasize the defendant's heavy burden include: *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 147 (10th Cir. 1967); *General Portland Cement Co. v. Perry*, 204 F.2d 316, 319 (7th Cir. 1953); *Menendez Rodriguez v. Pan American Life Ins. Co.*, 311 F.2d 429, 434 (5th Cir. 1962); *Lykes Bros. Steamship Co. v. Sugarman*, 272 F.2d 679, 681 (2d Cir. 1959); *Blake v. Capitol Greyhound Lines*, 222 F.2d 25 (D.C. Cir. 1955); *Akers v. Norfolk & W. Ry.*, 378 F.2d 78 (4th Cir. 1967); *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949 (9th Cir. 1968).

31. *Friends of the Earth v. Armstrong*, Civil No. 3273-70 (D.D.C., decided May 18, 1971).

32. See note 2 *supra*.

33. Upper Colorado River Storage Project Act, 43 U.S.C. § 620(b) (1971).

The government emphasized three points. First, the "Upper Basin" Colorado River states—Colorado, Utah, Wyoming and New Mexico—had a keen interest in maintaining Lake Powell at a higher elevation, since the extra water would belong to and could be used by those states. The states and their water users might want to intervene or appear as *amicus curiae* in order to protect their interests.

Second, the government noted that, although some potential witnesses were Washington-based Bureau of Reclamation employees, most witnesses were people from the Bureau's western offices and other Westerners. If evidence had to be presented, for example, on an application for a preliminary injunction or on the issue of the balance of equities for permanent injunctive relief, it would be more convenient for these witnesses to testify in Utah.

Third, the government emphasized that the case would involve detailed and technical considerations of western water law in general and "the law of the Colorado River" in particular; a Utah court would be far more capable of dealing with these questions than the court in Washington. The government noted that 28 U.S.C. § 1391(e), adopted in 1962, expanded the venue for suits against government officials to include the district in which the affected real property was located. Previously, suits against government officials could be brought only in Washington. Now that § 1391(e) was available, the District of Columbia courts need not be burdened with deciding local and regional questions involving western mining, land use, and water law. The government also argued that the court in *Young v. Director, U.S. Bureau of Prisons*,³⁴ had held that transfer was in accord with Congress' purpose in enacting § 1391(e)—to relieve congestion in the District of Columbia Circuit.

The plaintiffs countered by arguing that the inconvenience to the Upper Basin states and their residents could not be properly considered by the court, since they were neither parties nor witnesses, and their interest in the case was speculative, at best. They noted, further, that the case primarily involved an issue of statutory construction and the major factual allegation—that water would, in fact, enter the Rain-

The government argued that § 620(b) had been repealed by implication in a series of later appropriation acts. See, e.g., the appropriation sections of the following statutes: Pub. L. No. 86-700, 74 Stat. 747; Pub. L. No. 87-330, 75 Stat. 726; Pub. L. No. 87-880, 76 Stat. 1221; Pub. L. No. 88-25, 77 Stat. 29; Pub. L. No. 88-511, 78 Stat. 687; Pub. L. N. 89-299, 79 Stat. 1102; Pub. L. No. 89-689, 80 Stat. 1008; and Pub. L. No. 90-147, 81 Stat. 476, which all contain the following restriction:

Provided, That no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument.

34. 367 F.2d 331, 333 n. 7 (D.C. Cir. 1966).

bow Bridge National Monument—had been conceded by the government. Therefore, the convenience of witnesses was not a major factor. They also argued that the case was not merely of local concern—that the matter was of national significance and interest, involving federal laws, a national monument, and the tax moneys of all United States citizens.

District Judge Jones granted a transfer, relying heavily on *Young v. Director, U.S. Bureau of Prisons* and the presumed Congressional intent embodied in § 1391(e), to relieve the crowded District of Columbia court dockets.³⁵ The court also indicated that complicated questions of western water law should be decided by a western court and found it “entirely possible and not improbable that to properly consider the public interest as well as private interests, evidence will need to be taken.”³⁶ The Court of Appeals for the District of Columbia Circuit denied plaintiffs’ application for a writ of mandate to overturn Judge Jones’s decision on July 20, 1971.³⁷

The court’s decision in the *Rainbow Bridge* case was erroneous on several grounds. First, the issue of familiarity with western water law is a red herring. The plaintiffs were not asking the court to determine a question that touched on water rights or on the long series of statutes and cases dealing with the allocation of Colorado River water. Rather, the simple question presented was whether Section 3 of the Upper Colorado River Storage Project Act of 1956 was still in force, or whether it had been repealed by later appropriation acts. The determination of such a question is merely a matter of statutory interpretation, a task that can be performed as ably by a judge in Washington as one in Utah.

Second, even if one were to concede that evidence would have to be taken in the case, the government did not present a sufficient showing on the issue of witnesses’ convenience. It is not enough merely to assert generally that “the majority of witnesses will come from the Western states.”³⁸ The law is clear that the defendant is required “to list the witnesses by name and their place of residence, and . . . to state generally what is expected to be proved by the witness named.”³⁹

35. *Friends of the Earth v. Armstrong*, Civil No. 3273-70, at 5 (D.D.C., decided May 18, 1971); see also 1962 U.S. CODE CONG. & AD. NEWS 2784, 2786.

36. *Friends of the Earth v. Armstrong*, Civil No. 3273-70, at 6 (D.D.C. decided May 18, 1971).

37. *Friends of the Earth v. Jones*, Civil No. 71-1403 (D.C. Cir., decided July 20, 1971).

38. Memorandum for Defendant in Support of Motion for Change of Venue at 3, *Friends of the Earth v. Armstrong*, Civil No. 3273-70 (D.D.C., decided May 18, 1971).

39. *Johnson v. Chicago, Rock Island & Pac. R.R.*, 228 F. Supp. 160, 161 (D.

The judge's reliance on 28 U.S.C. § 1391(e) and its legislative history is unfounded. That section was enacted for the convenience of plaintiffs, not defendants; the section gives plaintiffs another forum in addition to Washington, in which they can sue government officers in cases involving real property. Indeed, the Senate Report quoted by Judge Jones supports this thesis:

The broadened venue provided in this bill will assist in achieving prompt administration of justice by *making it possible to bring these actions* in courts throughout the country, many of which are not nearly as burdened as the District Court for the District of Columbia.⁴⁰

Furthermore, while the possibility of the defendant's receiving a speedier trial in another district may be considered on a motion for transfer,⁴¹ "[n]o district court may, however, order such a transfer only to serve its personal convenience."⁴² As the court remarked in *Collins v. American Auto Ins. Co.*,⁴³

We think it dangerous to suggest that a judge may deny entrance to his court to a litigant on the ground of his serious burdens; his understandable complaints should be directed elsewhere, as to the executive and the legislature.⁴⁴

In any event, docket congestion and attendant trial delays are "never [factors] to which great weight is assigned."⁴⁵

The *Young*⁴⁶ case is clearly distinguishable. There, two inmates of the federal penitentiary in Lewisburg, Pennsylvania, sought declaratory judgments regarding the validity of their parole revocations. The

Minn. 1964). For further discussion of this point, see text accompanying notes 66-68 *infra*.

40. S. REP. NO. 1992, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S. CODE CONG. & AD. NEWS 2784, 2786 (emphasis added); *Friends of the Earth v. Armstrong*, Civil No. 3273-70, at 4 (D.D.C., decided May 18, 1971).

41. See, e.g., *Koehring Co. v. Hyde Constr. Co.*, 324 F.2d 295, 296 (5th Cir. 1963); *Axe-Houghton Fund A, Inc. v. Atlantic Research Corp.*, 227 F. Supp. 521, 523-24 (S.D.N.Y. 1964); *Polaroid Corp. v. Casselman*, 213 F. Supp. 379, 384 (S.D.N.Y. 1962); *Wilson v. Ohio River Co.*, 211 F. Supp. 666, 667 (W.D. Pa. 1962).

42. *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.*, 88 F. Supp. 863, 866 (S.D.N.Y. 1949).

43. 230 F.2d 416 (2d Cir. 1956), *petition for cert. dismissed*, 352 U.S. 802 (1956).

44. 230 F.2d at 419.

45. *Clendenin v. United Fruit Co.*, 214 F. Supp. 137, 141 (E.D. Pa. 1963), quoting *Peyser v. General Motors Corp.*, 158 F. Supp. 526, 530 (S.D.N.Y. 1958); see also *Blue Bell, Inc. v. Jaymar-Ruby, Inc.*, 311 F. Supp. 942 (S.D.N.Y. 1969), *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.*, 88 F. Supp. 863, 866 (S.D.N.Y. 1949). It should also be pointed out that the burdens of the district court for the District of Columbia were substantially lightened by the portions of the D.C. Court Reform and Criminal Procedure Act of 1970, *codified at* 28 U.S.C. § 292 (1971), which withdrew certain local civil and criminal matters from its jurisdiction.

46. *Young v. Director, U.S. Bureau of Prisons*, 367 F.2d 331 (D.C. Cir. 1966).

District of Columbia Circuit upheld orders transferring their cases to the Middle District of Pennsylvania, noting that this type of action "should ordinarily be transferred as a matter of course."⁴⁷ The court emphasized that the men were not confined and were not sentenced in the District of Columbia and that the issues involved were in no way related to that jurisdiction. The court also noted that the liberalized venue provisions of 28 U.S.C. § 1391(e) now made trial possible in the affected district, thus eliminating the unpleasant possibility that the Washington court would be flooded with similar cases. It also based its holding on the logistical difficulty of bringing prisoners from all over the country to Washington for trial, if an evidentiary hearing proved necessary, and on the fact that the court would have to deal with events occurring in different parts of the country.

In the *Rainbow Bridge* case, on the other hand, the actions of Washington officials concerning a National Monument of interest to the whole country were at issue. The peculiar problem of transporting prisoners was not involved, and factual issues were of minimal importance. The *Young* case, therefore, was a very narrow exception to the general rule favoring the plaintiff's choice of venue. Its expansion to cover conservation cases, in which the whole country has such a vital stake, is clearly unwarranted.⁴⁸

District of Columbia district judges have shown a disturbing tendency to shift the burden of proof to the conservationists on transfer motions. Defendants are granted transfers of cases upon a lesser showing of inconvenience than that seemingly required by § 1404 (a). In the one case where the government's motion for transfer was denied by that court, the *Alaska Pipeline* case,⁴⁹ Judge Hart said:

I think generally conservation and ecological questions should be decided by courts in the areas involved and had the Govern-

47. *Id.* at 332.

48. At least one district court has declined to follow the D.C. District Court's approach in the *Rainbow Bridge* case. In *Natural Resources Defense Council v. Tennessee Valley Authority*, 3 ERC 1468, Civil No. 71-1719 (S.D.N.Y., decided Dec. 9, 1971), the plaintiffs attacked the T.V.A.'s contracts to purchase strip-mined coal. The action was brought in the Southern District of New York. The government claimed that under 16 U.S.C. § 831g (1971), proper venue was in the Northern District of Alabama. That statute provides that the official residence of the T.V.A. is in Alabama. The court found that this section was not an exception to the general provision of 28 U.S.C. § 1391(e) (1971), which allows the plaintiff to bring an action in the district of his residence against United States Government officials. The motion to transfer was therefore denied.

The Second Circuit recently reversed this decision. — F.2d —, 40 U.S.L.W. 2692 (2d Cir. March 27, 1972). It noted that the T.V.A. is a corporation, rather than a government official. Therefore, since T.V.A. did no business in the southern district of New York, venue could not properly be laid there.

49. *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422, 1 ERC 1355 (D.D.C. 1971).

ment moved a year ago to transfer this case, I would have considered the burden on the plaintiffs to show the court why it shouldn't be moved.⁵⁰

He denied a transfer only because the government's motion was made over a year after he had issued a preliminary injunction and the plaintiffs would have suffered an enormous burden due to the delay if a transfer had been granted.

III

THE SOUTHWEST POWER CASES

Section 1404(a) has been invoked by Federal District judges in the District of Columbia in three recent environmental cases,⁵¹ all related to various aspects of the gigantic Southwest power complex now under development. Ten electric companies propose to construct a network of six coal-fired electrical generating stations in the Four Corners area of Utah, New Mexico, Arizona, and Nevada that will ultimately produce as much as 13,000 megawatts, about as much power as the entire output of the Tennessee Valley Authority. Virtually none of this power is to be used in the region; it is to be shipped to distant load centers such as Los Angeles, San Diego, Las Vegas, Phoenix, and Tucson. The coal for four of the six plants is to come from three gigantic strip mines; the other two plants will be fueled by underground mines. Altogether the plants will burn about 144,000 tons of coal every day. Cooling water will be drawn from the already severely overdrafted Colorado River at the rate of 250,000 acre-feet (about 80 billion gallons) per year, more than twice the annual consumption of the entire city of San Francisco. Estimates of the air pollution associated with the power complex stagger the imagination: over 200 tons of particulates, 1,350 tons of sulfur oxides and 1,000 tons of nitrogen oxides will be produced every day—more than in Los Angeles, the nation's smog capitol.⁵²

The situation is even more appalling when one considers that the Four Corners region is one of the last areas of relatively clean air left in the country. It contains some of our most prized scenic, recreational and cultural treasures: the Grand Canyon, Mesa Verde, Zion, Bryce Canyon, Lakes Mead and Powell, and Canyon de Chelly. In this area, too, live some of the last groups of Indians who have

50. Excerpt from transcript reprinted at 1 ELR 10131 (1971).

51. *Jicarilla Apache Tribe of Indians v. Morton*, Civil No. 1089-71 (D.D.C., filed June 2, 1971); *Lomayaktewa v. Morton*, Civil No. 974-71 (D.D.C., filed May 14, 1971); *Yazzie v. Morton*, Civil No. 938-71 (D.D.C., filed May 11, 1971).

52. Amended Complaint at 4, *Jicarilla Apache Tribe v. Morton*, Civ. No. 71-566 (D. Ariz., filed Oct. 28, 1971).

been succeeding in maintaining their ancient way of life against the relentless pressures toward assimilation presented by modern American technology. Traditionalist Navajos and Hopis, who believe that the beauty and harmony of undisturbed nature is essential for the survival of mankind, looked on with dismay as their skies began to darken, the soil in their sacred Black Mesa area was uprooted by giant power shovels, and their reservations were crisscrossed with massive transmission lines, a pipeline, access roads, and an automated coal-haul railroad.

The role of the federal government, particularly the Interior Department, in this story is discouraging. It has long been recognized that the government has a strong fiduciary obligation to preserve and protect Indians' health, welfare, safety, and way of life.⁵³ This federal obligation extends to protecting the environment of its Indian wards.⁵⁴ Yet, the government not only approved and encouraged the Southwest power development, it actually is participating directly in it. The Bureau of Reclamation is selling cooling water to several of the plants, the Bureau of Land Management and the Forest Service have approved transmission line and transportation rights-of-way over lands in their charge, the Corps of Engineers has approved water intake facilities, and several Interior departments have issued approvals for pollution abatement facilities that many environmentalist consider grossly inadequate.

Perhaps the most flagrant conflict of interest concerns the Navajo power plant at Page, Arizona, on Lake Powell, where one branch of the Interior Department, the Bureau of Reclamation, is a one-quarter owner of the generating capacity. At the same time, another branch of the department, the Bureau of Indian Affairs, approved Navajo and Hopi leases of coal, water, and the plant site itself, without having fully advised those tribes of the environmental hazards involved.⁵⁵

53. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Kagama*, 118 U.S. 375 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971). President Nixon, in a recent message on Indian affairs, reaffirmed the trust relationship, noting that

the United States Government acts as a legal trustee for the land and water rights of American Indians. . . . Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust *without reservation* and with the highest degree of diligence and skill.

6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 902 (1970) (emphasis added).

54. The federal obligation to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" under § 101(b)(2) of the National Environmental Policy Act [42 U.S.C. § 4331(b)(2) (1971)], would, of course, cover Indians as well as other citizens. See 8 U.S.C. § 1401(a) (1971).

55. See e.g., the statement by Peter MacDonald, Navajo Tribal Chairman, in *Hearings on the Problems of Electric Power Production in the Southwest Before the*

Thus, the Interior Department is in the position of approving both the purchase and sale of Indian assets, a clear case of self-dealing.⁵⁶

Shocked and infuriated by this massive and arrogant desecration, individual Navajos and Hopis, other area tribes, and environmental organizations began a series of suits to block the power complex in the spring of 1971. The Jicarilla Apache Tribe is asserting that the construction of the power plants has been in violation of NEPA. Several Navajos are suing the Secretary of the Interior for unlawfully granting a lease of Indian lands to the power companies, and a group of traditional Hopis are attempting to challenge the power of the Hopi tribal council and the Hopi constitution, which had been imposed on them by the federal government. Unfortunately, this legal activity is somewhat belated. One of the plants, the Four Corners plant near Farmington, New Mexico, had been in operation since 1963 and the Mohave plant in Nevada had been on line since late 1970. Three of the other plants were already under construction and most of the important federal permits and approvals had been issued.

A. The NEPA Violation Suit

In the first such suit, *Jicarilla Apache Tribe of Indians v. Morton*,⁵⁷ the Jicarilla tribe, the Committee to Save Black Mesa, the Sierra Club, and six individual Navajos sued the Secretaries of Interior, Agriculture, and the Army, as well as the head of the Corps of Engineers on the ground that their approval of various phases of the Southwest power complex violated the National Environmental Policy Act (NEPA)⁵⁸ in several respects.⁵⁹

Federal officials issued many of these approvals after January 1, 1970 (the effective date of NEPA) without having filed any environ-

Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., pt. 5, at 1583 (1971).

56. See generally A. SCOTT, *ABRIDGEMENT OF THE LAW OF TRUSTS* §§ 170, 170.1 (1960).

57. Civil No. 1089-71 (D.D.C., filed June 2, 1971), transferred to the District of Arizona, Civil No. 71-566 (D. Ariz., filed Oct. 28, 1971). A companion case, *National Wildlife Fed'n v. Morton*, Civil No. 1090-71 (D.D.C., filed June 2, 1971), was filed the same day in the same court. The two actions are virtually identical and have been ordered consolidated for all purposes.

58. 42 U.S.C. §§ 4321 *et seq.* (1971).

59. There were several other causes of action set forth in the complaint, based on the Government's trust obligation, as well as other statutes, including the Fish & Wildlife Coordination Act, 16 U.S.C. §§ 661 *et seq.* (1971), and declarations of Congressional policy contained at 16 U.S.C. §§ 4601 *et seq.* (1971), §§ 470 *et seq.* (1971). In their first amended complaint, the plaintiffs deleted these separate causes of action on the theory that those duties are subsumed under NEPA, 42 U.S.C. §§ 4321 *et seq.* (1971).

mental impact statements, under the mandate of NEPA § 102.⁶⁰ Draft impact statements⁶¹ were submitted only after those decisions had already been made. The plaintiffs contend that these draft statements are fatally defective—aside from their being issued too late—because they did not reflect active, independent investigations by the federal officials involved. Instead, the officials blindly accepted data and conclusions submitted by the power companies while ignoring detrimental information supplied by Indians, environmentalists, and, in some cases, the Government's own consultants.⁶²

Another defect of the draft statements is their failure to deal meaningfully with the potentially disastrous cumulative, synergistic, and regional effects of the six-plant network.⁶³ Finally, the plaintiffs maintain that the federal defendants violated NEPA by failing to reassess projects under construction and approvals issued before the effective date of NEPA in order to consider possible alterations and modifications that might ameliorate environmental degradation.⁶⁴

The plaintiffs moved for a preliminary injunction against the issuance of any further federal permits until the defendants had complied with NEPA. In support of the motion, they filed more than twenty affidavits from experts concerning the adverse effects to be

60. NEPA § 102(2)(c), codified at 42 U.S.C. § 4332(C) (1971), requires agencies proposing "major Federal actions significantly affecting the quality of the human environment" to file a "detailed statement" on environmental impact, adverse environmental effects that cannot be avoided, alternative possibilities, the relation between short-term uses and long-term productivity, and irreversible and irretrievable commitments of resources.

61. Agencies are required to prepare and circulate for comment an initial draft statement before filing a final statement with the Council on Environmental Quality. See *Statements on Proposed Federal Actions Affecting the Environment*, ¶ 7, 36 Fed. Reg. 7725 (1971).

62. Brief for Plaintiffs on Motion for Preliminary Injunction at 21, *Jicarilla Apache Tribe of Indians v. Morton*, Civil No. 1089-71 (D.D.C., filed June 2, 1971). The requirement of an active, independent agency investigation under NEPA is set forth in *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1118, 2 ERC 1779 (D.C. Cir. 1971). In each of several cases, the courts ruled that it was improper for federal agencies in making their decisions to ignore environmental factors, especially evidence offered by interested parties. *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (Federal Power Act); *Conservation Soc'y v. Texas*, 2 ERC 1871, Civil No. 30915 (5th Cir., decided Aug. 5, 1971) (NEPA); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965) (Federal Power Act); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, 759 (E.D. Ark. 1971) (NEPA).

63. See the guidelines proposed by the Council on Environmental Quality in *Statements on Proposed Federal Actions Affecting the Environment*, ¶ 5(b), 36 Fed. Reg. 7724 (1971).

64. Such a reassessment of ongoing projects is required under the rationale of the *Calvert Cliffs'* decision, 449 F.2d 1109, 1127-28, 2 ERC 1779, 1792 (D.C. Cir. 1971).

expected from the air and water pollution, strip mining, and other forms of environmental degradation associated with the power complex.

Before that motion could be heard, the ten power companies with interests in the six plants and the coal company operating the Black Mesa strip mine moved to intervene under Rule 24 of the Federal Rules of Civil Procedure and to transfer the case to Arizona under § 1404(a). The federal defendants joined in the latter motion. Numerous grounds were set forth in support of the motion in several separate briefs.

The principal point argued was that the complaint raised factual issues concerning the effects of the power complex on the environment, Indian culture and religion, historical landmarks, scenic beauty, and recreation. The intervenors and the government contended that their employees, expert witnesses, and other witnesses from Arizona and surrounding states would have to testify with regard to these effects. It would be far more convenient for these witnesses to testify in Arizona than in Washington. They also pointed out that, with the exception of federal employees, compulsory process was unavailable in Washington for unwilling witnesses.⁶⁵ They noted that virtually all the experts who submitted affidavits in support of the plaintiffs' motion for a preliminary injunction also lived in the Southwest.

With the exception of one power company, neither the intervenors nor the government specifically identified the witnesses they intended to call or the exact subject matter of their testimony. The law requires that "[t]he moving party must set out in the affidavit the names of the witnesses and the substance of the evidence that each will give."⁶⁶ The reason for this rule is sound: "Unless the court has at least a general idea of the materiality of the evidence to be offered, virtually the entire decision on whether to transfer the case would be left to speculation and conjecture."⁶⁷

65. Under FED. R. Civ. P. 45(e)(1), a subpoena may be served only within the district in which the trial will be held or within 100 miles of the place of trial. No other states are within 100 miles of Phoenix; thus, compulsory process would be available only in Arizona, not in other Southwestern states. This fact considerably weakens the defendants' argument, since five of the six plants, four of the major load centers, and the two relevant offices of the Bureau of Reclamation are outside Arizona.

66. *Development Co. of America v. Insurance Co. of N. America*, 249 F. Supp. 117, 118 (D. Md. 1966).

67. *Id.* See also *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 148 (10th Cir. 1967); *Chicago, Rock Island & Pac. R.R. v. Hugh Breeding, Inc.*, 232 F.2d 584, 588 (10th Cir. 1956); *Securities & Exchange Comm'n v. Golconda Mining Co.*, 246 F. Supp. 54, 56 (S.D.N.Y. 1965); *Johnson v. Chicago, Rock Island & Pac. R.R.*, 228 F. Supp. 160 (D. Minn. 1964); *Clendenin v. United Fruit Co.*, 214 F. Supp. 137, 140

Instead of the detailed statement identifying witnesses and the substance of their testimony required by the cases, vague, general statements were submitted. A typical statement reads:

Representatives of all these federal offices will be called as witnesses to testify concerning their review and evaluation of the several documents approved by them as a part of the transaction complained of by the plaintiffs.⁶⁸

Only one of the eleven intervenors presented a detailed statement. An affidavit submitted on behalf of the Public Service Company of New Mexico listed eight witnesses who presumably would be inconvenienced by a trial in Washington. Three were company officers or employees. It is rather anomalous for an intervenor to ask to be made a party to a lawsuit and then to seek to remove the case from a forum with which the other parties were satisfied in order to suit its own convenience.⁶⁹

The inconvenience to three other witnesses would have been minimal. Two experts on meteorology and air pollution abatement equipment design were from the Denver area. Their inconvenience would have amounted to the difference in air fare between a Denver-Washington and a Denver-Phoenix trip—about \$110 apiece, round trip. Another consultant, who would testify about the effects of sulphur oxides on plants, was from Salt Lake City: the difference in air fare is about \$150.

Another potential witness was a New Mexico state official,⁷⁰ who would testify as to the inspections and findings of his department regarding air pollution and whether the Four Corners and San Juan plants complied with his state's air pollution law. His statement would be irrelevant, however; compliance with state and local laws and regulations is not a substitute for a full environmental assessment under NEPA. The *Calvert Cliffs*' case specifically forbade "abdication of NEPA authority to the standards of other agencies."⁷¹ Furthermore, the official personally assured the author by telephone that he would have been willing to travel to Washington to testify, if necessary.

(E.D. Pa. 1963); *Peysor v. General Motors Corp.*, 158 F. Supp. 526, 529 (S.D.N.Y. 1958).

68. Affidavit of James H. Krieger in Support of Motion to Transfer of Peabody Coal Co., Intervenor at 4, *Jicarilla Apache Tribe of Indians v. Morton*, Civil No. 1089-71 (D.D.C., decided Aug. 17, 1971).

69. Indeed, there is some question whether an intervenor even has standing to seek a transfer in the first place. See 3B J. MOORE, *FEDERAL PRACTICE* ¶ 24.19 (1969); 2 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE WITH FORMS* ¶ 593 (Rules ed. 1961).

70. Larry Gordon, Director of the New Mexico Dep't of Health and Public Services.

71. 449 F.2d 1109, 1122, 2 ERC 1779, 1788 (D.C. Cir. 1971).

Besides, testimony of this type can be submitted in writing, often by stipulation; there would simply be no need for him to appear in person. The last witness named was the manager of a small New Mexico power cooperative, who would testify that his company needed the power from the San Juan plant.

The fundamental point common to all eight witnesses listed in the Public Service Company's affidavit was that none of their testimony was relevant to the basic issue in the case. That issue is whether the federal officers had followed the "not inherently flexible,"⁷² precise procedural requirements of NEPA. None of the proposed testimony could shed any light on this fundamental question.⁷³ The narrow issue of statutory compliance, which is central to all NEPA cases, is basically a question of statutory interpretation. The only relevant factual issues concern the actions taken by government officers, and these actions are virtually all documented in official records.⁷⁴

The government and intervenors asserted speculative reasons in support of transfer. They emphasized the sizeable economic interest in the six-plant network centered in the Southwest. Other Southwest power companies and large electrical consumers might wish to intervene or file amicus briefs, they argued, and it would be easier and more convenient for them to do so nearer home. Mere speculation that third parties might become part of a lawsuit, however, does not warrant transfer.⁷⁵ The government argued, in a similar vein,

72. 449 F.2d 1109, 1115, 2 ERC 1779, 1782 (D.C. Cir. 1971).

73. The plaintiffs in all three of the transferred Southwest power cases are moving for summary judgment. Indeed, in the *Jicarilla* case, the defendants agree that there are no factual disputes—they have filed a counter motion for summary judgment. In this context, testimony from the witnesses described by the intervenors would be manifestly unimportant.

74. Unfortunately, the *Jicarilla* complaint also contained several non-NEPA causes of action based on such minor statutes as the Fish & Wildlife Coordination Act, 16 U.S.C. §§ 661 *et seq.* (1971). See note 59 *supra*. The question of compliance with these statutes *did* raise issues of fact concerning which Western witnesses' testimony would be necessary. Section 662, for example, calls for consultation with state wildlife officials. It appeared to the plaintiffs' attorneys at the hearing on the transfer motion that the judge was impressed with the argument that it would be inconvenient for those officials to testify in Washington.

The courts have repeatedly emphasized that NEPA confers no substantive rights; relief can be granted only a showing of procedural irregularities. See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, 755, 2 ERC 1260 (E.D. Ark. 1971); see also *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1112, 2 ERC 1779, 1780 (D.C. Cir. 1971). Therefore, courts may view detailed factual allegations concerning potential environmental harm to be surplusage. For this reason, and due to the danger of inviting a motion for change of venue, such allegations should not be included unless essential to the case.

75. See *Goodman v. Columbia Steel & Shafting Co.*, 171 F. Supp. 718, 719 (W.D. Pa. 1959); see also *Development Co. of America v. Insurance Co. of N. America*, 249 F. Supp. 117 (D.Md. 1966).

that location of the suit in the Southwest would help to avoid repetitious and multiple litigation, although no possible examples were cited. Again, the government advanced a purely conjectural reason; yet conjecture is simply not enough to satisfy the requirement that a strong showing is needed to overturn the plaintiff's choice of forum.⁷⁶

Many of the proponents of transfer placed great store by the fact that the *plaintiffs*—as well as the defendants' witnesses—were from the Southwest. The plaintiffs' residence should not be a factor in a transfer motion. In *Heiser v. United Air Lines, Inc.*,⁷⁷ the court said:

I do not see where plaintiff's inconvenience is of any moment on a motion of this type. If plaintiff is willing to suffer inconvenience and expense by suing in this district, his disposition to do so is entirely his concern.⁷⁸

As in the *Rainbow Bridge* case, some of the intervenors argued that the case involved issues of western water law, with which a Western court would have more familiarity. In the *Jicarilla* case, as in *Rainbow Bridge*, a national statute, NEPA, was involved. NEPA § 101 declares a national policy and issues directives to federal, not local officers. The question in *Jicarilla* does not involve state and local air and water pollution regulations and enforcement procedures, or the law governing the allocation of western waters, but the decision-making process of responsible federal officials acting in Washington.⁷⁹ Indeed, it can be argued that the national ties of the *Jicarilla* case are stronger than those of *Rainbow Bridge*. *Jicarilla* involves a declared national environmental policy statute, while *Rainbow Bridge* was concerned with a statute that dealt with a specific geographical area.

Two of the intervenors argued that the government officials named in the complaint were somehow "nominal" defendants, who would not actually be needed as witnesses. The "real" defendants, they maintained, were local federal officers and the owners of the power complex, and they were all located in the Southwest. This assertion is simply incorrect, as was recently pointed out by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*.⁸⁰

In that case, the Court emphasized that a court reviewing wheth-

76. See text accompanying notes 29-30 *supra*.

77. 167 F. Supp. 237, 238 (S.D.N.Y. 1958). See also *Clendenin v. United Fruit Co.*, 214 F. Supp. 137, 139 (E.D. Pa. 1963), in which the court said: "I think [the plaintiff is] entitled to inconvenience himself if he wants to without defendant's interference"; *Cline v. New York R.R.*, 192 F. Supp. 206 (N.D. Ohio 1961).

78. 167 F. Supp. 237, 238 (S.D.N.Y. 1958).

79. See *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1112, 2 ERC 1779,1781 (D.C. Cir. 1971).

80. 401 U.S. 402, 2 ERC 1250 (1971).

er an administrative action complied with environmental statutes must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."⁸¹ The Court went on to indicate that the way in which the Secretary of Transportation made his decision and the nature of the record that was before him were important considerations and that he and other top decision-makers might have to testify regarding their actions.⁸² Therefore, it is patently erroneous to conclude that the Secretaries involved are mere "nominal" defendants.

Finally, the intervenors and the government argued that they could get a quicker trial in Phoenix, pointing to the crowded trial calendar in Washington and several opinions, such as *Young v. Director, U.S. Bureau of Prisons*,⁸³ in which District of Columbia courts commented on their heavy trial loads. As already indicated,⁸⁴ this argument does not have much force. Furthermore, it is almost certain that the case will be disposed of on motion⁸⁵—either for summary judgment or on the defendants' motion to dismiss—and the waiting time for a hearing on a motion in Washington and Phoenix is about the same.

The plaintiffs in the *Jicarilla* case advanced two major lines of argument in opposing the transfer motion. One, dealing with the national, rather than local, nature of the suit, will be discussed in connection with the *Lomayaktewa* case.⁸⁶ The second dealt with a very serious and important concern in the field of public interest law, *pro bono publico* work.

All of the plaintiffs were represented without fee by nonprofit litigators; many of the Indians were indigent. The attorneys were fortunate to procure assistance, *pro bono publico*, from an outstanding Washington law firm.⁸⁷ The plaintiffs urged that the District of Columbia bar was best equipped to handle *pro bono publico* work of this type because it has the most experience with administrative practice. They noted:

81. *Id.* at 416.

82. *Id.* at 420.

83. 367 F.2d 331, 333 (D.C. Cir. 1966).

84. See text accompanying notes 41-46 *supra*.

85. See note 73 *supra*.

86. See text accompanying notes 96-109 *infra*.

87. The plaintiff's inability to bear the expenses of a trial in the transferee district has been a factor in several denials of transfer requested by defendant. *General Portland Cement Co. v. Perry*, 204 F.2d 316, 320 (7th Cir. 1953); *Walter v. Walter*, 235 F. Supp. 146, 147 (W.D. Pa. 1964); *Seaboard Machinery Co. v. Bethlehem Steel Co.*, 120 F. Supp. 591, 593 (N.D. Fla. 1954); *Mason v. Chicago, Rock Island & Pac. R.R.*, 96 F. Supp. 361, 363 (W.D. Mo. 1951).

If public interest litigation is forced to proceed without the aid of the bar that most frequently practices before federal agencies it perform will suffer and the task of the judiciary will be made correspondingly difficult.⁸⁸

Despite these arguments, the trial judge in Washington ordered the *Jicarilla* case transferred to Arizona on the following grounds:

the ease of access, the sources of proof, the availability of compulsory process, the possibility of viewing the premises, the better understanding of regional problems . . . the physical location of the property involved in the action and a number of other reasons⁸⁹

Plaintiffs' petition for a writ of mandate was summarily denied by the District of Columbia Circuit.⁹⁰

B. *The Lease-Approval Suit*

In *Yazzie v. Morton*,⁹¹ five Navajos who live near the Four Corners plant alleged that air pollution abatement methods at the plant do not comply with the standards written into the plant site lease with the Navajo Tribe and approved by the Secretary of the Interior. They contend that Interior's approvals and its failure to demand strict compliance with the terms of the lease are a breach of its fiduciary duty to Indians. The same theory is advanced against the failure of the Secretary of the Department of Health, Education and Welfare to make the follow-up investigations recommended by a 1970 HEW study.⁹² That study showed that there were definite health hazards associated with the plant's emissions. The plaintiffs seek an injunction to compel the Secretary of the Interior to withdraw his approval of certain parts of the lease and of some of the air pollution abatement equipment installed at Four Corners. They are also asking that HEW be required to make detailed studies of the air pollution problem.

88. Petition for Writ of Mandamus at 5, *Jicarilla Apache Tribe v. Pratt*, Civ. No. 171-1676 (D.C. Cir., decided Aug. 24, 1971).

89. Transcript of Hearing on Transfer Motion at 63, *Jicarilla Apache Tribe v. Pratt*, Civ. No. 71-1676 (D.C. Cir., decided Aug. 24, 1971).

90. *Jicarilla Apache Tribe v. Pratt*, Civ. No. 71-1676 (D.C. Cir., decided Aug. 24, 1971). Subsequently, J. Frey of the Arizona district court granted defendants' motion for summary judgment. 3 ERC 1919, Civil No. 71-566-PHX-WCF (decided March 14, 1972). That decision is currently being appealed to the Ninth Circuit. Civil No. 72-1634 (filed March 16, 1972).

91. Civil No. 938-71 (D.D.C., decided Aug. 27, 1971), subsequently transferred to Arizona.

92. Division of Control Agency Development, Bureau of Abatement and Control, Dep't of Health, Education and Welfare, Estimates of Air Pollution Concentrations from Four Corners Power Plant, New Mexico, Jan. 1970, abstracted in *Hearings on*

Once again, the plaintiffs argued that this was not a suit about "ecology," but about the administrative decision-making process—a process that takes place in Washington. Again, they argued that witnesses from the Southwest could not speak to that issue. Nevertheless, transfer to Arizona was granted.⁹³ Judge Hart of the District of Columbia District Court remarked:

Isn't ecology an essential part of the suit? It certainly is. If there is any type of suit that ought to be heard in the neighborhood involved, it is this type of suit. What, in the name of heaven, does somebody sitting in Washington know about the Navajo Indian and ecology of the southwest? We couldn't be more ignorant. We have not known anything about the Indians here since 1620.⁹⁴

One can readily agree with Judge Hart's skepticism regarding Washington officialdom's knowledge of Indians and the Southwest. But those officials are, in fact, the ones who have final authority to make decisions affecting the southwest environment. It is the inadequacy of those decisions that is the basis of the suit.⁹⁵

C. *The Hopi Tribal Government Suit*

The last of the three suits relating to the southwest power complex to be transferred was *Lomayaktewa v. Morton*.⁹⁶ In this action, sixty-two chiefs and religious leaders of the traditional branch of the Hopi Tribe challenged Peabody Coal Company's Black Mesa strip-mining operation. This branch of the Hopi Tribe is trying, against tremendous odds, to maintain the age-old Hopi ways in the face of strong outside pressures toward change. They emphasize a simple, agrarian existence, based on reverence for and harmony with nature. John Lansa, one of those leaders, spoke of that operation in these terms:

Problems of Electrical Power Production in the Southwest Before the Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. 148 (1971).

93. It is no strange quirk that the government and power companies asked for a transfer to Arizona, rather than New Mexico, the site of the plant. New Mexicans are up in arms about Four Corners plant pollution; indeed, the state is a plaintiff in a public nuisance action against the plant. *New Mexico ex rel. Nowell v. Arizona Public Service Co.*, Civil No. 17994 (D.N.M., filed Sept. 13, 1971). Arizona, on the other hand, is a far friendlier forum. Residents of Phoenix and Tucson receive the power from Four Corners but are unaffected by its smog.

94. Transcript of Hearing on Transfer Motion at 11, *Yazzie v. Morton*, Civil No. 938-71 (D.D.C., decided Aug. 27, 1971).

95. The plaintiffs filed a petition for a writ of mandate in the D.C. Circuit, but the petition was denied, again without comment. *Yazzie v. Hart*, Civil No. 71-1726 D.C. Cir., decided Sept. 9, 1971).

96. Civil No. 974-71 (D.D.C., decided Oct. 13, 1971).

Nature is everything important to the Hopi. It is the land, all living things, the water, the trees, the rocks—it is everything. It is the force or the power that comes from these things that keeps the world together. . . . This is the spiritual center of this land. This is the most sacred place. Right here in this mesa Now there is a big strip mine where coal comes out of the Earth to send electricity to the big cities. They cut across our sacred shrines and destroy our prayers to the six directions. . . . Peabody is tearing up the land. . . . It is very bad that Peabody takes away the water because it upsets the balance of things. You can't do things like that and have Nature in balance.⁹⁷

The plaintiffs have three basic complaints about the way the strip-mine lease was executed by the Hopi Tribal Council and approved by the Interior Department. They argue that the Hopi Tribal Council, whose authority has never been recognized by the traditionals, does not have the power under the Hopi Constitution⁹⁸ to dispose of or lease Hopi lands. They also argue that a quorum was not present when the Tribal Council approved the lease, since several delegates who purportedly represented certain traditional villages had not been certified by village leaders, as required by the Hopi Constitution. In the face of these deficiencies, Interior's approval of the lease was unlawful, it is claimed. Another cause of action alleges arbitrary interference by the Interior Department in the internal affairs of the Hopi Tribe and discrimination against the petitioners. The plaintiffs sought to overturn the lease approval on those grounds.

As in the *Jicarilla* and *Yazzie* cases, the affected power companies intervened and, joined by the government moved to transfer the case to Arizona for basically the same reasons advanced in the earlier cases. The plaintiffs countered with arguments similar to those used before but also emphasized two other points.

The ties of the *Lomayaktewa* case to Washington are strong. When the issues of a case turn on the validity of an instruction or decision of a government official who resides in Washington, the District of Columbia is a proper forum for resolving the matter in controversy.⁹⁹ Here, the Secretary of Interior made the critical government decision to delegate to the Hopi Tribal Council the power to lease Reservation lands, a power not included in the Hopi Constitu-

97. San Francisco Chronicle, May 20, 1971, at 19, col. 4.

98. Hopi traditionals have consistently maintained that the Hopi Constitution was imposed on them against their will in 1936. They claim that it is completely alien to Hopi traditional values.

99. *E.g.*, *Fine v. McGuire*, 433 F.2d 499, 501 (D.C. Cir. 1970); *Menard v. Mitchell*, 430 F.2d 486, 488 n.3 (D.C. Cir. 1970); *Nestor v. Hershey*, 425 F.2d 504, 522 (D.C. Cir. 1969).

tion; the decision was made in Washington.¹⁰⁰ The trial judge, Judge Corcoran conceded:

[A]s you know here in D.C., it's commonplace to have cases against cabinet members and administrative heads, . . . as to the propriety of their action, and half our business around here is people who customarily come to Washington to test the propriety of the actions of a cabinet officer, commissioner, or anyone. They pick their venue because the man is here and the records are here.¹⁰¹

The plaintiffs also argued that the "interests of justice"¹⁰² militated against a trial in Arizona. They contended that the very magnitude of Arizona's supposed need for and interest in receiving the power from Black Mesa coal was a major factor against trying the matter there. Public opinion in Phoenix and Tucson in favor of the Southwest power complex is overwhelming. Along with their petition for a writ of mandate, the plaintiffs attached a series of articles and editorials from central and southern Arizona newspapers that very strenuously supported the development.¹⁰³

Transfer should be denied where there is a presumptive impossibility of getting a fair trial in the transferee district. In *Wilson v. Great Atl. & Pac. Tea Co.*,¹⁰⁴ the court ruled that possible racial prejudice against the plaintiff, a Negro, in the proposed transferee district, (where race riots had recently taken place,) was a sufficient reason to deny the motion.¹⁰⁵

100. See Memorandum for Plaintiffs in Opposition to Transfer Motion at 7-8, *Lomayaktewa v. Morton*, Civil No. 974-71 (D.D.C., decided Oct. 13, 1971).

101. Transcript of Hearing on Transfer Motion at 13, *Lomayaktewa v. Morton*, Civil No. 974-71 (D.D.C., decided Oct. 13, 1971).

102. This may constitute the overriding consideration on a transfer motion.

Manifestly the most important criterion in determining the advisability of transfer is the "interest of justice." In most cases, if the convenience of the parties and witnesses will be served by transfer it usually follows that justice will also be served by transfer. This does not necessarily follow, however, and irrespective of the convenience to parties and witnesses, I am of the opinion that whether or not transfer will be ordered should be governed in large measure by the effect of transfer upon the "interest of justice."

Cinema Amusement Inc. v. Loew's, Inc., 85 F. Supp. 319, 326 (D.C. Del. 1949).

103. The plaintiffs had another important symbolic reason for wanting the case to be heard in Washington. It is their feeling that the Hopi Tribal Council and Constitution were imposed on them, against their will, by the unilateral action of government officials in the capital. These actions, written into law with the supposed purpose of "protecting" the Hopis, are now being negated by other national officials. To the plaintiffs, it seems appropriate for a Washington court to order those officials to adhere to their own laws. See Plaintiffs' Petition for a Writ of Mandate, Supporting Affidavit of John E. Echobawk at 3, *Lomayaktewa v. Corcoran*, Civil No. 71-2002 (D.C. Cir., decided Feb. 1, 1972).

104. 156 F. Supp. 767 (W.D. Mo. 1957).

105. *Id.* at 769; see also *Haase v. Gilroy*, 246 F. Supp. 594 (E.D. Wis. 1965).

This argument, however, could backfire. The bench is sensitive to suggestions that the decision of a fellow district judge might be influenced by local pressure.¹⁰⁶ Indeed, at the hearing on the motion in *Lomayaktewa*, Judge Corcoran remarked: "I'm sure that issue will never arise in a Federal Court."¹⁰⁷

The *Lomayaktewa* case was ordered transferred, even though it was conceded by the Government that there were no issues of fact (and hence no need to call witnesses from the Southwest).¹⁰⁸ The court based its decision on the possible need to hear testimony on the defenses of laches and estoppel raised by the Government and on the discrimination count in the complaint. The plaintiffs' writ of mandate against transfer was once again denied.¹⁰⁹

IV

AVOIDING THE VENUE PITFALL

There are several steps that an environmental lawyer can take to obviate transfer. First, the complaint should emphasize the government's improper administrative activities, not the environmental damage in suits based on NEPA or other statutes containing procedural mandates. Descriptions of environmental effects should be only detailed enough to show that the plaintiff is or will be harmed. The complaint should be short and devoid of technical details in order to avoid overwhelming the judge.¹¹⁰

106. See, e.g., *Cunningham v. Chesapeake & O. Ry.*, 228 F. Supp. 492, 493 (N.D. Ill. 1964); *Tuck v. Pennsylvania R.R.*, 122 F. Supp. 527, 529 (E.D. Pa. 1954); *Kirk v. Spur Distrib. Co.*, 95 F. Supp. 428 (D. Del. 1950).

107. Transcript of Hearing on Transfer Motion at 11, *Lomayaktewa v. Morton*, Civil No. 974-71 (D.D.C., filed May 14, 1971).

108. *Id.* at 7.

109. *Lomayaktewa v. Corcoran*, Civil No. 71-2002 (D.C. Cir., decided Feb. 1, 1972), *petition for cert. filed*, 40 U.S.L.W. 3529 (U.S. May 1, 1972) (No. 71-1418).

The *Cross-Florida Barge Canal* case was also transferred out of the capital by the Judicial Panel on Multi-District Litigation. *In re Cross-Florida Barge Canal Litigation*, 329 F. Supp. 543, 544, 2 ERC 1796, 1 ELR 20366 (1971). In that case, the Environmental Defense Fund had obtained a preliminary injunction in Washington against further work on the canal [*Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1970)] and, before the order was entered, the President personally ordered a halt to construction. The Canal Authority then filed an action in Florida challenging the President's order. The Panel ordered the cases consolidated, to be tried in Florida because the canal, its engineers, and most witnesses on ecological impact were located there. The Panel believed these factors overrode the familiarity with the issues in the case developed by the trial judge in Washington.

110. It is not a good idea to "throw in" minor causes of action in a NEPA suit. They can make a case seem far more complex and the factual issues far more difficult and important. These apparent factors do not prompt swamped Washington judges to retain jurisdiction. In general, the complaint should be framed so as to avoid controversial factual issues—proof of facts usually requires local witnesses, thereby

Second, a motion for summary judgment should be filed *before* transfer is sought, if possible. The motion papers will show there are no factual issues, hence, no need for local witnesses. If the motion provokes a government cross-motion for summary judgment, the "no factual issue" contention will be greatly bolstered.

Third, if possible, a motion for a preliminary injunction should be presented *after* the issue of transfer is settled. Three of the four elements that must be shown in order to obtain preliminary relief involve factual questions—irreparable injury, balance of hardships, and the relative importance of the plaintiff's rights against the defendant's acts.¹¹¹ The government would otherwise be able to argue that proof (or disproof) of those facts will require local witnesses.

Fourth, experts should be gathered from all parts of the country, especially the Northeast, not just from the affected area. It will then be easier to counter the argument of witnesses' convenience.

Fifth, the emphasis in argument should be on the national nature of environmental problems and the national interest in making sure that Washington bureaucrats follow Congressional directives.

The trend toward transfer of environmental cases appears to be growing stronger. A new rule, shifting the burden of proof to the plaintiffs, appears to be emerging in the District of Columbia District Court, despite extensive authority to the contrary. It can only be hoped that the District of Columbia Circuit will address itself to this controversy and issue definitive guidelines. Until that time, environmental lawyers should be prepared to head off into the sunset to try their cases.

increasing the persuasiveness of a transfer motion. See note 74 and accompanying text *supra*.

111. *Perry v. Perry*, 190 F.2d 601, 602 (D.C. Cir. 1951). The fourth factor—probability of ultimate success on the merits—is often a question of law.