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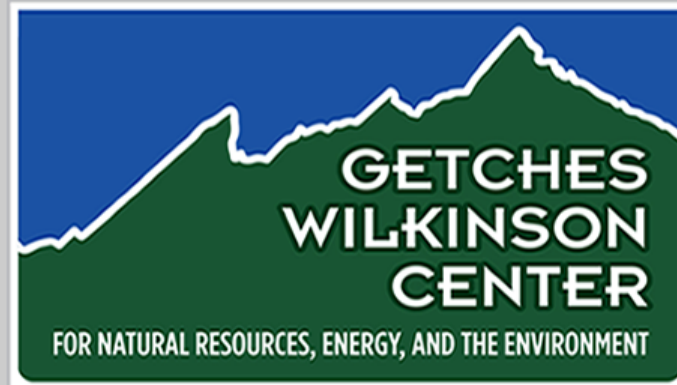
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RESOURCE LAW NOTES

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Number 28

Spring Issue, April 1993

Annual Water Conference Offers Look at Water Organizations in Transition

Water Organizations in a Changing West
Fourteenth Annual Summer Program
June 14-16, 1993
University of Colorado, Boulder

Water organizations in the western United States range from small, traditional *acequia* associations to large metropolitan water suppliers. What do these vastly different kinds of organizations have in common? All are feeling the pressures of change in the region — growing urban populations, environmental concerns, and calls for public participation.

This year's summer program will examine how water organizations are adapting to these pressures for change. Speakers drawn from urban, agricultural, and community organizations will share their experiences and describe innovative approaches to adapt to new demands.

The conference agenda includes the following topics:

- An introduction to water organizations in the West
- Innovative approaches to irrigation and urban water conservation
- Strategies for obtaining new urban water supplies
- Who "owns" water rights?
- Meeting water quality needs
- Providing for fisheries, recreation, and other instream benefits
- Public versus private approaches to water supply and management
- Water and communities
- Watershed initiatives
- New legislative approaches
- Future directions: Water organizations serving a changing West



Upper left, Verde Ditch spillway, Verde Valley, Arizona. Lower right, water reuse treatment, Denver, courtesy of American Water Works Association.

From rural to urban, the numerous pressures facing water organizations in the West will be considered at the annual water law conference, June 14-16.



Advance registration costs \$450, with discounts available for representatives of government agencies, nonprofit groups, and academic institutions. (Note: the Center is staying with the lower registration

rate it reintroduced last year - down from \$550 to \$450, the lowest rate since 1984!) For a full agenda and registration materials, contact Katherine Taylor, Conference Coordinator, at (303) 492-1288.

Final Spring Hot Topic Program Addresses Endangered Species Act Reauthorization

The third and final Hot Topics luncheon program for the spring semester will be held Thursday, April 22, at noon. Speakers Robert Irvin (National Wildlife Federation, Washington, DC) and Janice Sheftel (Maynes, Bradford, Shipp & Sheftel, Durango, Colorado) will provide contrasting views on proposals for reauthorizing the federal Endangered Species Act. Mike Brennan (U.S. Fish and Wildlife Service, Washington, DC) will comment from the perspective of federal agency implementation.

As with all of our Hot Topics programs, this will be held in the Hershner Room, One Norwest Bank Center, Denver. To register, call (303) 492-1288.

Center Convenes National Water Policy Group, Produces White Paper

In December 1992 the Center convened a group of 30 water policy experts from across the country for an intensive two-day workshop at the Aspen Lodge, near Rocky Mountain National Park. The "Long's Peak Working Group," as it came to be known, produced a 16-page white paper outlining guiding principles and detailed recommendations of actions for the new Administration and Congress. The report, *America's Waters: A New Era of Sustainability*, may be purchased from the Natural Resources Law Center.

The Group identified four broad objectives of water policy —

- Water Use Efficiency and Conservation;
- Ecological Integrity and Restoration;
- Clean Water;
- Equity and Participation in Decisionmaking

and focused on federal actions that would further these objectives. It encouraged a more watershed-based approach to water problems. New federal initiatives are needed, the Group concluded, but the goal should be to keep decisionmaking as close as possible to the level of the problem.

Many of the recommendations arose from a fundamental principle of ecological health, including approaches to strengthen the Clean Water Act and to ensure that federal project and agency operations take into account both economic and environmental costs.

"Our nation's waters have been the source of many human benefits," remarked



Group composing section of Long's Peak Report, using portable computers. From left, John Volkman, Oregon; Fran Korten, New York; Guy Martin, Washington, DC; Don Snow, Montana; John Thorson (standing), Arizona; Prof. David Getches, Colorado.

David Lester of the Council of Energy Resource Tribes and a member of the Long's Peak Working Group. "However, it is increasingly clear that these benefits have come at the expense of the nation's natural capital."

The Long's Peak recommendations bring together threads being considered throughout the West's water system, at all levels. "These are turbulent times for water management in the West," summarized Jo Clark of the Western Governors' Association. "Dealing with them will require all of us to work together. As someone once said, 'the best way to cope with change is to help create it.'" The Long's Peak report is an effort to suggest future directions.

The members of the Long's Peak Working Group attended the meeting as individuals, not as formal representatives of their agencies or organizations.

Center Hosts Western Lands Workshop; Fall Conference Planned

The Center's new Western Lands Program was the focus of a two-day workshop in Boulder in early January, bringing together 30 public lands experts from throughout the country. Workshop participants discussed high-priority public lands issues; topics for Natural Resources Law Center attention through research, conferences, and publications; and options for reform of public policy with regard to the western public lands.

In addition, we will hold the first of an annual series of western lands conferences in the fall, tentatively scheduled for September

19-21. Watch for details in the next issue of *Resource Law Notes*.

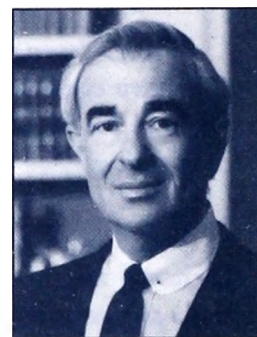
A series of five discussion papers prepared for the workshop will be available from the Center by May 1. They include one paper by Larry MacDonnell — "The Changing Economics of the Public Lands"; one by Teresa Rice — "State and Local Public Lands"; and three by Sarah Bates — "The Changing Management Philosophies of the Public Lands," "Managing for Ecosystems on the Public Lands," and "Public Lands Communities."

CU Alumni Association Honors Marvin Wolf

"Marvin Wolf is one of those special people whose goal is to make the world a better place than he found it." So began the tribute to our Center's most generous benefactor, honored January 22 by the CU Alumni Association with the George Norlin award for distinguished lifetime achievement and a devotion to the betterment of society and community.

Wolf graduated from the CU Law School in 1954, and achieved remarkable success as a leader in the independent oil and gas business in Colorado. His challenge grant in the early 1980s made possible a financial base for the Natural Resources Law Center. He has donated not only money and needed equipment (a fax machine and a copier), but also steady support and quiet advice through his service on the Center's Advisory Board.

Wolf also contributed to the CU Law School by establishing a fund for financial assistance to students working on the *Law Review*. And he and his wife Judi have supported many Denver civic organizations, including the Colorado Symphony Orchestra, the Denver Center for the Performing Arts, the Central City Opera, and the Denver Art Museum.



Marvin Wolf



Small group work at the January workshop on Western Public Lands Policy: Kate Zimmerman, the LAW Fund (left), and Karin Sheldon, The Wilderness Society (right).

Center Seeks Applicants for Spring 1994 El Paso Natural Gas Law Fellowship

Thanks to the financial support of the El Paso Natural Gas Foundation, the Center is pleased to invite applications for the El Paso Natural Gas Law Fellowship for spring 1994. This fellowship offers a visiting researcher a stipend of \$20,000, student research assistance, office space and secretarial support for the spring semester. (This is a continuation of the Burlington Resources Fellowship offered previously.)

The El Paso Natural Gas Law Fellow will spend a semester in residence at the School of Law, researching a topic concerned with energy and minerals law. Emphasis is on legal research, but applicants from law-related disciplines, such as economics, engineering, or the social sciences, will also be considered. While in residence, the Fellow will participate in activities of the Law School and the Center, and will have an opportunity to exchange ideas with faculty and students in both formal and informal sessions. The Fellow is expected to produce written work suitable for publication in a professional journal.

There is no formal application. Those wishing to apply should address a 2-3 page letter detailing their research plans and background to Professor David H. Getches, RE: El Paso Fellowship, Campus Box 401, Boulder, CO 80309-401, including a resume and reference names. For additional information on applying for the El Paso Natural Gas Law Fellowship, contact the Center, (303) 492-1288.

Tim Wirth Joins Advisory Board

Retired Colorado Senator Tim Wirth honored the Natural Resources Law Center by joining its Advisory Board in January 1993. Senator Wirth has always had a strong interest in environmental issues, and was appointed by President Clinton in January to the newly created position, Counselor and Under-Secretary of Global Affairs in the State Department.

Wirth introduced a commendation for the Natural Resources Law Center into the Congressional Record on the occasion of our Decennial celebration last spring. Tim and his wife Wren have demonstrated particular interest in the Center's new Western Lands Program. We are pleased to have him among the distinguished members of our Advisory Board.



Prof. Steve Born

Research Fellow: Steve Born Visits Law School

Stephen M. Born, a Professor in the Department of Urban and Regional Planning at the University of Wisconsin-Madison, arrived in early February for a semester at the CU School of Law.

Born spent the first three months of an academic sabbatical leave working on Northern Rocky Mountain resource issues, based for the most part at the University of Montana. He has just returned from a whirlwind ten-week research stint in New Zealand and Australia. His research in New Zealand entailed a study of New Zealand's relatively new (1991) Resources Management Act, one of the most sophisticated and progressive national natural resource laws addressing the issue of sustainable management.

He is particularly interested in assessing the prospects for meaningful implementation of this vanguard environmental law in a nation undergoing accelerated privatization. In Australia, Born's work focused on new national and state policies pertaining to "integrated catchment management," and the institutional arrangements for governmental water policy.

In Madison, Born teaches government and natural resources planning and management; water resources policies and institutions; and regional and state planning. He is also on the faculty of the Institute for Environmental Studies, which offers graduate degree programs in Water Resources Management, Land Resources, and Energy Analysis and Policy. In the 1970s he served the State of Wisconsin first as Director of the State Planning Office and later as State Energy Director. He has had extensive involvement with developing natural resources legislation. In the 1960s he worked for Shell Oil Company, Pacific Coast as a geologist in petroleum exploration and development.

As the Spring 1993 Natural Resources Law Center Fellow, he is continuing his work on the conceptualization and practice of "integrated resources management," including a survey of the statutory basis for this emerging paradigm, and pursuing ongoing collaborative research on water policy and institutions with colleagues from the University of Arizona — William Lord, Marv Waterstone, and former NRLC Fellow Frank Gregg.



Former Colorado Senator Tim Wirth

Center Associates Make a Difference

Over the past decade, the Natural Resources Law Center has enjoyed the support of many individuals, law firms, and other organizations who share interests in natural resources issues. As Associates of the Center, these supporters have donated funds to make possible our many public outreach programs, including your free subscription to *Resource Law Notes*.

If you have enjoyed reading *Resource Law Notes*, attending our public education programs, or reading our publications, we invite you to join our growing circle of Associates. In addition to the satisfaction of helping to make our programs and materials widely available, Associates who donate at least \$100 receive one free Center publication. All Associates receive annual reports of the Center's activities and occasional invitations to special events. A donation form is in the fold of this newsletter.

The Natural Resources Law Center thanks all our 1992-93 donors for their generous support:

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Distinguished Visitor John Echohawk Speaks on Native American Issues

John E. Echohawk, Executive Director of the Native American Rights Fund (NARF) in Boulder, was the 11th annual Natural Resources Distinguished Visitor and the first to be sponsored under a generous gift from the Denver law firm Holme Roberts & Owen.

A standing-room-only crowd of students, faculty and community people heard Echohawk speak February 10 on "Native American Policies in the Clinton Administration." Echohawk had just returned from Washington, DC, after serving on President Clinton's transition team for



John E. Echohawk

the Department of the Interior.

Echohawk also addressed students at a brown bag lunch talk on current cases under consideration at NARF, an organization he helped found in 1970. In 1988 and again in 1991, the *National Law Journal* included John among a ranking of the nation's 100 most influential attorneys, citing the success of his organization in advocating Indian interests.

Echohawk, a Pawnee, was the first graduate of the University of New Mexico's special program to train Indian lawyers, and was a founding member of the American Indian Law Students Association while in Law School. In 1987 he was the recipient of the National Indian Achievement Award from the Indian Council Fire, the nation's oldest urban Indian organization.



Holmes Roberts & Owen attorneys Ray Petros (left) and Jan Steiert (center), a member of the NRLC Advisory Board, talk with Center Assistant Director Sarah Bates at reception for John Echohawk.

An Interview with Robert Pelcyger*

CU Law Professor Charles Wilkinson conducted this interview with Robert Pelcyger on February 26, 1992, in his *Advanced Natural Resources* seminar. Pelcyger is a partner with the law firm *Fredericks, Pelcyger, Hester & White* in Boulder. He shares his reflections on pivotal Indian natural resources litigation in which he was involved.

Charles Wilkinson: Bob is sitting in a chair that in past seminars has been occupied successively by Wallace Stegner, Bruce Babbitt and Stewart Udall, and he is a worthy successor. He is one of our great natural resources lawyers. Bob, given your career, you must have grown up deeply rooted in the West.

Robert Pelcyger: I was born in Brooklyn, New York, close to that other Mecca of western natural resources law, Bronxville, N.Y.

CW: Where did you take your first legal job?

RP: I didn't know what I was going to do, and I knew a lot of things I didn't want to do. It was the mid 1960s and the Legal Services Program was just beginning. I got a call from Professor Monroe Price who was teaching at UCLA Law School and putting together a course on Indian law. He was also networking with legal services programs just then starting on Indian reservations. I was in England on a Fulbright. He called me from Window Rock, Arizona, and I thought then, and still think today, that that was probably the only phone call between those two points on the globe!

Monroe was trying to arrange for me to come to work, ultimately in California. Meantime there was a spot in Window Rock, Arizona, with the new Navajo Legal Services Program. Would I be interested in doing that? I said "yes." So I went from London to Arizona.

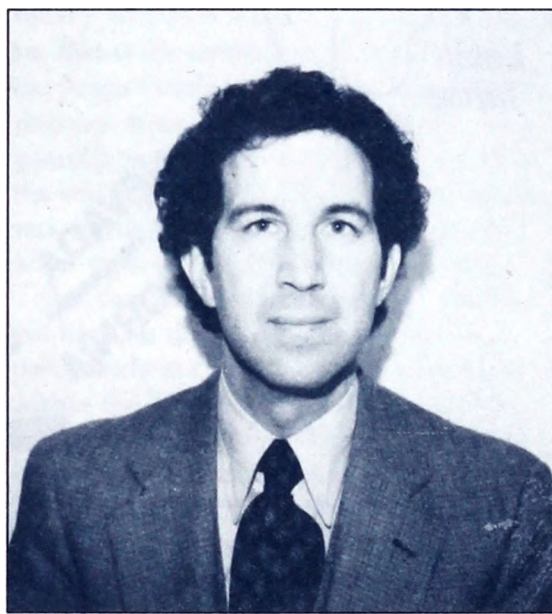
Monroe had arranged for an office which served as the Southern California Office of California Indian Legal Services. I went to Escondido in 1968 or 1969. My biggest case there was the San Luis Rey case.

CW: Tell us about the nature of San Luis Rey.

RP: While I was still in Los Angeles, I set up workshops for Indian people on tribal government issues. At one session, a woman from one of the Southern California bands came up and said, "I was over at the Bureau of Indian Affairs, and asked them about water, and they gave me this. They said this will tell me everything I want to know about the Rincon Band's water." It was a 1914 contract between the United States acting on behalf of the Rincon Band and the Escondido Mutual Water Company, and she said, "I read this and I don't understand

it, so will you tell me what this means?" I read it and saw references to things like cubic feet per second, and acre-feet, and had no idea what they meant. When I went to law school, I didn't know there was a course called water law, or Indian law for that matter.

In the first instance, we sued the Secretary of the Interior and the Attorney General and sought a court order which would compel them to bring suit in their trustee capacity on behalf of the five bands against Escondido and Vista. That was my first plan, and I thought I wouldn't have to learn much about acre-feet, or water law, if I could get the United States to bring the lawsuit! There was a statute [25 U.S.C.A. section 175] which says, "In all states and



Robert Pelcyger

territories where there are reservations or allotted Indians, the United States Attorney shall represent them in all suits at law and equity." I was young and foolish, and thought maybe they meant what they said! It says, "shall." I was naive.

That case actually went up to the Ninth Circuit. We had originally gotten an order from the local federal judge in San Diego directing the Attorney General to make up his mind what he was going to do. We presented documents going back to 1925, that said the federal government was thinking about what to do on the San Luis Rey River. This was 1969, and they were *still* thinking about it. So the judge said, "Well, you've got to make up your mind."

Finally, they made up their mind and decided they weren't going to do anything.

* A transcript of this interview was edited for publication by Debra Pentz, a 1992 CU Law graduate, who participated in the seminar at Professor Wilkinson's home.

We took that to the Ninth Circuit which said, "They can't be forced to act affirmatively." "They can be forced to make up their mind, but they can't be forced to act affirmatively." [*Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F.2d 1082 (9th Cir. 1972).]

We ultimately filed a case in federal district court challenging the validity of the various contracts the government had entered into which allowed the diversions and purported to quantify the Indian rights, and we sued for trespass damages and illegal diversions. The case resulted in a congressional settlement in 1988, after the partial victory in the Supreme Court in 1984, which is still being implemented.

CW: When did the Pyramid Lake case begin for you?

RP: Shortly after San Luis Rey. I knew what acre-feet and cfs meant by then and I had gotten over some of my fright. There was a famous attorney in the Bureau of Indian Affairs at that time, previously in the Department of Justice, named William H. Veeder. I had encountered him working on the San Luis Rey case, and he said, "Pyramid Lake is made for you. You've got to go to Pyramid Lake. I'll meet you there."

Veeder really did a lot, especially in those days. Believe it or not, at that time, there was virtually no litigation being brought on behalf of Indian tribes. The Winters Doctrine had been pretty much forgotten. [*The Winters Doctrine was derived from a 1908 case, Winters v. United States*, 207 U.S. 564 (1908), which held that when the United States set aside an Indian Reservation, it impliedly reserved sufficient water to fulfill the purposes of the reservation.] Bill Veeder, almost single-handedly, raised the consciousness of Indian tribes throughout the country to their lost water resources and to the necessity of being vigilant about protecting them. While I was still with California Indian Legal Services he introduced me to the Pyramid Lake Paiute Tribe.

CW: In the early times, how did you feel about the lake? How did you feel about the Tribe and the injustice done to the Tribe?

RP: I felt it was a terrible injustice. I think at the time I felt more outraged by the legal than by the environmental injustice. The legal system had utterly failed these people and this resource, and the government had brought this elaborate water case and had purported to represent the interests of the reservation, but had totally sacrificed and subordinated them to the larger interests of the Newlands Project and no one had done anything about it. It was a travesty. [*The Newlands Project, formerly the*

Truckee-Carson Project, was one of the first Bureau of Reclamation projects. It provides irrigation water from the Truckee and Carson Rivers for the lower Carson Valley near Fallon in western Nevada. See map. Construction began in 1903 on Derby Diversion Dam and the Truckee Canal.] Over time the environmental issue came into sharper focus for me.

CW: You, like most people, at the time, did not have background in the hydrology of the watershed. It seems to me that you therefore chose legal handles that were more familiar to you, such as suing to try and get the government to do the work for you, and that your knowledge of the watershed came later.

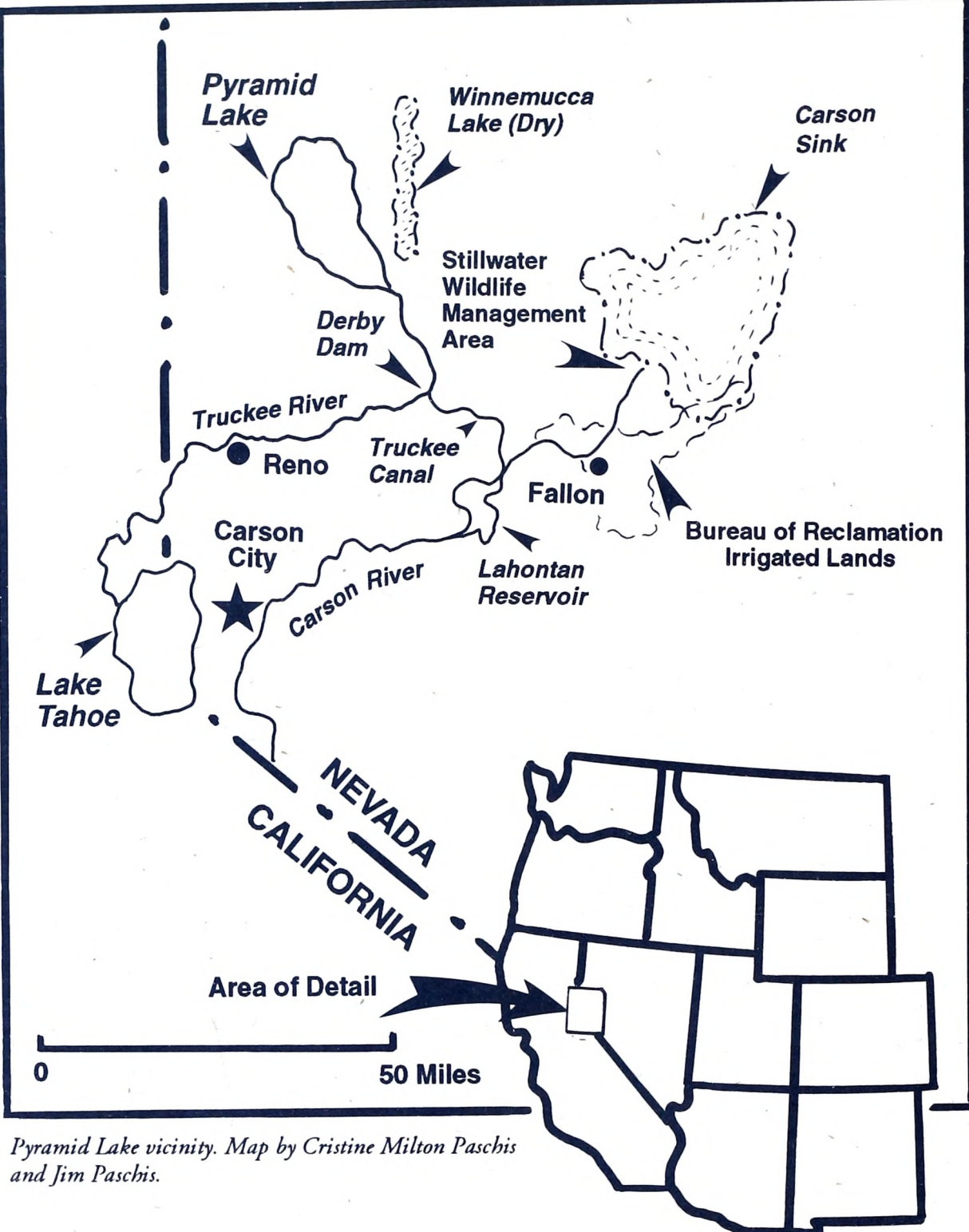
RP: That's absolutely right. There was not a lot of knowledge out there, particularly about Pyramid Lake. For one thing, the biologists had not studied the Cui-ui. The major interest at the time, or the entire interest at the time, was really the Lahontan cutthroat trout, not the Cui-ui. Nothing was known about the Cui-ui, and nobody really knew how the Cui-ui had managed to survive in Pyramid Lake, whereas the trout had become extinct around 1940. The trout were back in the lake. There was both a federal and a tribal hatchery; the tribal ethic was just getting started around that time. The major issue at the time was framed in terms of maintaining the stability of Pyramid Lake.

CW: When did you file the suit against the Secretary of the Interior?

RP: I think it was 1970. We also sued the Attorney General. We followed the familiar pattern. The lawsuit was limited to the Newlands Project. It was brought to invalidate the regulation Secretary Udall had issued in 1967 which, we said, allowed too much water to go the Newlands Project and not enough to go to Pyramid Lake. The suit against the Attorney General was to compel him to reopen the Orr Ditch Case and establish that the Pyramid Lake Tribe had a reserved water right. [*The 1944 Orr Ditch Decree was the result of a 1913 suit by the United States to adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project.*]

CW: Of course you won the great case in '73 [*Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972)] that effectively led to a new regulation. Tell us about that moment in the courtroom when Judge Gesell got mad.

RP: Well, this was my first trial and Judge Gesell conducted a very strict courtroom. He felt that we had taken liberties and we were not making the best use of his time. He got mad at several points. He said, "I will not allow my



Pyramid Lake vicinity. Map by Cristine Milton Paschis and Jim Paschis.

courtroom to be turned into a circus." I asked some hydrologist about what happened when you put too much water on a piece of land, because one of our claims was that they were over irrigating on the Newlands Project. Judge Gesell shouted, "Well I know what happens to it! Go on to your next question!" He was an angry judge, and I was a young man. It was hard.

He got angry with Interior also. What was business as usual to the Interior Department was just incredible malfeasance to Judge Gesell. I think we won that case mostly because of the government's bad lawyering. At some point in the pretrial proceedings, the government became quite concerned when they realized that Judge Gesell was very interested in the case and that they were not likely to win. That is what led the government to file the original action in the Supreme Court. [*U.S. v. Nevada*, 412 U.S. 534 (1973).] They felt

that they could get Judge Gesell to give up the case and lose interest if they could convince him that they were trying to do something. They were wrong.

As a result of Judge Gesell's decision, the Orr Ditch decree didn't have to be reopened. The decision itself could be fit within the context of the Orr Ditch Decree, but the Secretary had to be a lot more careful about how he managed water.

We were lucky because Erwin Griswold, the former Dean of Harvard Law School, was the Solicitor General. Griswold was a very conservative jurist, as you know. He felt, however, that never had a greater outrage been perpetrated on any people by the American legal system than what happened to the Tribe in the Orr Ditch Case. He was very interested in the case. The Interior Department's recommendation

to appeal Judge Gesell's decision came to his desk and he rejected it out of hand. It was never appealed.

CW: So the Orr Ditch Decree didn't have to be reopened as a result of the Gesell opinion of '73, but the government did move to reopen it.

RP: The government originally moved to reopen it as a way to convince Judge Gesell that judicial intervention was not necessary, but now they became advocates for the Tribe. They were not clear what they should do, but number one: they recognized that a great outrage had been committed. Number two: they felt they were going to be in trouble before Gesell and that this was one way to avoid that problem.

In any event, Interior still couldn't get itself to recommend that the government forcefully advocate on behalf of the Pyramid Lake Paiute Tribe. They sent this very soft recommendation to Justice that they file a lawsuit to determine what the Tribe's water rights were. They did say that they felt there was originally a reserved water right for the lake and for the fishery when the reservation was created in 1859, but they did not say the extent to which the reserved right had survived either the establishment of the Newlands Project and the diversion of the water at Derby Dam under authority of the federal reclamation laws, or the Orr Ditch Decree.

The case first had to go to the Solicitor General; Griswold got it and he rewrote the complaint. He then established that the position of the United States would be that not only was there a reserved right established when the reservation was created, but it was a good one and it hadn't been diminished or extinguished by subsequent events.

CW: When did the government file to reopen the Orr Ditch Decree?

RP: It was filed in 1973, after the Supreme Court declined to exercise its original jurisdiction. They basically said that this has to be filed in Nevada. And the federal government then filed it about six months later against 17,000 or so individuals. [*U.S. v. T.C.I.D.*, 649 F.2d 1286 (1981), *rev'd sub nom. Nevada v. United States*, 463 U.S. 110 (1983). This action did not dispute the rights decreed in the Orr Ditch Case, but sought to gain "additional rights for the United States and the Tribe, with priority dates superior to those of the Defendants."] It was before Judge Anderson from Idaho. He ruled that the decision not to assert a water right to the Pyramid Lake Tribe in the Orr Ditch Case was made at the highest levels of the government, that federal officials had been authorized to make that decision, and that *res judicata* barred the claim for the additional right with an earlier priority.

CW: Okay, you're going up to the Ninth Circuit in the late '70s appealing Anderson's dismissal of your effort and the government's effort to reopen. The government filed, but then you intervened. At this point, had you again begun trying to get somebody else to do your work? For instance, what about your attempt to get Fish and Wildlife to begin enforcing the Endangered Species Act, and to get Reclamation to begin enforcing conservation standards at the Truckee-Carson Irrigation District (TCID), so less water would have to be diverted from Pyramid Lake?

RP: Yes, there was a dual strategy from the beginning for Pyramid Lake. We saw early on that there were two ways to win. The more conventional route was to reopen the Orr Ditch Decree and establish that the Pyramid Lake Tribe had the first right on the river to enough water to maintain the fishery, whatever amount that turned out to be. But at the same time, as manifested in the Judge Gesell case, we also had an alternate strategy — really a form of guerrilla warfare — which turned out to be the winning strategy. That alternate strategy was, assuming that there was no superior water right for the Pyramid Lake Paiute Tribe, that nevertheless we would need to cut back on the extravagant diversions, particularly at Derby Dam, but elsewhere within the Truckee River System as well.

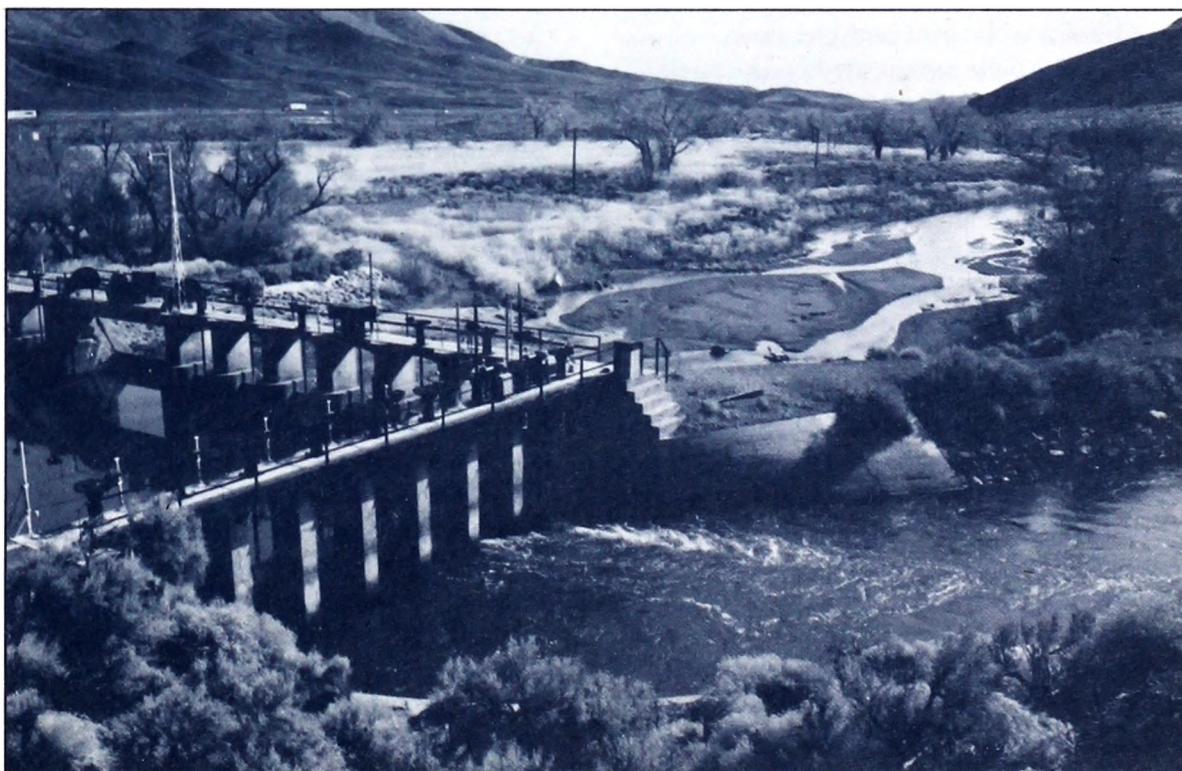
Unfortunately, one of the problems of litigating in Washington, D.C. was that TCID was not a party to the case, and we couldn't get jurisdiction over them in Washington. TCID's position was that the

federal district judge didn't have jurisdiction over them, and they felt the judge didn't have jurisdiction over the Truckee River. They continued to divert water as if Gesell's decision and the regulation promulgated by the Secretary didn't exist. Gesell had included a provision stating that, if TCID continued to violate the Secretary's regulation, that the Secretary should then invoke the clause of his 1926 contract with TCID which authorized him to terminate the contract under which TCID controlled Derby Dam.

CW: Gesell can't regulate TCID directly, but he can direct Interior to direct TCID, or so he thought.

RP: Right. During the spring of '73, as TCID continued to fail to comply with the decree and the Secretary's regulations, we put a lot of pressure on Interior to terminate the contract. Interior and Reclamation replied, "We can't do that. We never have!" And so we kept saying, "Well you'd better, and if you don't, we're going to go back to Judge Gesell and hold you in contempt." About six months after Gesell's decision, Interior wrote a letter to TCID that the Secretary was invoking the termination clause, Article 34 of the 1926 contract.

Interior terminated the contract, but the contract had a provision that said you had to give notice a year before the actual termination. The letter of notification on behalf of the Secretary to TCID turned out to be quite prophetic. It said, "Now I recognize, because this termination isn't going to take effect for a year, that you're going to continue to divert water. You're going to have physical control of Derby



Derby Dam on the Truckee River; the remaining river flow is shown above the dam. Photo by Alise Rudio.

Dam during this interim period. If you violate the regulations and you take more water than you're entitled to, ultimately you're going to have to return that water to Pyramid Lake."

About six months after that, TCID brought its own lawsuit in Nevada against the Secretary of the Interior, claiming that Judge Gesell had no jurisdiction, that the Secretary had no authority, that the contract was still in effect, that the Operating Criteria and Procedures (OCAP) were illegal, and that they should be able to go on diverting the way they always had. [*TCID v. Sec of Interior*, 742 F.2d 527 (1984).] The judge kind of put that case on hold because that was going on at the same time as the suit to reopen the Orr Ditch Decree.

CW: Okay, so now you've got things going on, on different fronts, and the Orr Ditch Decree case was up to the Ninth Circuit, and you put your heart and soul into that brief and argument.

RP: Yes, and I thought the Ninth Circuit came out with a splendid decision, but it was not a complete victory. They said, "Well we're going to uphold the Orr Ditch Decree in so far as it affects everyone, except the Newlands Project." That's where the real conflict of interest was and that's where all the water went. That's why we put so much emphasis on the OCAP litigation. The cities of Reno and Sparks had net depletions of 30,000 acre feet, whereas the Newlands Project, historically, was diverting 250,000 acre-feet at Derby Dam, none of which returned to the river, because it was a transbasin diversion.

The Ninth Circuit said that, "As between the two interests that were represented by the United States, Pyramid Lake and The Newlands Project, there was no adversity of interest between them, because they were represented by the same attorneys and therefore, since adversity of interest is an essential element of *res judicata*, then *res judicata* doesn't apply, as between the two entities." We were thrilled and delighted.

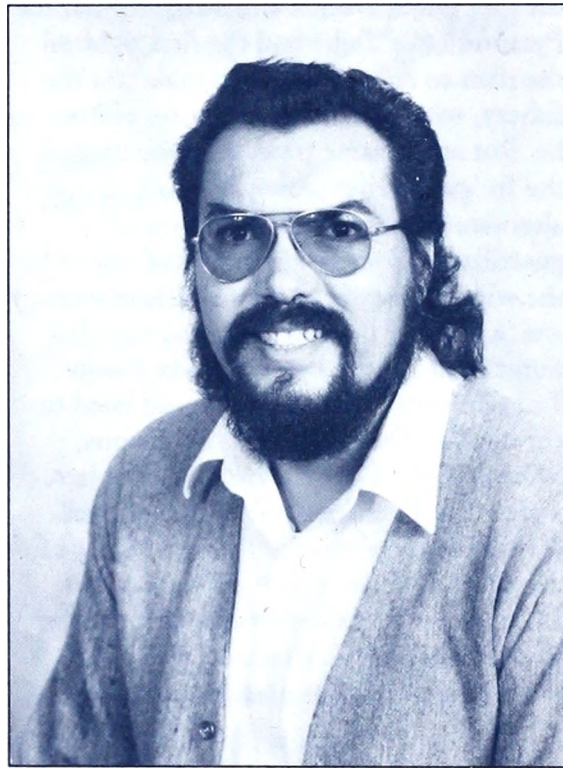
CW: Next was the petition for *certiorari*.

RP: We lost overwhelmingly in the Supreme Court: nine - zero. Even Justices Brennan and Marshall came down against us. [*Nevada v. United States*, 463 U.S. 110 (1983).] I was still Special Counsel at that time. I was no longer with NARF because in 1982 I had founded my own firm. I went out with the Tribe's general counsel and there was a great deal of consternation, disappointment, sadness, anger, and frustration within the Tribe. I told them I understood how they felt. I told them that I felt the legal system had disserved them again. But I told them that there was, and always had been an alternate strategy, and

that they should hang in there.

CW: And when did Joe Ely come in, '86 or '87?

RP: Joe Ely was on the Tribal Council at that time, in 1983. Even though he was not the chairman, he was leading the discussion. Joe Ely had left the reservation and later returned. He was a high school dropout and got into some trouble, but he found himself. He found a spiritual meaning to life. He is an extraordinary human being. He had eventually gotten a high school degree but never had any higher education. However, he was extraordinarily intelligent, gifted, and brilliant. This guy went toe-to-toe in negotiations with the chairman and chief executive officer of the Sierra Pacific Power Company and beat him hands down. These



Joe Ely

guys had to come back after Joe got through with them and say, "Yeah, I know we accepted the deal, but we've got to renege because we didn't know what we were doing."

I can remember very well, Joe and I coming to Washington. Joe had become the tribal chairman in very difficult circumstances in 1985. I had, under those same circumstances, then become the Tribe's general counsel. We really were a team for the first time. We went to Washington and sat across a long table with the members of the Nevada congressional delegation. There were only four of them, so they were on one side, and Joe and I were on the other. Joe was sitting across the table from Senator Laxalt, and Senator Laxalt stuck his finger across the table, practically three inches from Joe's face, and said, "I want to tell you something. I want this compact [*an*

interstate compact originally negotiated in the 1950s and 1960s, which the Tribe opposed] approved before I retire, and I'm going to do anything I can to get it. You can fight me if you want to, but if you fight me, I'm going to roll over you and we're going to get that compact approved." Joe was a 30-year-old Indian, a high school dropout, and he just said to himself, "Nobody treats me that way. Nobody points his finger at me like that." Oftentimes when we were down at our lowest, we would remember that for inspiration.

So we had to fight Senator Laxalt and fight the Congress in 1986, and we hired a major lobbying firm to help us. Senator Laxalt had gotten a rider attached to the appropriations bill (the one bill that couldn't get vetoed because the government would stop in its tracks) that would have simply said, "The United States hereby ratifies the California-Nevada Interstate Water Compact." So they put this one little teeny, weensy provision to ratify the compact on this humongous appropriations bill.

CW: Now Laxalt is telling members of both parties, "This is my last swan song. This is what I want. I want this compact."

RP: Yes, "This is my retirement gift." And the Tribe's motto became, "Build him a library!"

CW: The compact never got out of appropriations?

RP: Actually, it was reported out of the Appropriations Committee on a tie vote. But then we entered into negotiations with Senator Laxalt and actually made a deal with him. But when the State of Nevada, Sierra Pacific Power Company, and the other Nevada interests found out about it, they were furious. They told Senator Laxalt that they would rather have nothing than the deal we had negotiated. So at that point Senator Laxalt gave up on his effort to obtain ratification of the compact; he really had no other choice.

CW: What would you tell us about the [*Fallon Paiute-Shoshone and Truckee-Carson-Pyramid Lake water rights*] settlement [*which became law on Nov. 16, 1990*] in terms of people, strategies, or events that might not catch the eye?

RP: I guess there are three or four things. The first, I can best express by comparing Pyramid Lake with San Luis Rey. San Luis Rey was dealing with a situation where there were significant, economic forces. But people, in dealing with the San Luis Rey controversy, were rational and they always realized that water was a commodity and also there was an alternate source of water. The lawyers dealt with the issue professionally. It took us a long time to have a breakthrough, but we always had communi-

cation. I think we always respected each other. There was none of that on the Truckee River with Pyramid Lake.

From 1969, when I got involved, up through 1985-86, it was entirely a bitter, adversary proceeding in which there was no meaningful dialogue. Pyramid Lake was the enemy. Not just the adversary, but the enemy. It was a collective feeling. It was TCID, Reno, Sparks, Washoe County, the State of Nevada, the Sierra Pacific Power Company, and the State of California; it was everybody against the Tribe. Everyone felt terribly threatened by what the Tribe was up to. I remember going to settlement meetings — settlement meetings in name only — where it would turn into Tribe bashing sessions. There would be fifty or a hundred people in the room and Pyramid Lake representatives, and it would be them against us. So we never really got anywhere. We never established a dialogue.

The predicates for a dialogue were first of all that we had beaten Senator Laxalt in 1986; that was critical. I think it made people realize that we were a player. It made them realize that they were not going to be able to impose their will on us, at least not through Congress. They realized that we could stop the compact. The compact was dead, which was a critical issue for both California and Nevada. The only way they were going to get either the compact or some kind of interstate apportionment was if the Pyramid Lake Paiute Tribe agreed to it.

The other breakthrough was that there was another case at the time involving water rights and Stampede Reservoir. [*Carson Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (1984), cert. denied 105 S.Ct. 1842 (1985).] We won that case about the same time that Judge Gesell's decision was ultimately affirmed by the Ninth Circuit. So the alternate strategy was working. The Stampede decision was also very important because here the Sierra Pacific Power Company, a private utility serving water to Reno and Sparks, had a real obsession with Stampede Reservoir. When we won that, under the Endangered Species Act, they realized that the only way they were going to be able to use Stampede Reservoir was through a settlement.

That was the backdrop. Senator Reid of Nevada, who replaced Senator Laxalt, was a true hero in this. At one time, Senator Reid was the boy wonder of Nevada politics. Part of his motivation was very personal. In 1974, he had lost a very close race for the Senate against Senator Laxalt. He wanted to succeed where Senator Laxalt had failed. That was really important to him. When Laxalt retired, he was quoted as saying that his major regret as a public official was he



Pyramid Lake with fishermen. Photo by Alise Rudio.

had not been able to resolve the Truckee River/ Pyramid Lake conflict.

Senator Reid's approach was very different from Senator Laxalt's. Senator Reid acted as an honest broker, a facilitator, whereas Senator Laxalt never got directly involved and always made it clear that his agenda was to further and protect the interests of the State, TCID and Sierra Pacific. We never would have been able even to begin a dialogue if it had not been for Senator Reid.

The real breakthrough, I think, in the negotiations was when Sierra Pacific Power Company broke from the rest of the pack in Nevada and negotiated a deal with the Pyramid Lake Paiute Tribe. Sue Oldham, of Sierra Pacific Power Company, was very instrumental in this, and it was a very hard decision. It is difficult to convey the kind of courage that took. Nevada is a very small state. Even when the negotiations began, the Director of Conservation of Natural Resources, Roland Westegard, was quoted in the paper publicly as saying, "The most important thing is that we all stand together." He meant that all Nevadans stand together. The Tribe was not considered Nevadan. Sierra Pacific Power Company had a lot to lose because they were tied into the power structure and depended, to a very significant extent, on the governor, the Director of Conservation, the state engineer, and the state legislature.

The other key thing was how the Tribe and the advocates for the wetlands at Stillwater National Wildlife Refuge ultimately came together, because our relationship with them also had been hostile

and adversary for a long time. The reason for the adversity was that the wetlands had been maintained with wastewater from the Newlands Project. The more wasteful the Newlands Project was, the more water the wetlands got. The U.S. Fish and Wildlife Service had come down on the side of getting *more* water for the Newlands Project, so that there would be more left over, or more wastewater for the wetlands.

There were two things that happened that changed that around. One was very personal. Joe Ely just basically took that over himself and went to the meetings with the Wetlands Coalition, and dealt face-to-face with that group. He was able to convince them that the only way that the Stillwater area could survive on a long-term basis was by getting its own water supply. It could not be a parasite on the Newlands Project.

The second event contributing to the change was that terrible contamination and toxicity problems were being discovered at Stillwater. That helped a lot, because I think everybody realized that getting left-over water from the Newlands Project created water quality problems, severe water quality problems, and that the only way that situation ultimately was going to be redressed was through taking Newlands Project land out of production and obtaining and transferring water rights to Stillwater.

CW: Now one other thing just to finish off on this, but I think it's implicit from what you said earlier. You were talking

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about central people and events that made the settlement possible. I suppose another one would just be the quality of the science.

RP: Yes. We had an extraordinarily gifted hydrologist named Ali Shahroody from Stetson Engineers in California. As you said, the difficulty was that Pyramid Lake was at the end of this ecosystem that involves two rivers and other major resource conflicts. Everybody else was in this for their own interests. TCID was in it to protect itself. The wetlands advocates were in it to get more water for Stillwater. California was in it to get water for the California portions of the basin. Sierra Pacific was in it for their storage, and Nevada had its own interests. Pyramid Lake was the only entity that had to be concerned with *everything* that was going on, because we were at the end of the system.

Everything that happened above us, from

a quality or quantity standpoint, ultimately affected the fishery and the ecosystem. We were kind of the center. So we not only had to understand the hydrology and the biology of Pyramid Lake, but also the ecology of the wetlands, how Sierra Pacific's system operated, what California's interests were, etc. All of the key players, except TCID, which eventually turned out not to be a key player, had to be satisfied or else there would not be a settlement, and it was primarily our job to figure out how their needs could be met within the overall framework of the settlement.

I should also note that we had to keep in mind not only the science we knew, but also its limits, what we didn't know. The history of the various agreements and decrees over the past 100 years on the Truckee River is a magnificent case study in how *not* to manage a river system. We learned a lot by seeing the mistakes that had been made and understanding why. Probably the biggest mistake that had been made was that the legally mandated operating regime of the

Truckee River was much too rigid; there was no flexibility to accommodate either changing circumstances or gaining a better understanding of how the ecosystem functions. So one of our major goals was to solve the existing problems on the River while still leaving room to adapt to new conditions. In the last analysis, the only thing we can be sure of is that the future will evolve in ways that we are not able to anticipate.

One of the things I would recommend to all lawyers, that you really have to take control of a case or a situation. You have got to know the hydrology, the politics and the biology better than anybody else, or at least as well as other people. You must essentially control the negotiations and decide who to negotiate with first, how to build from the ground up, and how to make sure that a key party doesn't pull out. Understanding the politics of the situation is very important. The technical issues have to be put into a larger context. Knowing what to give on, and what not to give on, is also critical.

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Calendar

Thurs. Apr. 22: The Endangered Species Act Reauthorization: Are Changes in Order?

Robert Irvin, National Wildlife Federation, Washington, D.C. and Janice Sheftel, Maynes, Bradford Shipp & Sheftel, Durango. **Third of spring Hot Topics in Natural Resources Continuing Legal Education lunch series.** (Held at noon, Hershner Room, One Norwest Bank Center, Denver. Charge for lunch and registration.)

Mon.-Wed., June 14-16: "Water Organizations in a Changing West," annual water law conference, Univ. of Colorado School of Law, Boulder. Information will be mailed in early April.

Sun.-Tues., Sept. 19-21: first of annual public lands conferences.

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