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### Hero for the People, Hero for the Land and Water: Reflections on the Enduring Contributions of David Getches

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# HERO FOR THE PEOPLE, HERO FOR THE LAND AND WATER: REFLECTIONS ON THE ENDURING CONTRIBUTIONS OF DAVID GETCHES

CHARLES WILKINSON\*

This is a complicated world and as a community we need to pause and take time to celebrate our successes, be inspired by them, and understand and learn from them so that we can apply them to other situations in the years to come. David's accomplishments and the way he led his life are quintessential examples of this. My aim is to present one person's perspective on David's professional career. I have worried about the title of this talk, with its identification of a "hero," for fear that some might wonder if it would stray off into hero worship. But this is a factual matter. There are heroes, and the question is whether a particular person has earned such standing as a matter of fact. At the memorial service for David that overflowed the law school's large, open courtyard back in August 2011, Billy Frank, Jr., the Nisqually tribal leader from the Puget Sound area, was one of the speakers. Billy told all of us, in a halting voice, that "David is our hero."<sup>1</sup> His statement was based on facts, facts I will return to, and I think that Billy Frank's belief, and mine also, is that not only are there heroes, there are also some heroes with a capital *H*.

In the early afternoon of June 9, 1971, I drove across the high and graceful San Francisco-Oakland Bay Bridge on a sunny, magical Bay Area day, headed for a job interview in Berkeley. I had been given the address and the assurance that the office was easy to find—"It's right above the bagel bakery."

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\* Distinguished Professor and Moses Lasky Professor of Law, University of Colorado Law School. This essay was prepared for the University of Colorado Law School symposium *A Life of Contributions for All Time: in Honor of David H. Getches* that took place in April 2012. I give thanks to Julia Guarino, Travis Bruner, Cynthia Carter, Dennis Donald, John Echohawk, Bruce Greene, and the editors of the University of Colorado Law Review for their help on this article.

1. Billy Frank, Jr., Chairman, Nw. Indian Fisheries Comm'n, Remarks at the Memorial Service for David Getches, Boulder, Colo. (Aug. 11, 2011) [hereinafter Frank Remarks], available at <http://lawweb.colorado.edu/events/mediaDetails.jsp?id=3450> (last visited Aug. 25, 2012).

There I met with Bruce Greene, Joe Brecher, John Echohawk, and David Getches, the blue-jeaned attorneys of a fledgling law firm, just a year old, the Native American Rights Fund ("NARF"). I was swept away, and still am, by their idealism, terrific lawyer skills, docket of important cases, and, surprisingly, the organized, business-like administration of the nonprofit firm. This was plainly due to David. I learned not only that the firm was about to move to Boulder, Colorado, but that David had obtained a grant from the Ford Foundation for eight—*eight!*—more lawyers.

As I drove back over the Bay Bridge at the end of the day, my heart—in the end that is what you look to in decisions like this—sang over the possibility of leaving my San Francisco firm to join NARF if an offer came through. It was the combination of a compelling cause and the seeming stability, the solidity of NARF despite its youth. As I soon learned, it all came back to David, the director.

And on my drive back I kept thinking that there was something else about him. What was it? What *was* it? Ahhh, yes . . . . It was his lustrous, mahogany-rich hair, dropping down neatly to his shoulders in perfect page boy fashion.

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On my very first day in the Boulder office that fall, I came face-to-face with a metaphor for David's administrative approach and high standards. "Jen Evans! What are you doing here?" Jen was the super office administrator for Lewis & Roca, the Phoenix law firm I had worked for several years before. "Well, Mr. Getches called me and asked if I could take a two-week leave and come up and set up all the administrative systems—filing, calendaring, finances, and so forth. I've just loved working with the staff here. I almost hate to go back."

In just two years, David made NARF into a mature, full-blown law firm substantial in every way, with fourteen attorneys and an office in Washington, D.C. He negotiated a two-year option to purchase the building on Broadway in Boulder and the building next door as well. At the time, the idea of a nonprofit legal services firm owning its own office building was unheard of. Still, he exercised both options and, forty years later, those buildings still house the main NARF offices and the National Indian Law Library.

Other formative issues came up at the very beginning. The

Ford Foundation balked at NARF's proposals for a strong Indian preference in hiring and an all-Indian Board of Directors. The Ford program officer was convinced that Indians were not yet ready for so much responsibility. David dug in his heels, arguing that, while it was true that there were few Indian lawyers at the time, the program should aim for the best and take risks in close calls. As for the Board, nonlawyers could serve on it as well as lawyers, and the Board had to be Indian to pass muster in Indian country. This was a matter of self-determination. The grant hung in the balance for a while, but Ford finally relented.

Then there was the passion for the cause. A fierce commitment to bringing tribes the highest quality legal representation was palpable—it filled up the building. This was a moral crusade, not a job. The passion for the work was intensified by the newness of the project. Law in America had never before seen this kind of law firm for Indians. To be sure, this was not all David's doing, but he inspired the staff at firm meetings and in individual discussions. And talk about high standards: he embraced them and displayed them by his example, day in and day out, then and for four more decades.

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As David carried out his duties as executive director, he was an active practicing lawyer handling several large matters. Number one on the list was serving as lead counsel in *United States v. Washington*,<sup>2</sup> soon to be known as the "Boldt Decision" after District Judge George Hugo Boldt who handed down the central ruling in the complex and historic litigation.

By the late 1960s, the so-called "Salmon Wars" had been waging since the end of World War II, with the intensity steadily rising. The United States negotiated treaties with the tribes of northwest Washington in the mid-1850s, with the tribes reserving the exclusive right to take salmon on their reservations and, as well, the right to harvest off-reservation at their traditional sites "in common with all citizens of the territory."<sup>3</sup> As the population (and the number of commercial

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2. 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

3. The treaties and affected tribes are cited at *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 661–662 (1979).

and sports fishers) surged, the state cracked down on off-reservation Indian fishing ever more severely.<sup>4</sup>

There was plenty at stake: the three biggest industries in the region were timber, Boeing, and salmon. State officials and non-Indian fishing groups denied the continuing validity of the treaties and branded the tribal treaty fishers—who insisted on fishing under the treaties and their own laws and not state seasons, bag limits, and gear restrictions—as poachers and renegades. The state enforced its position with tear gas, billy clubs, and high-tech crowd control equipment, including high-speed power boats. Between 1945, when he was fourteen, and 1974, Billy Frank endured some fifty arrests and confiscations of his nets, canoes, and catches.<sup>5</sup> This was not done to preserve the runs—there were no instances of tribal fishers’ wasting fish. Rather, the state was acting purely on behalf of its non-Indian constituents who wanted to eliminate the three or four percent of the total harvest that tribal fishers managed to harvest in between the arrests.

Northwest tribes refer to themselves as “Salmon People.” Traditionally, the fish were a mainstay in the Native way of life, providing large parts of Indians’ diets (one-quarter to one-third). They had a spiritual relationship, with tribes holding “first salmon ceremonies” in the fall to welcome back the runs once again. The ties to the runs continued. Billy Frank explained that “[w]e lived with the salmon. He’d tell us about the weather—the droughts, the floods. If he came back at the normal time, that told us everything was normal. If he came early or late, you’d know something was changing.”<sup>6</sup> The United States Supreme Court emphasized this comprehensive relationship in 1905, writing that the salmon “were not much less necessary to the existence of the Indians than the atmosphere they breathed.”<sup>7</sup> Sid Mills, a Yakama resister at the time, reflected that “[t]here is no reason why Indian people should not be permitted to fish in the waters where these

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4. For more information on the Salmon Wars and related issues, see TROVA HEFFERNAN, *WHERE THE SALMON RUN: THE LIFE AND LEGACY OF BILLY FRANK JR.* (2012); CHARLES WILKINSON, *MESSAGES FROM FRANK’S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY* (2000); MARY ISLEY ET AL., *UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS* (1970).

5. Interview with Billy Frank, Jr., Chairman, Nw. Indian Fisheries Comm’n, in Olympia, Wash. (Sept. 5, 1997).

6. Frank Remarks, *supra* note 1.

7. *United States v. Winans*, 198 U.S. 371, 380 (1905).

rights exist. There is no reason why Indians should spend their lives in the courts, in jail, or under the dominion of fear.”<sup>8</sup>

In the exceedingly complex litigation that *United States v. Washington* and associated cases would become, David served as lead trial counsel for the several tribes; conceived of the argument that the tribal right “in common with” non-Indian fishers meant a fifty-fifty split; participated in convincing the Nixon White House to file “United States” against Washington (with the individual tribes then coming in as interveners) to gain the prestige of the national government on the tribes’ side; presented the opening and closing arguments; and helped create a seamless relationship between the tribes and the United States. How seamless? Stan Pitkin, the United States Attorney for western Washington, gave the tribal attorneys the key to his office so they could spread out in Pitkin’s conference room during evening work sessions. The final trial brief, a joint filing by the tribes and the United States, carried just one signature, “David H. Getches, for the Plaintiffs.”<sup>9</sup> At this point, he was a full thirty-two years old.

Judge Boldt handed down his blockbuster 203-page decision on February 12, 1974, intentionally choosing Lincoln’s birthday. The Supreme Court affirmed it in 1979<sup>10</sup> in a six-to-three decision, but Judge Boldt’s opinion was the great moment in American law and history. The Supreme Court majority almost surely took note of his comprehensive, carefully supported opinion and his reputation as an eminent, conservative judge. The Boldt Decision belongs in the company of America’s brightest emblems of justice with its respect for the rights of a small, dispossessed minority, its honoring of an ethic of promising, and its full and fair consideration of the relevant history.

Further, the Boldt Decision, which made several important rulings in addition to the fifty-fifty split, made all the difference in the real world. The tribes steadily increased their take up from the single digits to the 50 percent share guaranteed by the treaties. The northwestern Washington

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8. Sidney Mills, *I am a Yakama and a Cherokee Indian, and a Man*, in RED POWER: THE AMERICAN INDIANS’ FIGHT FOR FREEDOM 22, 26 (Alvin M. Josephy, Jr. et al. eds., 2d ed. 1971).

9. Plaintiffs’ Post-Trial Brief, *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) (No. 9213).

10. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979). This case was a collateral attack on Judge Boldt’s decision in *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974).

tribes, with their sovereignty reaffirmed in such dramatic fashion, quickly established or greatly expanded fisheries management systems with scientists, codes, enforcement capability, and tribal courts. They developed commercial operations. Collectively, they founded the Northwest Indian Fisheries Commission as a substantial organization for research, policy development, and relations with federal and state agencies and legislatures.<sup>11</sup> For tribes across the country, it was inspiration of the first order right when the modern Indian revival was beginning to pick up speed. It was a time when the heroes came forward.

David took on several projects at NARF other than *United States v. Washington* and his duties as director, but the following are notable because they reflected how, from his vantage point as director of the national Indian legal services firm, he could identify the most acute needs for legal services among the country's Native communities. He gave special attention to Alaska Natives and Native Hawaiians, have-nots in the extreme in the struggle for sovereignty.

The Alaska Native Claims Settlement Act of 1971 ("ANCSA"), supposedly designed to resolve land claims fairly, is often called "termination in disguise."<sup>12</sup> The Native leadership did manage to achieve a grant of forty-four million acres (two-thirds the size of Colorado) and a financial payout. But Indian fighters in Congress exacted a heavy price: the lands would be owned not by sovereign Native governments but by twelve Native regional corporations and over two hundred village corporations, all chartered under state law. Further, the ANCSA terminated all hunting and fishing rights of these Native resource-based communities. In one case, David successfully sued to overturn a decision by the Bureau of Indian Affairs ("BIA") and vindicate the right of nonresident Alaska Natives to form a "13th Regional Corporation" to receive ANCSA distributions, invest them, and distribute the dividends to shareholders.<sup>13</sup>

He also represented Alaska Natives in a true *tour de force*. Inupiat have always lived on the North Slope of Alaska, the

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11. For information regarding the Northwest Indian Fisheries Commission, see generally NW. INDIAN FISHERIES COMM'N, <http://nwifc.org/> (last visited June 21, 2012).

12. For more on ANCSA and Alaska Native rights, see DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* (2d ed. 2002).

13. *Alaska Native Ass'n of Oregon v. Morton*, 417 F.Supp. 459 (D.C. Circ. 1974); CASE & VOLUCK, *supra* note 12, at 160.



frigid land above the Arctic Circle. As of the early 1970s, with the forced move into the cash economy and a foreign culture, their economic and social circumstances were dire. There was not a single hospital. As bad or worse, of the five schools, only the Barrow School reached tenth grade. Dropout rates were off the chart, and the children who wanted to get an education past eighth or tenth grade had to go to BIA boarding schools in Anchorage or the lower forty-eight states. How could a young person possibly make her way in this new and chaotic world?<sup>14</sup>

With the mammoth oil strikes on the North Slope at Prudhoe Bay in the 1960s, Inupiat leaders saw a path. In the early 1970s, they began circulating a petition to establish a borough under Alaska law. Boroughs—invented in old England but alive and well in modern Alaska—can tax. The state Local Boundary Commission held field hearings in Barrow and was blown away by the Natives' testimony. At an Anchorage hearing in 1972, the commission ratified the petition, giving the go-ahead. The oil companies were not amused.

The Natives called in David during the commission process, and he represented the new Borough when the seven oil companies sued.<sup>15</sup> The Superior Court upheld the Borough designation, and for the Supreme Court, David, along with the Alaska Attorney General's Office, briefed and argued the case for the new but still uncertain Borough. On January 16, 1974—just twenty-eight days before the Boldt Decision came down—the Supreme Court of Alaska unanimously ruled in favor of the Borough.<sup>16</sup>

What a difference it has made. Among many other things, the North Slope now has nine K-12 schools and the drop-out rate is just a few points above the national average of 7.4 percent.<sup>17</sup> No less an authority than *Parade Magazine* has

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14. For more on the situation before the creation of the Borough and on the establishment of the Borough, see generally BILL HESS, *TAKING CONTROL: THE NORTH SLOPE BOROUGH—THE STORY OF SELF DETERMINATION IN THE ARCTIC* (1993); and David H. Getches, *The North Slope Borough, Oil, and The Future of Local Government in Alaska*, 3 UCLA ALASKA L. REV. 55 (1974).

15. See HESS, *supra* note 14, at 56.

16. *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92 (Alaska 1974).

17. See *Fast Facts*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=16> (last visited Sept. 4, 2012) (National dropout rate of 7.4 percent); NORTH SLOPE BOROUGH SCHOOL DISTRICT, REPORT CARD 2010–2011, <http://nsbsdbeta.schoolwires.net/cms/lib01/AK01001879/Centricity/Domain/38/ReportCards/NSBSD-REPORT-CARD-092611.pdf> (last visited Sept. 7, 2012) (North Slope dropout rate of 11.3 percent). For more information on the North Slope Borough School District education statistics, see

called Mayor Edward Itta, whose government raises \$250 million in tax revenues each year, “one of America’s most powerful mayors.”<sup>18</sup>

This is not your grandfather’s borough. Stretching across some eighteen million acres of terrain, at once forbidding and spectacular in terms of sheer beauty and wildlife, the North Slope Borough is bigger than thirty-eight states and is the largest local government in the United States and probably the world.

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When David and John Echohawk went out to Hawaii at the behest of traditional islanders, they found an accelerating revival as on the continent, but the particulars differed. Hawaiians had no political relationship with the United States ever since the forced overthrow of Queen Liliuokalani in 1893. The grievances were many, including the continuing anger regarding the overthrow of the beloved queen; access to spiritual places on high Mauna Loa, other sites in the national parks, and on sacred Kahoolawe, made into a Navy bombing range; and water rights to sustain the taro that produced poi, a staple both for the diet and the spirit.

From the many meetings emerged a consensus for a legal institution to meet some of the needs and help coordinate responses to others. A nonprofit legal services firm, the Native Hawaiian Legal Corporation (“NHLC”), was born in 1974 (its original name was the Hawaiian Coalition of Native Claims). The longtime director of NHLC Mahealani Wendt reports that David and John “literally mentored the Native Hawaiian founders” on matters such as funding, attorney recruiting, and priority setting, “so that it could be the ‘Hawai’i NARF.”<sup>19</sup>

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*North Slope Borough School District*, EDUCATION.COM, <http://www.education.com/schoolfinder/us/alaska/district/north-slope-borough-school-district/> (last visited June 6, 2012).

18. *The Mayor at the Top of the World*, PARADE MAG. (July 18, 2010), <http://www.parade.com/news/2010/07/18-the-mayor-at-the-top-of-the-world.html>.

19. Email from Mahealani Wendt, former Dir. Native Hawaiian Legal Corp., to author (Apr. 3, 2012) (on file with author). For information on Getches’s other work for Native Hawaiians, see Melody Kapilialoha MacKenzie, *Ka He’e Director’s Column: In Honor of David H. Getches*, KA HE’E (Nov. 2011), [http://www2.hawaii.edu/~nhlawctr/November%202011%20Newsletter/1\\_Directors\\_Column.html](http://www2.hawaii.edu/~nhlawctr/November%202011%20Newsletter/1_Directors_Column.html) (Ka He’e is the Online Newsletter for Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawaii at Mānoa William S. Richardson School of Law in Honolulu, Hawaii).

Today the NHLC remains a stalwart for Native Hawaiians.<sup>20</sup>

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Almost from the beginning of NARF there was a widely held belief, which David himself held, that an Indian should head up the national Indian law firm. David and John, neither being ambitious to be the director but both fully willing to serve when needed, worked closely together to develop a smooth transition. By 1973, it was time, and David stepped down. He continued on as a staff attorney for three years before forming a partnership with Bruce Greene. He also began teaching at the law school, first as an adjunct, then as a visitor. In 1979, he joined the faculty fulltime as an associate professor.

Admittedly, sometimes the excitement of that heady era overflowed a bit. In 1979, David and I were finishing up our Indian law casebook, the first book for each of us.<sup>21</sup> He flew out to Eugene so we could go through the galleys together in my office at the law school. Without going into detail, let us just say that we agreed on most matters relating to the book but not all matters, including how to write a simple declarative sentence. We worked way past dinnertime and finally ordered in two medium pizzas. A contentious point came up. Voices were raised. Personal insults, some not profane, followed. All of a sudden, one of us—I honestly do not remember which—found that editing had become more difficult due to the slice of pizza that had been firmly implanted on his face. The food fight was on, to the great disadvantage of hair, clothing, and the office walls and carpet. With that done, we cleaned up in the restroom, ordered two more pizzas, and returned to our editing in good cheer. The wonder and saving grace of it was that beer, of which plenty was at hand, was never invoked.

Food fights aside, David dove into his teaching and scholarship. He quickly became known as a willing and productive member on faculty committees. Over time, he also built a broad-based set of relationships in the outside world of western resource management that blended with his research and teaching and complemented his many contacts in Indian country. He came to know many of the state engineers; the

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20. For more information on the NHLC, see NATIVE HAWAIIAN LEGAL CORP., <http://www.nhlchi.org/> (last visited Sept. 6, 2012).

21. The current version is DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS & MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW (6th ed. 2011).

powerful heads of state water agencies; Interior Department officials; environmental leaders; tribal leaders; practitioners in the natural resources bar; colleagues in other disciplines at the University of Colorado ("CU") and beyond; and western governors, senators, and other political leaders. He learned from them and was credible in their eyes. Two of his greatest assets, in addition to just knowing a lot, were his humility and his transparency: people thought, "This guy has a passion for reform, but he listens to me and respects my views."

One core area of David's expertise was the Colorado River Basin that drains parts of seven states, serves some thirty million people, flows through spectacular southwest country including the Grand Canyon, and is home to twenty Indian tribes. He spoke and wrote widely on the subject, and, characteristic of all his western resources work, his approach was both practical and philosophical. He knew the geography cold, the natural landscape—the tributaries, wildlife, vegetation, the flows, the deepest canyons—and, as well, the built landscape—the mines, power plants, water diversions, tunnels, and farmland. At bottom, he explained—respectfully—that traditional water law continues to have virtues but that it needs to be reformed in areas such as conservation and instream flows, free from diversion.<sup>22</sup> On a more theoretical level, David urged a move to a new basin "governance" designed to reduce the current, far-ranging federal authority.<sup>23</sup>

The Colorado River was probably preeminent, but David was seen quite early on as an observer of great stature on western resources issues across the board. A person who felt obligations to act, he brought his accumulated knowledge—his wisdom—to the classroom and the journal pages, but he also felt obligated to contribute directly to the making of public policy.

This was an exciting, transformational time in American law. When David went to law school in the mid-1960s, law was mostly a field of private law—disputes and negotiations over money or property between citizens and often businesses. Soon, building on *Brown v. Board of Education*, the civil rights movement and the "Great Society" legislation of the Kennedy

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22. See, e.g., David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3 (2001).

23. David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573 (1997).

and Johnson years, public law was coming on strong. NARF, of course, is illustrative.

David believed profoundly in the worth of institutions. For him, federal, state, and nonprofit offices can be the best breeding and proving grounds. When done right, institutions can inspire people, help them reach, and bring out the best in them. They can be main engines of social progress.

The nonprofit organizations in the fields closest to David's heart—Indians, water, and the public lands—all boomed during the 1970s. Now, at the beginning of the 1980s, they remained at once dynamic and also in need of shoring up the foundations after such rapid growth. There was another aspect to this. Much of the progress had come at the national level. David was a Westerner and, ever since his days and nights in the Sierra Nevada as a boy, an outdoorsperson. The creation and growth of robust western institutions had lagged behind, in part because of greater fundraising potential at the national level. At the same time, and critically, the west had distinctive, pressing issues due to the aridity, Indian country, high percentage of federal lands, and explosive growth since World War II.

A consistent thread through the last thirty years was David's dedication—as already evidenced by his roles in founding NARF and the Native Hawaiian Legal Corporation—to nonprofits, especially institutions that are environmental, Indian, and Western. It is necessary to provide details here because describing his work with nonprofits generally, without the detail, would not properly raise the real question: Has anyone else ever done this much?

In 1982, David and fellow faculty member Jim Corbridge founded the Natural Resources Law Center here at the law school that, for three decades, has produced valuable research and annual conferences that have been main forums for improving western water and land laws. In 1989, he began serving a ten-year stint as the first board chair of the LAW Fund (now Western Resource Advocates). From 1989–1990, on a sabbatical in Costa Rica, he helped found and served as a board member for CEDARENA, an environmental law nonprofit, and Derecho Indígena de Talamanca, an indigenous-rights law nonprofit. Both were the first in those fields in that country.<sup>24</sup> In 1991, he joined the Board of Trustees of the

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24. For more information on the founding of the two organizations, see

Grand Canyon Trust and served a seven-year term as board chair. He was a member of the Board of Trustees for the Rocky Mountain Mineral Law Foundation continuously beginning in 1991. He served on the American Rivers' Scientific and Technical Advisory Committee beginning in 1991. The Trust for Public Land appointed him to its National Advisory Board in 1991. In 1999, he joined the boards of two leading national environmental organizations—The Wilderness Society and Defenders of Wildlife. In 2001, he became a member of the inaugural board of the Colorado Water Trust. In all cases, unless otherwise mentioned, he remained on these boards until his passing last year.

As people in those organizations know, David was a premier board member—as good as they get—hardworking, creative, and knowledgeable. He was a bear on budgets, pressed for efficiency, insisted on using mission statements to keep the workload focused, volunteered for the difficult work of searching for new executive directors when necessary, and blessed the organizations with his extraordinary strategic sense for public issues, his contacts, and his talent for fundraising.

And know that he loved these nonprofits and their work. In 2003, he left the Grand Canyon Trust board because of term limits. At his last meeting, he wanted to stay past the end of the meeting to walk slowly through the Trust's new, handsome, and green building just north of Flagstaff and the ponderosa pine forest outside. I said it was about time to head for the airport. He said, "OK," and we started walking back to the car. Then I realized he was not next to me. I turned around, and he was sobbing convulsively, overcome by the sadness of leaving the Trust behind.

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David applied for his first two jobs after law school as an associate in a San Diego law firm and as a staff attorney with California Indian Legal Services ("CILS") (NARF was soon

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*CEDARENA—The Environmental and Natural Resources Law Center*, 3 Colo. J. Int'l. Envtl. L. & Pol'y 615 (1992). For more information on CEDARENA, see CEDARENA, <http://www.cedarena.org/003/> (last visited Sept. 6, 2012). Derecho Indigena de Talamanca continues as a project of CEDARENA and has been inactive in some years. CEDARENA, *Proyectos*, <http://www.cedarena.org/003/?i=4> (last visited Oct. 9, 2012).

spun off from CILS). Ever since, even with the directorship at NARF and the deanship, jobs always came to him. This included, to my knowledge, the many nonprofit board positions. His lack of personal ambition fascinated me. He invariably had future projects in mind to do in his current position and made sabbatical plans. But he never looked out over the landscape for a new position.

And so it was in 1983. Tom Brown, former interim dean of the law school, knew that Governor Dick Lamm was looking for a new Executive Director of the Colorado State Department of Natural Resources ("DNR"). Brown suggested David to Roy Romer, the state Treasurer who was overseeing the search. Romer ended up recommending David for the job, and Lamm offered him the position.

David served for four years until Lamm's term ended in 1987. The DNR was a busy place at the time. The agency, with twelve hundred employees, was one of the largest state natural resources agencies in the west.<sup>25</sup> He loved his tenure there—indeed, he loved every job he ever had.

He took on the seemingly intractable Animas-La Plata project in southwestern Colorado—an old-style reclamation project designed to pump water uphill from the Animas River in Durango to create a reservoir for supplying water to irrigators, the two Ute tribes, and planned residential development west of Durango.<sup>26</sup> The irrigators, tribes, environmentalists, and a citizen's group opposing the subsidized project on fiscal grounds were all far apart and negotiations had stalled. David managed to bring the parties to the table, and a settlement, based on a project downsized by two-thirds, finally emerged in 1986.<sup>27</sup> While this settlement was later refined further to address additional Endangered

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25. Interview with Dennis Donald, former Deputy Dir. of the Colo. Dept. of Nat. Res., Boulder, Colo. (Mar. 30, 2012) [hereinafter Donald Interview] (notes on file with author).

26. See generally *Animas-La Plata Project*, U.S. DEPT OF INTERIOR, BUREAU OF RECLAMATION, <http://www.usbr.gov/uc/progact/animas/> (last visited June 5, 2012); *Animas-La Plata Project*, APPLGATE GROUP, INC. (Aug. 2009), <http://www.applagategroup.com/articles/animas-la-plata-project>; *Animas-La Plata Project Collection*, FT. LEWIS C., CENTER OF SW. STUDIES, [http://swcenter.fortlewis.edu/finding\\_aids/Animas\\_La\\_Plata\\_Project.shtml](http://swcenter.fortlewis.edu/finding_aids/Animas_La_Plata_Project.shtml) (last visited June 21, 2012).

27. Donald Interview, *supra* note 25; *Animas-La Plata Project: Implementation of the Colorado Ute Settlement Act Amendments of 2000*, U.S. DEPT OF INTERIOR, BUREAU OF RECLAMATION, <http://www.usbr.gov/uc/progact/animas/overview.html> (last visited July 2, 2012).

Species Act concerns, and while it is hard to imagine any resolution to the tangled Animas-La Plata controversy that could come even close to pleasing everyone, the ultimate settlement did eliminate a toxic conflict that had been plaguing the southwestern Colorado community since the 1960s.

Another major issue at the DNR was making the critical decisions, along with two other cabinet-level officials, on which sites would be cleaned up under the CERCLA Superfund program. The final list included the Rocky Mountain Arsenal near Commerce City and numerous old mining sites, two on the Arkansas River and one on Clear Creek.<sup>28</sup> Rather than delegate the analysis to staff, David burned the midnight oil to go through the voluminous files himself.<sup>29</sup> In addition to ruling on specific issues, David used the office as a bully pulpit, giving talks across the state. Water, contentious though the subject is in Colorado, was his favorite topic.

I should mention two other decisions, one he would change and one he would not. Governor Lamm asked him to head up the United Way Campaign for all state offices. David, as always, took the assignment seriously and creatively designed a lottery system to give employees an incentive to sign up and give generously. He should have read the state lottery laws more closely. The Secretary of State did.<sup>30</sup> The other decision was his choice, when giving an after-dinner address at a Cattlemen's Association annual meeting on the Western Slope, to order—he was a vegetarian—fish instead of beef. This may have happened more than once.

I spoke with Dennis Donald, David's Deputy Director at the DNR, about David's DNR years. In a reflective moment, Dennis offered this: "David led by example. He was so earnest. He always wanted to do the right thing. You never wanted to disappoint him because he was your hero."<sup>31</sup>

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28. See *Colorado Site Locator*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region8/superfund/co/index.html> (last visited Aug. 25, 2012) (listing all Colorado Superfund cleanup sites, including California Gulch and Lincoln Park, which are the Arkansas River sites).

29. Donald Interview, *supra* note 25.

30. See Bill McBean & Cindy Parmenter, *Official Unruffled in Raffle Row: Secretary of State May File Charges Against Resources Director*, DENVER POST, Oct. 27, 1984, at 1A; Bill McBean, *Meyer Says Raffle Still Breaks Law*, DENVER POST, Nov. 1984, at 6A.

31. Donald Interview, *supra* note 25.



The experience at the DNR of seeing resources law and policy from the inside, and actually making it, left a deep and lasting imprint on David's scholarship. Now he knew that water, and especially the Colorado River, was, along with Indian law, his greatest public policy and academic passion. The DNR propelled him. Starting in 1985, when he was still in government service, over a four-year period he authored no fewer than six articles and two papers on water.<sup>32</sup> They are rich in his first-hand knowledge of place, conviction of the need for reform, and experience with the agencies that grind out the real law through the granting and administering of water rights.

One of the many places where David's stature made a mark was in the so-called Long's Peak Report, entitled *America's Waters: A New Era of Sustainability*.<sup>33</sup> With Bill Clinton's election in 1992, David, collaborating with others, including Larry MacDonnell, director of the NRLC, obtained spur-of-the-moment funding from the Ford Foundation to produce, in a matter of weeks, a comprehensive report to the new administration putting forth recommendations on water law and policy.

A call went out to potential participants, and a group of thirty experts from around the country put aside other obligations and came to a lodge in Allenspark, up on the Peak-to-Peak Highway, to put together such a report. You can call it a political document, and in truth, most of the participants were Democrats. But you can also call it a focused, well-thought-out program for moving away from excesses in a system that, in many respects, had outlived its usefulness. The

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32. The following articles and papers were authored by David H. Getches: *Controlling Groundwater Use and Quality: A Fragmented System*, 17 NAT. RESOURCES L. 623 (1985); *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413 (1985); *Legal and Administrative Framework: Is it Adequate?*, in COLO. WATER ENG'G AND MGMT. CONF. INFO.: FEB. 17-18, 1987 (Colo. State U., Dep't of Civil Eng'g ed. 1987); *Water Planning: Untapped Opportunity for the Western States*, 9 J. ENERGY L. & POL'Y 1 (1988); *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515 (1988); *Water Use Efficiency: The Value of Water in the West*, 8 PUB. LAND L. REV. 1 (1987); *Learning From the Colorado River Basin Experience*, in BOUNDARIES CARVED IN WATER: 5 MO. RIVER BASIN SERIES 1 (Northern Lights Research and Educ. Inst. ed. 1988); and *Focus: Clean Water Act's Section 404*, 60 U. COLO. L. REV. 685 (1989).

33. LONG'S PEAK WORKING GROUP ON NAT'L WATER POL'Y, NAT. RESOURCES L. CENTER, AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY (1992), *reprinted* in 24 ENVTL. L. 125 (1994).

Long's Peak Report had its critics in the state legislature, and Dean Gene Nichol, accompanied by Larry MacDonnell and Jo Clark, had to justify the effort at a committee hearing in Denver. But the report articulated a modern approach to water and became a respected guide in the Secretary's office, the Bureau of Reclamation, and other reaches of the Interior Department.

Interior Secretary Bruce Babbitt had discussions in early 1993 with David about joining the administration, but the timing did not work out. Then, in 1996, Babbitt asked David to act as a special consultant to advise the Secretary on departmental initiatives during the second term. Babbitt was not assuming that there would be a second term, just making sure that he would have plans in place in case there was. David put in quite a lot of time on that report, making several trips to Washington to interview departmental employees. David thrived on the work, and Babbitt liked the report.

Shortly thereafter, at the end of the first Clinton administration, David came under active consideration for an assistant secretaryship in the Interior Department. It was unclear whether the position would be filled by the Secretary or the White House. Babbitt nominated him and sent his name over to the White House, but Washington is the place where great ideas go to die and, for reasons not fully understood, this never came to pass.<sup>34</sup> David would have welcomed the chance to make a difference in the nation's capital, but he and Ann were quite happy to continue their established lives in Boulder.

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Judging deans is a precarious enterprise because there are major and sometimes controlling influences external to the law school; because moving parts such as statistics bounce around from year to year; because there are intangibles as well as tangibles; and because of blind luck, bad and good. Acknowledging all of that, I believe that David was a great dean, a transformational dean, and I believe that most people in the broad law school community, including alumni, agree with that. These are some of my reasons.

The faculty, perhaps the group with the most information

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34. The author has had several discussions over the years with former Secretary Babbitt, former Assistant Secretary of the Interior for Fish, Wildlife, & Parks Don Barry, and David H. Getches concerning these events.

and long-range perspective, graded David generously. In his last evaluation in 2008, the Boulder Faculty Assembly analyzed the data from the law school faculty questionnaires and concluded that the faculty evaluations were “very high.”<sup>35</sup> The report added that, compared with the other deans being assessed that year, David “was rated higher . . . on every item . . . , and for many items, significantly higher.”<sup>36</sup>

David decided to announce his retirement in August 2010 at the annual faculty retreat held on the Friday before the first day of classes. The faculty was unaware that the announcement was coming. Typical of David, he did not want to make a big deal out of this, to make the retreat be about him. Just before lunch, he basically began mumbling quickly and barely audibly. Among the mumbles were the words “step down next June.” At that point he quickly tried to turn to the logistics of where lunch would be served when former dean Hal Bruff rose and shouted, “Thank you, David, for all you have done for this law school.” The whole faculty stood and issued an all-out standing ovation—rolling, rolling, rolling on, on and on. To my memory, it was the longest such honoring I have experienced. Law faculties, it should be noted, are not exactly uncritical, soft audiences.

There are numerous positive numbers. David was able to convince the central administration to support many additional faculty lines, with the result that we were able to bring on eighteen new faculty members, including seven diversity hires. The endowment went from \$26 to \$46 million, student scholarships from \$561 thousand to \$3 million, student diversity from 17 percent to 22 percent, and the student-faculty ratio from 13:1 to 11.5:1. LSAT scores in our highly competitive entering classes rose from 162 to 164, a significant increase.<sup>37</sup>

Two numbers are not positive. Tuition has gone way up to heartbreaking levels. It is not an excuse to attribute that to the legislature’s dramatic reduction of funding for higher education. In response, David took many measures to provide

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35. UNIV. OF COLO. AT BOULDER, BOULDER FACULTY ASSEMBLY ADM’R APPRAISAL COMM., REPORT CONCERNING DAVID GETCHES, DEAN OF THE SCHOOL OF LAW, SPRING 2008 7, *available at* <http://www.colorado.edu/FacultyGovernance/committees/REPORTS/getches08.pdf> (last visited June 5, 2012).

36. *Id.* at 8.

37. See Dayna Bowen Matthew, Former Vice Dean, Univ. of Colo. Law School, Remarks at the Memorial Service for David Getches, Boulder, Colo. (Aug. 11, 2011), *transcript available at* <http://www.colorado.edu/law/faculty/getches/speeches/MatthewDayna.pdf> (last visited June 21, 2012).

student scholarships. The second bad number is our rating *vis-a-vis* other law schools that, as measured by the U.S. News & World Report, sits at forty-fourth.<sup>38</sup> That rating system has all manner of arbitrariness and vagaries, and David aggravated the situation by insisting that our numbers be reported honestly.

David beefed up the administrative staff in several areas, including fundraising. He asked much of the staff, and the staff responded out of respect for him. Compared with other administrators, he disciplined and criticized staff less and also praised them less. I wish he had done more of both.

These days deans have so many external responsibilities that it is hard to stay on top of relationships in the building. David probably did as well as anybody on this, simply because he was so diligent, but he did especially well with students. He hated the tuition increases and had no higher priority than student financial aid. In formal ways, he put a lot into his annual speeches to entering students and departing graduates. He went to as many student meetings as possible, usually finding ways to emphasize the imperative of absolute, unwaveringly high ethical standards in all of their relationships—one aspect being the ethical obligation to do pro bono work. They rightly saw him as a person of great dignity and honor, an image of how to do it right.

Speaking of intangibles, what about the dinner parties at the Getches home? It is true, not trite, that David and Ann were a team—she was a valued confidant and advisor. Ann happens to be a great cook, but the larger point is that she is an architect of hearty and memorable evenings. During his deanship, Ann and David hosted almost exactly one hundred dinners, an average of one per month. Sometimes out-of-town guests and Colorado notables were there. The ultimate gift from the celebratory atmosphere and engaging conversation, covering both personal matters and issues of the time, though, was to enrich the sense of community at the law school. As a demonstration of the value of these unique evenings, Ruth Wright has made a generous contribution to the law school so that Ann can continue with these salons.

Then there is the Wolf Law Building. A very large number of people from many different walks of life contributed to it, but

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38. *Best Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings/page+2> (last visited June 21, 2012).

David was far and away the force that made the building happen. Hal Bruff, the previous dean, made major contributions by completing the initial fundraising and working hand in glove with the architects to create the new law school's classic architecture, which is more faithful to the true, traditional Charles Klauder campus architectural style than any CU building since World War II. But in the cruelest turn, the legislature pulled the plug on promised state funding virtually on the eve of breaking ground.

That is how it stood when David came in. He conceived of the radical idea of having the university students themselves—all twenty-nine thousand of them—contribute four-hundred dollars apiece each year for twenty years to pick up the slack for the state in order to fund the law building and four others across campus. Working with student leader Brian Mason and others, after a long and agonizing campaign and series of meetings in 2004, the student legislature finally agreed. David raised an additional eight million dollars of private funds for construction and obtained significant contributions from the Chancellor's office.<sup>39</sup>

Usually deans delegate construction details to a faculty committee, which in turn defers to the various architects, engineers, contractors, and campus officials. David would have none of that (I chaired the faculty building committee and saw this first-hand). He had a strong background in construction and, while he enlisted plenty of help, took the lead at every level—from plan changes, to obtaining the gold green building designation, to no-flush urinals, to the kind of grass for the lawns. He worked closely and collaboratively with the architects, contractors, and CU building officials. They knew his word was gold and that theirs had to be too.

One of my favorite places in the building complex is the William J. Hybl Family Fountain in the courtyard at the elbow of the main walkway. At the bottom of the water feature is a quote that David came up with. It is from the journal of John Wesley Powell, the storied nineteenth-century explorer of the southwest, written as he and his men on the first Powell journey stood at the entrance to the deepest part of the Grand Canyon, the "Great Unknown," as Powell put it. The words from Powell that grace our fountain are: "We have an unknown

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39. See, e.g., Kasey Cordell, *CU Breaking Ground on New Law Building*, BOULDER DAILY CAMERA, Nov. 12, 2004, at A09.

distance yet to run, an unknown river yet to explore.”<sup>40</sup>

Those words describe the emotions that our most recent law students felt when they left the building as graduates. It is what we felt when we graduated. It is what all our future graduates will feel. “We have an unknown distance yet to run, an unknown river yet to explore.”

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David's future plans, made before his passing, give a further measure of him. It has to do with his burgeoning interest in international law. In 1989, in preparation for his sabbatical in Costa Rica, he set out to learn Spanish. He had never studied the language at all, not even high school Spanish. He took serial immersion courses and, toward the end of his sabbatical, was able to present formal lectures on legal matters in Spanish.

His international work, always involving water or indigenous peoples or both, continued to increase after his sabbatical. He consulted for the Interamerican Development Bank and the United Nations Economic Commission for Latin America and the Caribbean. In 1999, he published a book chapter in Spanish and another in French.<sup>41</sup> He gave lectures in Tunisia, South Africa, Colombia, the Netherlands, and Spain. Beginning in 2006, when he was Dean, he coauthored no fewer than three articles in Spanish.<sup>42</sup> He also coedited a book on international water rights with Rutgerd Boelens and Armando Guevara-Gil from Peru.<sup>43</sup>

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40. WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 96 (1982).

41. David H. Getches, *Resolución Jurídica de Conflictos Sobre el Agua entre los Estados de la Union*, in *IX JORNADAS SOBRE DERECHO DE LAS AGUAS, PLANIFICACIÓN HIDROLÓGICA Y POLÍTICA HIDRÁULICA* (1999); *La Gouvernance de Bassin-Versant: Des Limites Naturelles pour des Decisions Relatives aux Ressources Naturelles*, in *GESTION NÉGOCIÉE DES TERRITOIRES ET POLITIQUES PUBLIQUES*, L'AARMATTON (1999).

42. David H. Getches et al., *Conclusiones: La Complejidad de la Gestion de Agua en los Paises Adionos*, in *Agua y Derecho: Politicos Hidricas, Derechos Consuetudinarios e Identidades Locales* 411 (Rutgerd Boelens, David H. Getches, Armando Guevara-Gil & Instituto de Estudios Peruanos eds., 2006); David H. Getches et al., *La Defensa de los Derechos de Agua Indegenas Con las Leyes de la Cultura Dominante: El Case de los Estados Unidos*, in *Agua y Derecho*, supra, at 227; David H. Getches et al., *La Gestion Indigena y Campesina del Agua Frente a las Politicas Hidricas de los Paises Adinos*, in *Agua y Derecho*, supra supra, at 11.

43. *OUT OF THE MAINSTREAM: WATER RIGHTS, POLITICS AND IDENTITY* (Rutgerd Boelens, David Getches, and Armando Guevara-Gil eds., 2010).

David had a sabbatical coming after his deanship and he talked enthusiastically about it before and after learning of his illness. He planned to study three progressive and promising watersheds—the Murray-Darling in Australia, the Rhine in Europe, and the Delaware in the eastern U.S.—and compare them with the Colorado River to see if the analysis might suggest institutional reform on the Colorado River. You know that he would have ended up recommending changes and that they would have been taken seriously. Standing up for change always carries the possibility of scaring off people comfortable with the status quo. Yet, he had such an open, straightforward, and considered way of urging reform, putting forth ideas that were undeniably bold but also entirely sensible. And he had such stature.

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One last subject. What of David the person, as opposed to David the professional? It might seem that the work must have blotted out the person. After all, he worked long hours, up early and quickly into the work day—after the one hundred push-ups and one hundred sit-ups that he did every day except Saturday. He either did not need a lot of sleep or just managed to cope with having too little of it. But he was not all work and no play.

When David was off work, he was off work. He looked relaxed and he was. He and Ann had a great marriage and, oh, how he loved his son, two daughters, and their spouses. He was enormously loyal and generous toward his friends. He loved giving gifts to people, sometimes small, sometimes substantial, but always thoughtful.

He was relentlessly funny—quick-witted funny with a gift for spontaneous puns and play on words. I cannot remember them and people I have asked recently about this cannot either, although they all remember waves of them. Maybe it is because many were groaners. The one I happen to recall was when we were out fishing in the Indian Peaks Wilderness. Somehow we got off on cases we especially hated. I mentioned *Kake* against *Egan*, a 1962 case where the Supreme Court allowed the state to regulate Native fishing—the Court gave Alaska everything it asked for.<sup>44</sup> David's comment? "Yeah. The state really got its *Kake* and *Egan* too."

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44. *Organized Vill. of Kake v. Egan*, 369 U.S. 60 (1962).

I have only seen Santa Claus once. We had a group that got together often. One year, there was a family Christmas party. All the kids came. All of a sudden, out of nowhere, with great "ho, ho, hos," Santa threw the front door open and charged the room, handing out a present to each child and then leaving as quickly as he came, staying for no longer than a minute. Even the adults were speechless. It was too bad David did not see it—he arrived just a few minutes after Santa left.

On another night, the group was enthralled by the "Church Lady," but this was not the one done by Dana Carvey on Saturday Night Live. This was the real Church Lady, frowzy, curly brown hair, wire rim glasses way down on her nose, a one-woman morality enforcement machine. "Oh, you went to the night club, did you? Well, isn't that spehhhhhtial? How did it feel to be so close to Sssssatan?" David missed that one, too.

Rick Collins, a longtime faculty member, former NARF attorney, and close friend of David, said that to understand David, you had to know that he was a Boy Scout. And it is true that, in his earnestness, he embodied the Boy Scout Law: be "trustworthy, loyal, helpful, friendly courteous, kind," and all the rest. The family did, really did, have the GETCHES'S RULES posted on the refrigerator door:

- (1) BE HONEST;
- (2) BE RESPECTFUL;
- (3) TRY TO DO OUR BEST AT EVERYTHING; and
- (4) TRY TO DO OUR SHARE OF THE WORK (AND A LITTLE BIT EXTRA, TOO!).<sup>45</sup>

The Boy Scout phase came with great accomplishment, one disappointment, and a dash of individuality. David advanced to the rank of Eagle Scout, the highest honor, with unprecedented speed: he was literally the youngest person in the history of California to qualify. Then, the night before the award ceremony, he urinated outside of the tent. That was against the rules. The Scoutmaster delayed the award for a full year. Still, Rick had it right: you have to know about the fact of David as a Boy Scout to understand him.

On the essence of David, I believe, although we never discussed it, that he aspired to be perfect. Put a bit differently, he wanted to do everything, large and small, always right and

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45. Thanks to Ann Getches for providing me with the original document.



never wrong, not just at work but as a husband, father, friend, colleague, private person, and public person. He wore it lightly. He expected a lot of others, but he never demanded it. He led by example.

No, David was not perfect, but he made a damn good run at it. His family, a great many colleagues, and friends are the beneficiaries. Indian country and the west are better places because of him. And we assume, perhaps correctly, that the rivers and the land cannot feel sorrow or give gratitude, but if they can observe, feel, and remember, then we can be sure that for all of time they will mourn his loss and cheer his lifelong commitment to them.

Thank you, David, for leaving so much behind.

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