

ORAL HISTORY INTERVIEW

JANET GOLDSMITH



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Interview Conducted and Edited by:
Donald B. Seney in 1999
California State University-
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By Brit Allan Storey, Senior Historian

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INTERVIEWER: DONALD B. BENEY

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Editorial Convention

A note on editorial conventions. In the text of these interviews, information in parentheses, (), is actually on the tape. Information in brackets, [], has been added to the tape either by the editor to clarify meaning or at the request of the interviewee in order to correct, enlarge, or clarify the interview as it was originally spoken. Words have sometimes been struck out by editor or interviewee in order to clarify meaning or eliminate repetition. In the case of strikeouts, that material has been printed at 50% density to aid in reading the interviews but assuring that the struckout material is readable.

The transcriber and editor also have removed some extraneous words such as false starts and repetitions without indicating their removal. The meaning of the interview has not been changed by this editing.

While we attempt to conform to most standard academic rules of usage (see *The Chicago Manual of Style*), we do not conform to those standards in this interview for individual's titles which then would only be capitalized in the text when they are specifically used as a title connected to a name, e.g., "Secretary of the Interior Gale Norton" as opposed to "Gale Norton, the secretary of the interior;" or "Commissioner John Keys" as opposed to "the commissioner, who was John Keys at the time." The convention in the Federal government is to capitalize titles always. Likewise formal titles of acts and offices are capitalized but abbreviated usages are not, e.g., Division of

Planning as opposed to “planning;” the Reclamation Projects Authorization and Adjustment Act of 1992, as opposed to “the 1992 act.”

The convention with acronyms is that if they are pronounced as a word then they are treated as if they are a word. If they are spelled out by the speaker then they have a hyphen between each letter. An example is the Agency for International Development’s acronym: said as a word, it appears as AID but spelled out it appears as A-I-D; another example is the acronym for State Historic Preservation Officer: SHPO when said as a word, but S-H-P-O when spelled out.

Introduction

In 1988, Reclamation created a history program. While headquartered in Denver, the History Program was developed as a bureau-wide program.

One component of Reclamation's history program is its oral history activity. The primary objectives of Reclamation's oral history activities are: preservation of historical data not normally available through Reclamation records (supplementing already available data on the whole range of Reclamation's history); making the preserved data available to researchers inside and outside Reclamation.

In the case of the Newlands Project, the senior historian consulted the regional director to design a special research project to take an all around look at one Reclamation project. The regional director suggested the Newlands Project, and the research program occurred between 1994 and signing of the Truckee River Operating Agreement in 2008. Professor Donald B. Seney of the Government Department at California State University - Sacramento (now emeritus and living in South Lake Tahoe, California) undertook this work. The Newlands Project, while a small- to medium-sized Reclamation project, represents a microcosm of issues found throughout Reclamation: water transportation over great distances; three Native American groups with sometimes conflicting interests; private entities with competitive and sometimes misunderstood water rights; many local governments with growing water needs; U.S. Fish and Wildlife Service

Bureau of Reclamation History Program

programs competing for water for endangered species in Pyramid Lake and for viability of the Stillwater National Wildlife Refuge to the east of Fallon, Nevada; and Reclamation's original water user, the Truckee-Carson Irrigation District, having to deal with modern competition for some of the water supply that originally flowed to farms and ranches in its community.

Questions, comments, and suggestions may be addressed to:

Andrew H. Gahan
Historian
Environmental Compliance Division (84-53000)
Policy and Administration
Bureau of Reclamation
P. O. Box 25007
Denver, Colorado 80225-0007
FAX: (303) 445-6690

For additional information about Reclamation's history program see:

www.usbr.gov/history

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**Oral History Interview
Janet Goldsmith**

Seney: My name is Donald Seney. I'm with Janet K. Goldsmith in her office in Sacramento, California. This is our first session and our first tape. Today is July 26, 1999. Good afternoon.

Goldsmith: Hello.

Education and Career

Seney: Why don't you give me that short biography I asked about.

Goldsmith: I was born in 1948, in Athens, Ohio, to an ex-serviceman. Part of the baby-boomer generation. Lived in upstate New York until I was about five. My father died, and we moved to California. My mother was a grade-school teacher. I went to college at the University of California at Davis and got a degree in botany, and then met my husband, who was in law school. I knew that botany was not going to be my life's work because there were not very many botanists who actually made a living doing other than fundamental research, which I didn't want to do, and there were even fewer women who made a living at anything

related to science in those days. It was pre-CEQUA and pre-NEPA. I'd have a better chance now.

Seney: The California Environmental Quality Act and the National Environmental Policy Act.

Goldsmith: Right. That was enacted in 1970.

Seney: CEQUA was about the same time, wasn't it?

Goldsmith: CEQUA was 1972, and I graduated from college in 1970. My timing was significant, whether for good or ill. You never know.

Seney: Right. Exactly.

Goldsmith: So I met my husband, who was in law school, and that seemed really interesting, and we decided I should go to law school. So I went to University of California at Davis law school. When I had finished my second year, I put an ad, which was also very forward-thinking of me at the time, shocking to some, in the local legal newspaper saying, "Topnotch legal scholar looking for summer work."

Seney: Did you have good grades in law school?

Goldsmith: Yes, I did. I got a response from Rita

Brandeis Singer, who was a solicitor with the U.S. Department of Interior here in Sacramento. She, after chastising me for advertising, hired me to do summer law clerk.

Seney: By the way, was it legal for lawyers to advertise by then? Had the state Supreme Court ruled on that in California?

Goldsmith: No, I don't think they had. Or if they had, it was—

Seney: Had just happened.

Goldsmith: But see, I was not a lawyer, and I was not advertising for clients. So, to my fine legal mind, this seemed just fine and novel, and apparently it did catch some interest.

Seney: Even though she felt obliged to heap some scorn on you.

Working for the Department of the Interior

Goldsmith: Yes. But it worked, and I thought it was tasteful. So I went to work for the Department of Interior in 1974, summer of 1974, at a time when the United States was just finishing up in district court the case that eventually became known as *Sierra*

Club v. Morton when it reached the U.S. Supreme Court. And part of what I did that summer was to assist in the post-trial briefing of that case. It was fascinating.

Seney: What is a post-trial briefing?

Goldsmith: It's a brief that you provide to the judge that says, "Here's what we've set out to prove. Here's what we proved. And here's how we think the law applies to these facts, and therefore, you should rule in our favor."

Seney: He has not rendered a judgment, but the facts have been heard.

Goldsmith: The facts have been heard, and it's your closing argument, but in writing, to attempt to persuade him to rule in your favor. It was interesting, because, for me, first of all, it was a very new area, and I love new areas. I get bored easily. [Laughter] But there were about, I don't know, a dozen parties involved. There was Kern County and the [California] state Department of Water Resources was involved, and the U.S. Solicitor's Office, and the U.S. Attorney's Office. Gosh, I don't even—probably the Central Valley Project contractors and the state water project contractors were all represented, plus who knows what else,

other parties.

I remember a specific meeting on a Saturday morning where all of the counsel gathered around a large conference table, and I met Cliff Schultz, who works in this office, Kronick Moskowitz. What was being discussed was who was going to brief what issues, and what issues we thought should be briefed and were the best issues not only for the post-trial brief, but also as vehicles for appeal on up.

Seney: Were you on the defense? You were defending Morton's viewpoint?

Goldsmith: I was on the defense side, yes.

Seney: And these other people were on the same side as, obviously, you were.

Goldsmith: Right. The issue was whether or not the United States had violated the Rivers and Harbors Act of 1899 in operating the Central Valley Project Act. The argument of the plaintiffs was that because the Central Valley Project pumps and the state water project pumps hydraulically lower the water level in some delta channels by as much as six inches, that this is an impedance to navigation and therefore compliance with

the Rivers and Harbors Act of 1899 is required.

Seney: That was just their way of getting something out there, was it not?

Goldsmith: That, and you needed to comply with NEPA and you needed to comply with CEQUA. I don't remember all of the issues, but I do remember that one. That was a key issue.

Cliff Schultz, of this office, presented what I thought was an awfully technical argument, and his argument was that these plaintiffs did not have legal standing to raise the issue of the Rivers and Harbors Act of 1899 because they didn't navigate. He presented a draft argument in written form, and I remember thinking how well written it was and how well reasoned it was, and thinking, "This guy's pretty good."

So, anyway, after that summer, and that summer also involved assisting in the case where the United States' compliance with NEPA was being challenged in the Northern District Court of California with regards to the San Felipe Division of the San

Luis Unit of the Central Valley Project.¹ I watched the presentation of evidence in that case. I don't remember if I participated in post-trial briefing.

But anyway, it was a summer where I spent a lot of time dealing with water issues. I also wrote an opinion, early on, for the department, a draft opinion—I think it was adopted at the time—that said the Bureau of Reclamation had no obligation, had no authority, to release project water for fishery purposes in the Trinity River. The salmon population in the Trinity River had been declining due to siltation of spawning beds and low flows ever since Clair Engle Lake, which I think now has been named Trinity Lake, when it was constructed.

1. The San Felipe Division of the Central Valley Project, in the central coastal area of California, embraces the Santa Clara Valley in Santa Clara County, the northern portion of San Benito County, the southern portion of Santa Cruz County, and the northern edge of Monterey County. Authorized in 1960, the division provides supplemental water to 63,500 acres of land, in addition to 132,400 acre-feet of water annually for municipal and industrial use. Water from San Luis Reservoir is transported to the Santa Clara-San Benito service area through Pacheco Tunnel and other project features which include 48.5 miles of closed conduits, two pumping plants and one small reservoir. For more information, see Wyndham Whynot and Wm. Joe Simonds, "The San Felipe Division, Central Valley Project," Denver: Bureau of Reclamation History Program, 1994, www.usbr.gov/projects/pdf.php?id=106.

After that, Congress went back and reauthorized the Trinity Project² to provide for fish. If you're following current events right now, Interior has come up with some proposed and recommended fish flows for the Trinity River that just gut the Central Valley Project water yield. I mean, it's a major water-shortage issue for those who've been relying on those flows, since I was a law clerk. So it's been interesting.

Seney: Are you working on that stuff now?

Goldsmith: I'm not directly. This office is.

Seney: I've only scanned the headlines that there's a new proposal up, and that a lot of the farmers, particularly, were angry about the

2. The Shasta and Trinity River Divisions catch the headwaters of the network of Central Valley Project waterways and channel the water southward. Both divisions are part of the Central Valley Project. They are close to each another, with the Shasta Division on the Sacramento River about 10 miles north of Redding and the Trinity River Division on the Trinity River about 25 miles northwest of Redding. Surplus water from the Trinity River Basin is stored, regulated, and diverted through a system of dams, reservoirs, tunnels, and powerplants into the Sacramento River for use in water-deficient areas of the Central Valley Basin. Water is used for irrigation, power generation, navigation flows, environmental and wildlife conservation, and municipal and industrial needs. For more information on the Trinity Unit, see Eric A. Stene, "Trinity Division, Central Valley Project," Denver: Bureau of Reclamation History Program, 1996, www.usbr.gov/projects/pdf.php?id=108.

implications of that.

Goldsmith: Well, it's going to cost between 250,000 acre feet in a dry year and 800,000 acre feet in a wet year. So basically it's the years when it's going to cost a half a million acre feet, the middle years, where it's really going to impact farmers, on top of a lot of other yield-impacting environmental measures in the past five, six years. So it's getting pretty tough. But I guess my roots go all the way back to some of the issues that are resurfacing now. Anyway, so I got done with my summer at Interior and decided, "Well, jeez, I really ought to take a water law class and find out what all this was about." So I took water law. I took it from "Hap" Dunning, who was subsequently named by Governor—oh, gosh—Brown, I think it was.

Seney: Jerry Brown.

Goldsmith: Yes, sure. It was by Jerry Brown, to head the commission to reexamine California water-rights law. Anyway, I thought he was a very good professor. He has views that I don't necessarily agree with, but he certainly provoked thought. I did very well in his class.

I graduated from law school, decided that I really liked to live in the central coast. Went down to Pacific Grove, near Monterey, and again was ahead of my time. This was 1975. Part of the charm of that area is that it's somewhat backwards and provincial. Their idea of a woman lawyer is somebody who maybe helps out her husband.

Seney: Yes. Handles divorce cases. Maybe.
[Laughter]

Goldsmith: I actually managed to be fully employed, but not with the same firm all the time. But an opening arose in Sacramento doing water law, and I couldn't resist.

Going to Work at Kronick, Moskowitz, Tiedmann, and Girard

Seney: Here at Kronick Moskowitz?

Goldsmith: Here at Kronick Moskowitz.

Seney: Did they search you out? Had they remembered you?

Goldsmith: No. In fact, I don't think they did remember me at all.

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- Seney: You remembered them.
- Goldsmith: I remembered Cliff Schultz, very much. I mean, he was one of the reasons I came back. I mean, you have to know that Pacific Grove is my idea of heaven.
- Seney: It's really beautiful.
- Goldsmith: I cried all the way out of town. But I had never been able to persuade any of them to hire me permanently. Everybody was willing to, you know, make do with a woman. But the combination of Kronick Moskowitz, Tiedmann, and Girard, which was one of the three firms that I would have come back to this area for, and water law, and the lack of a firm, permanent offer from the firm I was working with then, I came back. And I've been doing water law ever since, with this firm, since 1976.
- Seney: How many attorneys are in the firm?
- Goldsmith: Now? I think there's somewhere around sixty.
- Seney: Is that right.
- Goldsmith: It fluctuates around that number. Maybe plus five, minus five.

Seney: You must be a partner by now?

Goldsmith: Oh, yes.

Seney: For how long?

Goldsmith: Forever. I don't know. I just recently handed over the reins of head of our Resources Department to another attorney, which was a blessed relief. But I had headed that department for eleven years or thirteen years, one or the other.

Seney: And you came right to work on water law. Does that mean you came right to work with Mr. Moskowitz?

Goldsmith: Oh, yes.

Seney: I've heard a lot of nice things about the late Mr. Moskowitz. You're smiling very sweetly, which you, I guess, think of him.

Goldsmith: He was a real treat. He was brilliant. He was intense. He was so intense that he would have to consciously remember to be—I don't want to say "be human," but to express concern. It was clear that that was his inclination, but he would get so preoccupied in what he was doing. When he retired—or actually—well, it was his

retirement party, but he was ill with brain cancer at the time. We managed to get him a real retirement party. We beat death by about a month. I gave one of the speeches, and I remembered his training. He was a very precise writer, very precise grammarian. We would have many fine discussions over word usage and proper punctuation, things that really I kind of enjoy.

I'd like to try and pass on to junior attorneys that word usage is important. It's our stock-in-trade, and it means a great deal. That's what we lawyers argue about, is words.

Working on Newlands Project Issues

Seney: At what point did you start working on Truckee River issues?

Goldsmith: Well, pretty much immediately, but it was with respect to the Newlands Project³

3. Authorized by the Secretary of the Interior March 14, 1903, the Newlands Project was one of the first Reclamation projects. It provides irrigation water from the Truckee and Carson Rivers for about 57,000 acres of cropland in the Lahontan Valley near Fallon and bench lands near Fernley in western Nevada. In addition, water from about 6,000 acres of project land has been transferred to the Lahontan Valley Wetlands near Fallon. Lake Tahoe Dam, a small dam at the outlet of
(continued...)

lawsuit.

Seney: This is again what became the *Nevada v. United States*?

Goldsmith: Yes. The only way I can date is because I remember I wanted to take a trip to France, and I had to get the post-trial brief out on the Truckee River case before I left. It was either the post-trial—I think it was the appellate brief. No, it was post-trial. I remember sitting in my bedroom, in my bed, with a dictaphone, dictating the last parts of the brief, so I could get out of town and go to Paris.

Seney: [Laughter] And you made it?

Goldsmith: And I made it. And we won, at the trial court. We were reversed at the Ninth Circuit, on different issues. And then I was asked to do the petition for *cert*, which I did, when I was pregnant with—I don't know,

3. (...continued)

Lake Tahoe, the source of the Truckee River, controls releases into the river. Downstream, the Derby Diversion Dam diverts the water into the Truckee Canal and carries it to the Carson River. Overall, the project has 68.5 miles of main canals with a combined diversion capacity of 2,000 cfs. Along with the primary canals, more than 300 miles of laterals and almost 350 miles of drains have been constructed since work on the first laterals began in 1904. For more information, see Wm Joe Simonds, "The Newlands Project," Denver: Bureau of Reclamation History Program, 1996, www.usbr.gov/projects/pdf.php?id=142.

there seemed to be momentous occasions with each of these things.

Seney: How many children do you have?

Goldsmith: It has to have been with Meredith. I have three children. It doesn't make sense. Anyway, I was very pregnant when I was doing the petition for *cert*.

Seney: This was a case in which the United States tried to reopen the Orr Ditch Decree.⁴

Goldsmith: The United States didn't try to do it; the Pyramid Lake Tribe of Indians tried to do it.

Seney: The tribe did. Yes. Well, the United States

4. The Orr Ditch decree was entered by the U.S. District Court for the District of Nevada in 1944 in *United States v. Orr Water Ditch Co., et al.* The decree was the result of a legal action brought by the United States in 1913 to fully specify who owned water rights on the Truckee River and had rights to storage in Lake Tahoe. The Orr Ditch decree adjudicated water rights of the Truckee River in Nevada and established amounts, places, types of use, and priorities of the various rights, including the United States' right to store water in Lake Tahoe for the Newlands Project. The decree also incorporated the 1935 Truckee River Agreement among Sierra Pacific Power Company (now Truckee Meadows Water Authority), TCID, Washoe County Water Conservation District, Department of the Interior, and certain other Truckee River water users. See Truckee Carson Irrigation District, "What is the Orr Ditch Decree and why is it important?" <http://www.tcid.org/support/faq-detail-view/what-is-the-orr-ditch-decree-and-why-is-it-important>. (Accessed 5/2016)

was helping them trying to pry it lose, was it not?

Goldsmith: Yes, I guess that's right.

Seney: I mean, the theory was, I think, they had—

Goldsmith: That's right.

Seney: —slipped up on their fiduciary responsibilities originally and tried to represent both the Pyramid Lake Tribe and the project, the Bureau of Reclamation, and couldn't do it. Really represented the Bureau. The Orr Ditch Decree doesn't do much for the Indians in terms of water rights.

Goldsmith: Well, it certainly doesn't if you look at it in terms of today's understanding of Winters Doctrine⁵ and enlightened understanding of what is a good thing for these indigenous

5. "The federal reserved water rights doctrine was established by the U.S. Supreme Court in 1908 in *Winters v. United States*. In this case, the U.S. Supreme Court found that an Indian reservation (in the case, the Fort Belknap Indian Reservation) may reserve water for future use in an amount necessary to fulfill the purpose of the reservation, with a priority dating from the treaty that established the reservation. This doctrine establishes that when the federal government created Indian reservations, water rights were reserved in sufficient quantity to meet the purposes for which the reservation was established." Source: <http://www.blm.gov/nstc/WaterLaws/fedreservedwater.html>. (Accessed December 16, 2011)

peoples.

Seney: Right. I agree.

Goldsmith: But if you look at it from the historical perspective when what was thought best for the Indians was that they would become part of the larger society, which meant not a hunting-gathering existence any longer, but an agricultural or industrial or whatever kind of existence, it is not as bad as current thinking—

Seney: There's no question there's an historical element in the way ideas change. But reflecting what they wanted to accomplish in the 1970s and eighties.

Goldsmith: Oh, certainly. It did not. But the other thing, too, was that although I think the Truckee farmers were a major component by taking water out of the river, there were so many other historical developments—the debris in the river from the logging. I mean, there were a lot of causes to the decline of that fishery.

Seney: You're suggesting that the logging debris may have—

Goldsmith: It created a delta.

- Seney: Raised the toxicity of the river?
- Goldsmith: No. No, no. What it did was it put a--it probably did that, too. There was a lot of debris that floated down, and it raised a delta at the outlet of the Truckee River into Pyramid Lake that provided a barrier for the *cui-ui*, which was their historical diet. They could not get back up the stream to spawn. I suppose the same is true for the Lahontan cut-throat trout, but I'm more familiar with the plight of the *cui-ui*, because that was the matter of big concern at the time. So they couldn't get over the delta, and there were a number of measures that were taken by the government to try and remedy that. They built--it's been referred to as a "fish elevator" at Marble Bluffs Dam, to lift the fish back into the river.⁶

6. Constructed between 1973 and 1975, Marble Bluff Dam and Pyramid Lake Fishway are features of the Washoe Project. Marble Bluff Dam is located on the Truckee River approximately 50 miles downstream of Reno, Nevada, and approximately 3 miles upstream of Pyramid Lake. It is a zoned earthfill structure with a height of 22 feet and crest length of 1,622 feet, and it has a capacity of 19,700 cubic feet per second through the spillway. It functions to halt erosion within the Pyramid Lake Paiute Tribe's Reservation and controls water used by the Pyramid Lake Fishway. The Pyramid Lake Fishway, with a capacity to pass 50 cubic feet per second, extends from Marble Bluff Dam about 3 miles and improves the ability of the *cui-ui* and Lahontan cutthroat trout to migrate to their spawning habitats above the dam in the Truckee River. For more information, see

(continued...)

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- Seney: Apparently, not a sound device.
- Goldsmith: Well, it certainly was imaginative. I haven't seen it, but I've not heard of any fish elevators anywhere else. So, you know, no, it didn't work.
- Seney: And your side prevailed. You prevailed in that case.
- Goldsmith: Well, we prevailed because the court said, "Look, Congress gave both of these responsibilities to the same agency. Congress wanted them to carry water on both shoulders. You can't go back and rewrite it now. That's it."
- Seney: Yes. "Too many interests. Too long a time. It's settled."
- Goldsmith: Yes. "It's settled. There was no improper conflict of interest." I think, looking with today's eyes, there's a point. There are, looking back, different interests that if you knew back then what you know now, there might have been a different outcome. Better sensitivity. I think, also, the Indians back then had a much lower social status, civil

6. (...continued)
Carolyn Hartl, "Washoe Project," Denver: Bureau of Reclamation History Program, 2001, www.usbr.gov/projects/pdf.php?id=208.

status, I suppose.

Seney: Right. And were not inclined to press their rights.

Goldsmith: Right.

Seney: You know, that decision is followed pretty closely by a decision by the Ninth Circuit—I think within a month or two—to uphold the Bureau’s cancellation of the contract with T-C-I-D [Truckee-Carson Irrigation District], the 1926 contract to operate the project. Did you have anything to do with that case?

The Ambiguity of Court Cases

Goldsmith: I’ve basically been involved in all of those cases. The one I remember most vividly, of course, is *Nevada v. U.S.* The one thing that was really, I guess, interesting as a young lawyer was to see that water was so important that you could lose a 9-0 Supreme Court opinion and still have avenues to pursue the water. It has been very interesting to watch over the ensuing twenty years what the United States and the tribe have done to accomplish their goals. And I think they have—I’m not as close now to the situation as I was then, but from what I see now, the United States continued to try to

use whatever leverage it had to maximize water for the river and for the tribe. That included cancellation of Truckee's agreement, operating agreement, the OCAP. They continued to write very, very narrow, very, very difficult-to-comply with OCAP.

Seney: Were you involved in the case of challenging that?

Goldsmith: Yes, but those were—I mean, those were very technical. I was more the lawyer; I was not the trial attorney.

Seney: So you were researching specific issues for them?

Goldsmith: Yes. And writing briefs. But Fred [Girard]⁷ really was the one who was involved in that. The issues that were brought concerning forfeiture of the farmers' water rights, or the question of whether or not they'd been abandoned. Very technical. No giant steps like overturning the Orr Ditch Decree would have been, but incremental, a drop here, a

7. Frederick W. Girard participated in Reclamation's Newlands Series oral history project. See, Frederick W. Girard, *Oral History Interview*, Transcript of tape recorded Bureau of Reclamation Oral History Interview conducted by Donald B. Seney, in Sacramento, California, on July 20, 1999, edited by Donald B. Seney and desktop published by Andrew H. Gahan, historian, Bureau of Reclamation, 2014, www.usbr.gov/history/oralhist.html.

bucket there kinds of persistence, I think, has really netted them a great deal more water, and I think that also the social consciousness has changed somewhat.

Seney: Were you involved at all in the case that I think the Ninth Circuit decided in 1986, and that was the one that the Sierra Pacific Power and the Carson-Truckee Water Conservancy brought to get the Secretary of the Interior to live up to the Washoe Act as they saw it?

Goldsmith: No, I wasn't.

Seney: Let me just finish. That was the one that essentially gave Stampede Reservoir⁸ to the Indians for *cui-ui* recovery.

Goldsmith: No, I wasn't involved in that. I'm trying to think of what—I mean, I've been sort of following it with more of an observer's interest and observer's perspective since about, I don't know, 1994.

8. Completed in 1970 as a primary feature of the Washoe Project, Stampede Dam is a rolled earth and rock-filled structure is 239 feet high and 1,511 feet long. The water storage capacity of the reservoir is 226,500 acre feet, which is reserved by court decree for fishery enhancement, primarily for the spawning of the endangered *cui-ui*, along the Truckee River downstream from Derby Dam and facilities operation of the Pyramid Lake Fishway.

Public Law 101-618⁹

Seney: Did you play any part at all in Public Law 101-618? Did you get involved in that?

Goldsmith: No. I didn't.

Seney: Why the big smile?

Goldsmith: The big smile, because I think it was either the third or the fourth try. There were

9. Public Law 101-618 became law on November 16, 1990. The Law contains two acts: The Fallon Paiute-Shoshone Tribal Settlement Act and the Truckee-Carson-Pyramid Lake Water Rights Settlement Act. The main topics of the legislation are:

1. Fallon-Paiute Tribal Settlement Act
2. Interstate Allocation of water of the Truckee and Carson rivers.
3. Negotiations of a new Truckee River Operating Agreement (TROA).
4. Water rights purchase program is authorized for the Lahontan Valley wetlands, with the intent of sustaining an average of about 25,000 acres of wetlands.
5. Recovery program is to be developed for the Pyramid Lake cui-ui and Lahontan cutthroat trout.
6. The Newlands Project is re-authorized to serve additional purposes, including recreation, fish and wildlife, and municipal water supply for Churchill and Lyon counties. A project efficiency study is required.
7. Contingencies are placed on the effective date of the legislation and various parties to the settlement are required to dismiss specified litigation.

Source: [http://www.usbr.gov/mp/lboa/public law 101-618.html](http://www.usbr.gov/mp/lboa/public%20law%20101-618.html).
(Accessed December 2011)

attempts to reach settlement, and every time there was a settlement, the tribe would back out and it would fall apart. So, I mean it got to be almost a joke. You knew there would not be a settlement. And, frankly, there still is not a settlement. The final TROA, Truckee River Operating Agreement, that's required to give effect to these provisions. And the tribe is, you know, difficult.

Seney: Well, I think it's—from what I've been told, it's not just the tribe in this case. Sierra Pacific Power is also being very detailed—

Goldsmith: Sierra Pacific Power has probably learned a lot from the Indians, and that is, no matter what deal you make, it's not the last word. You can always come back and say, "Oh, well, gee, I forgot this." Or, "Oh, gee, you know, we really ought to look at this a little more." So it's a constant ratcheting-up of positions. It's very difficult.

Seney: Well, I don't think there's any question that's been the Indian strategy, too. A three-track—as Joe Ely¹⁰ put it, three tracks: one,

10. Joseph (Joe) H. Ely participated in Reclamation's Newlands Series oral history project. See, Joseph (Joe) H. Ely, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation oral history interview conducted by Donald B. Seney, edited by Donald B. Seney and further edited and desktop published by Brit Allan Storey, (continued...)

the legislative; one, the legal; and the other within the Department of the Interior.

Goldsmith: And it doesn't matter what is agreed to until the whole deal is done. Basically nothing is done.

Seney: Have you taken any part in the TROA business at all?

Goldsmith: Yes, I have.

Seney: What have you been doing in terms of TROA?

Water for Snowmaking

Goldsmith: I've been advising—well first of all, to get back to Adolph. Adolph represented the Tahoe City Public Utilities District for many, many years, and I do now. One of the issues in the TROA was the issue of how you account for snowmaking water. There's six hundred acre feet that basically are free. They don't count against either state—or they don't count against California. There's a three-fifty for Nevada that doesn't count against Nevada. One of the issues in

10. (...continued)
senior historian, Bureau of Reclamation, 2011,
www.usbr.gov/history/oralhist.html.

California is how is that six hundred distributed. Who gets part of the free six hundred acre-feet, and how much? But beyond the six hundred question—

Seney: When you say "free," you mean above the interstate allocation on Tahoe?

Goldsmith: What I mean is that, yes, there's a 23,000 acre-foot interstate allocation, but the first six hundred acre feet of water diverted to snowmaking—

Seney: Doesn't count against it—

Goldsmith: —is not part of that 23,000.

Seney: It's not free in the sense they're not going to pay somebody for it, literally.

Goldsmith: Right. It's free in that doesn't count against California's allocation.

Seney: Right. Okay. Good.

Goldsmith: But beyond that first six hundred acre feet, the question is what—there are two questions. One question is, how do you count the 23,000 for California? And the second question is, if it's net depletion, what is the net depletion of snowmaking water? At

some point the legislation says 32,000 acre feet of water diverted. Now, this is not in Lake Tahoe; this is the Truckee River Basin.

Gross and Net Diversions Below Lake Tahoe

Seney: Right. Below Tahoe Dam,¹¹ and just to the Nevada border.

Goldsmith: Right. Thirty-two thousand acre feet of water diverted. At some point in the TROA negotiations, before I became involved, there was apparently a demand by the tribe, and an acquiescence by California's negotiating team, that that was gross, that was gross diversion. What really counted was the net depletion, and everybody always knew that the net depletion was going to be 16,000. So right at the beginning, California's ability to use the water was cut in half. It may be true that everybody always talked about net depletion, but what Congress enacted was 32,000 acre feet of gross diversion.

What the compromise on the 16,000,

11. Lake Tahoe Dam controls the top six feet of Lake Tahoe. With the surface area of the lake, this creates a reservoir of 744,600 acre-feet capacity and regulates the lake outflow into the Truckee River. Completed in 1913, Lake Tahoe Dam is a concrete slab and buttress structure.

and eventually, I think, became a compromise of either 17.6 or 16.7 thousand–hundred acre feet. I can't remember right now.

Seney: I think it's the 16.7, but I could be wrong.

Goldsmith: It's about fifty-five percent.

Seney: Yes. That was the coin toss?

Goldsmith: No.

Seney: No?

Goldsmith: No, that wasn't the coin toss. That was before I became involved. Before that, that fifty-five percent, 16.7, was agreed to, the issue was if California diverted water and then reused it, thereby reducing the net return to the river, should that second reuse be counted against the 32,000. And the tribe said, "Yes, because we always meant 16,000." My own personal view is that, given the outcome, there is no incentive in California to conserve water. It doesn't do them any good at all.

Seney: But the law in California requires conservation efforts, does it not?

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- Goldsmith: Well, yes and no.
- Seney: Let me say, this is one of the arguments that people at Sierra Pacific have made to me, because not only has the tribe wanted this depletion business included, but apparently—
- Goldsmith: Oh, sure, they do, too.
- Seney: —Sierra Pacific does, too. Their argument to me is, well, California is going to mandate that they make the most careful use of this water, so if you disentangle the sewage from the gray water in the home, and you use the gray water on your shrubs and on your plants and so forth, that apparently they've written in as a reuse which will count against the depletion—the gross diversion, I should say. Right? You're nodding your head yes, which the tape won't see.
- Goldsmith: Oh, yes. I'm nodding my head yes and I'm frowning at the same time.
- Seney: Yes, you are. Right.
- Goldsmith: I think that—so I'm going to sign your modified release—after I'm dead and gone and my children can no longer be ashamed of me, I will be able to say that I think that California has been literally sold down the

river. That 32,000 was all we ever were going to be able to get out of that watershed, an entire watershed, and there is no way that we can continue to develop that water.

END SIDE 1, TAPE 1. JULY 26, 1999.

BEGIN SIDE 2, TAPE 1. JULY 26, 1999.

Goldsmith: Most of that water as our constitution requires.

Seney: Yes. You're not the only one who's said this to me, by the way. Virtually everyone that I've interviewed on the upper Truckee [River] in California, and that includes Mel Toy, Kathleen Eagan¹²—

Goldsmith: You know, you really ought to interview Carol Hammond and John Kramer—

Seney: I will.

Goldsmith: And Paul Dabs, and [John] Sarna, who were the people who agreed—

Seney: Sarna is, the first name is?

12. Kathleen Eagan participated in Reclamation's Newlands Series oral history project. See, Kathleen Eagan, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation oral history interview conducted by Donald B. Seney, edited by Donald B. Seney and desktop published by Brit Allan Storey, senior historian, Bureau of Reclamation, 2011, www.usbr.gov/history/oralhist.html.

Goldsmith: John Sarna. They're all with the Department of Water Resources, and they're the ones who agreed to this 16.7.

Seney: As I said, I'm working my way this way. I think they're probably already on my list. Kramer certainly is.

I've heard this said, again by the upper Truckee interests, that they feel, first of all, that they were not part of the mix—

Goldsmith: That's right. They were not.

Seney: —when Public Law 101-618 was negotiated.

Goldsmith: That's correct.

Seney: Though Dave Antonucci¹³ made the point to me that they got something very important in that law, from his point of view.

Goldsmith: The snowmaking.

Seney: Not just that. And the idea that you measure the gross diversion on the Tahoe Basin side

13. David C. Antonucci participated in Reclamation's Newlands Series oral history project. See, David C. Antonucci, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation Oral History Interview conducted by Donald B. Seney, edited by Donald B. Seney and desktop published by Brit Allan Storey, senior historian, Bureau of Reclamation, 2009, www.usbr.gov/history/oralhist.html.

at the meter, not at the intake. So the inefficiencies in their system, the leaks, wouldn't count against them.

Goldsmith: Correct.

Seney: Of course, as a water purveyor, he's very interested in that, although he feels their system is fairly efficient, they don't want to be charged.

Goldsmith: Well, they're a high mountain frozen in the winter system.

Seney: Absolutely. High stresses on that system. You bet.

Goldsmith: They have a lot of I&I—infiltration and inflow.

Seney: And then overnight you could begin to lose copious amounts of water. Right, exactly. Other than that and the snowmaking, his complaint was—and this includes Mel Toy and Kathleen Eagan and Tony Lashbrook, and all the other people that I've talked to—and I'll talk to some more up on the Upper Truckee—Craig Woods—

Goldsmith: Kathleen Eagan would be good.

The Upper Truckee Interests

- Seney: Right. She was very helpful. Is that the upper Truckee, California-side interests were not at the table.
- Goldsmith: No, they weren't. I don't even know that the [Lake] Tahoe interest or California, per se, was really there. I don't think there was a great deal of awareness or input sought at all. You have to understand that in California water politics, that's really a fringe area. I mean, the guts and the heart of California water politics is the delta and the Central Valley. What happens around the edges, which is really where my practice personally focuses, it's hard to get a lot of—
- Seney: And the Colorado River issues.
- Goldsmith: Yes. I'm not involved in that, either. I'm involved in like the coastal issues.
- Seney: Trinity?
- Goldsmith: Well, the Trinity, the winery issues, Russian River, Navarro.
- Seney: Would that be water quality to some extent?
- Goldsmith: No, it's water rights. There's a lot of issues

about summer flows and about spawning flows, particularly now that the Coho and the steelhead are threatened and endangered. There's a lot of issues. I represent a lot of wineries. I don't know if you've noticed in California, there are vineyards popping up everywhere.

Seney: I did know that there's been a big expansion.

Goldsmith: Even to me, it's an incredible explosion. Places you'd never—even in Central Valley, for god's sakes.

Seney: Yes, I know.

Goldsmith: Wine grapes in the Central Valley. Give me a break. [Seney laughs.] So what I've done, what I have been involved in a lot is watersheds that go into the Pacific Ocean or the eastern Sierra watersheds. Mono Lake was an issue that I was involved in.

Seney: Any explanation for why these upper Truckee interests weren't considered? Was it deliberate, do you think? Or just they weren't making noise and were off the political radar screen?

Goldsmith: I think that when people thought—I mean, this is a guess, but this would be my

educated guess, is that when people thought of the Truckee River watershed in California, they thought of [Lake] Tahoe. The town of Truckee, and North Star, I mean, these areas were not—and still, to a large extent, are not—economically potent. They're not what you think of when you think of recreation industries up there. They're just not visible then and they're not visible now. One of the problems now is that there is no political muscle behind them.

Seney: Even though they've gotten themselves organized to some extent and have a water users group that meets.

Goldsmith: Well, look at what's going on in California. They're still a pimple. We've got farmers who are going bankrupt in the Central Valley. We've got enormous reservoirs whose yields are off limits for any kind of use. We've got P-G&E completely divesting itself of sixty-eight hydro facilities in the foothills. This is a pimple.

Seney: Yes. I understand.

Goldsmith: So even though they've gotten themselves organized, it's very hard to get any visibility, and it's very hard get anybody to,

I think, expend any political capital on their behalf. There are more important issues.

The Issue of Wells in the Truckee Basin

Seney: You know, I know the upper Truckee people complain about the—and we're talking now from Tahoe City down to the border of the two states—complain about this 32,000 gross diversion. I guess that's 10,000 surface and 22,000 ground water.

Goldsmith: Right. Which is another issue all of its own.

Seney: That's right. Where do the wells go, and how close to the river, you mean?

Goldsmith: And one of the things that—and I can't remember right now as we sit here—there is a safe yield determination that is supposed to be made, or that might be made, by the U-S-G-S [U.S. Geological Service], of the groundwater basin in the Truckee Valley. One of the fears is that, essentially, they'll find that the safe yield is zero, because basically anything you take from it, you're taking from the Truckee River. I mean, it fills up every year and there's no storage. There's no elastic storage as there is in other watersheds, so there's a real problem with the connections between the watershed and

the river and the groundwater basin.

- Seney: I live in South Lake Tahoe, as I think I told you, so these things are not so remote to me. I've always wondered how you can sink a well, as South Tahoe Public Utility District does, sink wells, draw water out, they have no surface water rights to the lake, and how that is not lake water. I mean, I'm not a geologist, so it doesn't make sense.
- Goldsmith: I think it's not lake water because basically the water flows from the high to the low. And also, Tahoe is so enormous, you'd never be able to measure it. That's an idea.
- Seney: I asked Dave Antonucci, and he said exactly what you said, and that is it flows from the high to the low. I said, "You can be sure about that?" "Oh, yes." You're sort of—
- Goldsmith: That's how water flows.
- Seney: Yes, right.
- Goldsmith: Some cynical folks would say water flows uphill to money, and that's probably how the ski slopes get the water. But basically it flows downhill.
- Seney: But this rule would not apply, you fear, in

terms of the safe usage in the—what do they call it? The Truckee Basin, I guess.

Goldsmith: Yes. In the Truckee aquifer. There's some real concern.

Seney: That maybe it's flowing out rather than going in?

Goldsmith: Well, what they've got there is they don't have any gradient at all, so anything you take out is a depletion on the river, is the concern.

Seney: Is this U-S-G-S study—that must be going to be part of the TROA then, if they're going to put that in? That's in the TROA?

Goldsmith: It's not mandated that they do it. I think that there are folks that don't want it to happen, and that we would rather have negotiated agreements as to what the usage is. That's really been part of the negotiation process of the TROA.

Seney: What point I was going to raise with you—you've heard this before, too—say you can only have 16,000 acre feet. My god, do you want as much development in that area as 16,000 acre feet would permit? If it developed that much, it would lose its

amenities. And how do you counter that argument?

Development on the Upper Truckee River

Goldsmith: Well, you're assuming it would all be in the town of Truckee. That's an enormous watershed. It includes Sierra County, Nevada County, as well as Placer County. It includes all of the development around Donner Lake. It includes North Star. It includes Portola. I mean, it's a very large area.

Seney: Let me say, I'm not assuming. I'm just raising claims to you that others have put forth.

Goldsmith: Yes. No, what I'm saying is that this is the broad area that it covers. Yes, if you concentrated it all in Truckee, you wouldn't want it there because it's a bowl. It would have worse smog in the wintertime than it has now. People wouldn't want to be there, anyway. But you know, there's a lot of reasons.

Seney: Sure, sure.

Goldsmith: But when you spread it over three counties and you include agricultural pumping and

irrigation in the summer for cattle and pasture, things like that, it's not that much water.

Seney: Not that big a number then. You know, both the Tahoe Basin and the Truckee Basin aquifer numbers—what is it, 23,000 feet to California, eleven—

Goldsmith: For Tahoe.

Seney: Is it a total twenty-three in Tahoe?

Goldsmith: No.

Seney: It's twenty-three for California, eleven for—

Goldsmith: It's twenty-three for Cal and eleven—or twenty-two and eleven. Something. I think it's twenty-two and eleven.

Seney: Yes. Twenty-two and eleven. Yes. It's two-thirds, one-third. Just as the bowl is divided.

Goldsmith: Right.

Seney: Then the 32,000 gross diversion that we've been talking about. Those were all numbers that came out of the Interstate Compact.

Goldsmith: Yes.

Seney: And nobody reexamined them, and I guess everybody thought they were safe numbers. Apparently, certainly people in California hovered over that 22,000/11,000 split of water rights, surface—

Goldsmith: Now you're delving ancient history past my young recollections.

California's Interest in Public Law 101-618

Seney: [Laughter] Well, not so ancient. No, no, not so ancient. Because this number then surfaces again in Public Law 101-618. And I'm told that David Kennedy, then and to some extent, I suppose, legendary head of the Department of Water Resources, was actively involved in Public Law 101-618. Senator Reid has told me that it wouldn't have gotten done without him, and heaped great praise on Mr. Kennedy. You're sort of—

Goldsmith: Well, I mean—

Seney: You're shrugging, kind of.

Goldsmith: I don't know what his involvement was. You'll have to find out from Fred.

Seney: Well, I intend to talk to Mr. Kennedy, and I hope he'll tell me.

Goldsmith: Yes.

Seney: My understanding is, other's have said to me, that he was very interested in this, but not so interested in the Truckee River from the Tahoe City Dam to the state line.

Goldsmith: Well, that makes sense. Same issues.

Seney: Yes. So here the people—my god, as late as they come to this issue, which apparently was the Memorial Day drawdown in 1994 of Stampede Reservoir when it virtually disappeared over that weekend, “What happened to our water?” “Well, it's not your water. It belongs to the *cui-ui*, and we had to have a fish-run. Say goodbye. It's gone until next fall.” This was quite a shock to the—were you involved at that time?

Goldsmith: I wasn't.

Seney: You must have come shortly after that.

Goldsmith: I guess. It's been like maybe three or four years. Maybe '95.

Seney: Let me go back to something I wanted to ask

you about, and talk about Mr. Moskowitz a little again. You talked about him as a grammarian, and a–

Learning from Mr. Moskowitz

Goldsmith: A teacher, he was a great teacher.

Seney: Yes, right. Constructor of arguments and whatnot. What did he want you to learn about water law? What did he want you to know about that?

Goldsmith: Oh, I don't know that he had any goal. Water law changed dramatically while he practiced, and it was always like walking in an earthquake. He used to joke that he'll be immortal because he lost some of the most important cases in California water law.

We represented—our firm represented, he represented—the Romellis in the Long Valley case where the California Supreme Court said, “Well, yes, there are riparian rights and they do have priority, but we're not abolishing them. If you haven't used them, the state board can give them a lower priority than existing appropriative rights. But we're not saying that they're abolished.” This is [Associate Justice, California State Supreme Court, Stanley]

Mosk, a reason that I will never have any respect for Mosk. That is the grossest intellectual dishonesty that you can imagine, to say, “Well, we’re not destroying riparian rights. We’re not changing riparian rights.”

Seney: “We’re just rendering them worthless.”

Goldsmith: “You just can’t exercise them, that’s all.”
Huh? Anyway, Adolph argued that case and lost it at the Supreme Court.

He argued the National Audubon case on Mona Lake, which was the case in which the California Supreme Court found that there was, in fact, a doctrine called the Public Trust Doctrine, which was natural law. It came from the Romans. Nobody knew it, but it impressed all of California law with this duty that could now be raised from nowhere and take away vested water rights. He argued that case. I’ll never forget, it was the Monday after one of our firm retreats, in which he had had the end of his finger severed.

Seney: Sounds like a pretty vigorous retreat.

Goldsmith: Somebody had closed a car door, and his finger was in the hinge part of it. I remember that I rode with him to the

hospital in the ambulance, and somebody found the finger tip and brought it in a bucket of ice. But it was—

Seney: It couldn't be reattached?

Goldsmith: It couldn't be reattached. It was his index finger. So he argued with his hand—and he still argued on Monday—with his hand bandaged in this enormous white gauze boxing glove, in effect.

Seney: Sort of holding his hand out above his head?

Goldsmith: Holding his hand up—wrong hand. It was his left hand he was holding up. But as though he were lecturing the Supreme Court. He has my utmost respect. When I say the man was focused, he was focused and intense. He made a very good argument. But you know, we lost that one, too. California Public Trust now is a factor that every water-rights holder has to know is a wildcard out there.

Seney: So he was actually arguing on the part of the Metropolitan Water District of Los Angeles.

Goldsmith: Well, it's not Metropolitan Water District; it was City of Los Angeles Department of Water and Power.

Seney: That's right. To the extent you can tell us, I realize there are things you can't talk about, but what do you do for the Tahoe City Public Utility District?

Representing the Tahoe City Public Utility District

Goldsmith: Basically I advise them on water-rights matters. I have been representing them with regard to the snowmaking issue. Got derailed there. What I wanted to say is, as to the snowmaking that falls beyond the first 600, we argued that—the question was, how should this be counted, and we said it should be counted as depletion, only the amount that is lost, because the rest of it goes into the river.

Seney: So that would be a fifty-percent—

Goldsmith: Well, no. No. There were studies done. We had the District Commission studies that found that between eight and ten percent of the water was consumed. The rest of it went back into the ground and eventually flowed into the river. Eight to ten percent. That's the point at which we got the coin toss. The tribe wanted twenty. And the tribe opposed—basically the tribe opposes using water for snowmaking because it's not a natural use of water. It's a philosophical

sort of a thing. And my view is, “It’s none of your business.”

Seney: I’ve heard it said that they wouldn’t give in on this.

Goldsmith: They wouldn’t. It was like a religious icon.

Seney: Because they also said, “Well, we’ve given in on too many other things and we just can’t give in on this.” Did you hear that?

Goldsmith: I heard that. I’m not sure what they meant by that. But it seems to me, my view has always—I have a science degree as an undergraduate, and my view both as an attorney and as a policymaker, is that you follow the facts. The facts are what things should be based on. Science is what things should be based on, not voodoo, not philosophies, which can honestly differ between people.

I find it offensive that the tribe makes a point of philosophy over snowmaking. It’s not their water; it’s our water. We can do with it what we want. We feel differently about water. We use it differently. They should respect it. And they don’t. So I found the whole negotiation to be very difficult and unsatisfying. I

prefer to negotiate with folks who operate on facts.

Seney: Dave Antonucci felt as strongly, I think, as you do about this. He was very disappointed in the tribe's attitude about this, that they were unbending, and that you finally had to do a coin toss.

Goldsmith: It was irrational. I guess it bothers me to have things based on admittedly irrational criteria.

Seney: Right. Because the difference between you, the eight to ten percent on your side, the twenty percent on their side, what did you settle at, seventeen, I think, on the coin toss? Sixteen, seventeen?

Goldsmith: Sixteen.

Seney: That difference—

Goldsmith: We got them down to 17.5; they got us up to 15 just on sheer bullying. Then we could not get ourselves to agree to anything higher. Then there was a coin toss.

Seney: And they won?

Goldsmith: And we won.

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- Seney: You won. So you got to split the difference?
- Goldsmith: We got sixteen. But that's a disgrace.
- Seney: So the difference you're talking about here is a couple of percentage points, whether or not it's going to be at eight to ten—
- Goldsmith: It's several hundred acre feet of water.
- Seney: Is that what it amounts to in the end?
- Goldsmith: Yes.
- Seney: Okay. All right. Again, the Truckee, there's so little. Here in the Central Valley that wouldn't matter, but—
- Goldsmith: They get all of the flood excess. I mean, if there's anything in addition, it all goes to them. We never get more than we can obtain in this negotiation, ever. And if it's dry, we don't get that. So I think that California's operating for an extremely limited water source, forever. And if there's ever any abundance, it goes to them. It goes to Sierra Pacific. It does not go to California. And that colors how I view all of this.

Seney: Right. Right. I can see that. I mean, your face has changed, which the tape won't see, but I can see.

Goldsmith: I am not dispassionate.

Seney: Yes. No, that's fine. There's a great of emotion in this issue, and that's one of the things that drives the conflict. It's one of the things that drives negotiations. It's not a dry matter for them.

Goldsmith: One can be generous, one can make allowances when there's a lot of water. But when this is all the water you're ever going to have forever and ever, it's really hard to accept an agreement that is not rationally based, that takes water from you that you think rightfully belongs in California. And there are other issues that are very similar to that.

Seney: Which would be?

Goldsmith: One of them is this issue that you may have heard to referred as the mid-course correction. I mean, there's a lot of unsatisfactory things about this negotiation, as far as I can tell. One is, it's all based on modeled hydrology, based on Sierra Pacific's modeler. Nobody else has seen

this model. That's all we have to go on.

Seney: The internals of the model.

Goldsmith: Right.

Seney: Only the output is what you see. Right.

Goldsmith: Right. We have no idea about this model. California has been negotiating based on this model, based on the output that says there will be this much water in the streams, this is how the system will look twenty years from now when we're operating this way. Well, if twenty years from now that's not how it looks, there should be an opportunity to go back in and say, "This is what we agreed to in terms of outcomes. We need to renegotiate it."

Seney: This is the mid-course correction?

Goldsmith: Yes. There is no flexibility on the part of Nevada or the United States to reopen anything.

Seney: So they won't include a mid-course correction—

Goldsmith: They will not.

Seney: –provision in the agreement.

Goldsmith: Right. That's correct. We've gotten references to the fact that we'll check and we'll confer and we'll meet, but there's no teeth. There's no way to enforce any kind of reopener. And that, I think, is bad for California.

The Need for TROA to be Ratified

Seney: When I talk to the people in Reno and in Nevada, they're deathly afraid that this TROA will not go through and that somehow the 90-10 split between Nevada and California on the Truckee River below the Tahoe City Dam will be reexamined and reopened, and they won't do nearly as well as they have done. Do you get that sense from them?

Goldsmith: No, and I don't think the California negotiators believe it, because we can't get them to take a tough stand on this. And I, for the life of me, don't really know why. If Sierra Pacific truly were deathly afraid of it, they would have included a reopener. It's not saying you have to give up more water. It's saying, "We'll sit down and look at this. We agree." So between the lack of a reopener and the fact that we're relying one

hundred percent on their hydrology is a very weak position to be in and it's very threatening.

Seney: Right. I can understand that.

Goldsmith: I can understand how my clients are quite unhappy with it.

Seney: Yes. Well, it would have to be if I were in your shoes and Dave Antonucci's shoes. I would feel like I were operating from a position of weakness and uncertainty.

Goldsmith: I think Dave's position is better than the rest of the Truckee Basin. I think Tahoe is relatively in a more secure and in a better, more acceptable kind of a framework certainly than the Truckee Basin.

Seney: I think he may have been somewhat concerned that because they export their sewage to the Tahoe-Truckee Sanitation Agency [TTSA], that there are implications there in terms of—and maybe I've misunderstood him—but I know he was concerned to make sure that they would have adequate capacity and water and so forth to do what they need to do with their sewage. You're looking quizzical.

Goldsmith: I'm not familiar with that particular issue.

Seney: Well, maybe I've misunderstood.

Goldsmith: I know there are specific provisions in the law as to how you account for the return flows from the T-T-S-A, the Truckee-Tahoe Sanitation Agency. But that has more to do with water availability than it does with whether or not he's going to get to export his sewage.

Seney: Maybe it's just more general concern about the area and whatnot. What else besides the depletion and snowmaking and mid-course correction do you find troubling about the TROA?

Goldsmith: I think those are the major issues. There has been some discussion about the relationship between wells and the streams, but I'm, by and large, satisfied with how that's working out. I think it's working out in a way that it actually can be implemented.

Seney: The word is that they've come to an agreement. Do you understand it that way?

Goldsmith: On wells?

Seney: On the whole thing, and now they're just

negotiating the language. Are you going to be over at the meeting tomorrow and the next day?

Goldsmith: No. I will not. And good for them, I guess. [Laughter] I mean, it's a salvage operation at this point. If you can't get your own state to back you up, you'd better get what you can.

Seney: Well, that does put you in a curious and difficult position, because there is no question the State of Nevada is behind the Nevada interest a hundred percent.

Goldsmith: The state of Nevada has been probably the most reasonable of the other three.

Seney: Is that right.

Goldsmith: I think so.

Seney: The Truckee-Carson Irrigation District is not going to sign off on this, apparently. They were signatories of the original TROA agreement, the 1935 one that was incorporated the Orr Ditch Decree. Does that trouble you? Do you think they're going to sue? Or maybe that would make you happy, that they would sue and challenge it?

- Goldsmith: I have mixed feelings. It's been so long, that if there's an agreement, perhaps it's better than no agreement. It's clear that the Reno area has grown far faster than anything on California. And if you did go to the U.S. Supreme Court, there is no provision for recognizing a water reservation to an area of origin. I mean, it's quite possible, as you'll hear from the California negotiators, that we would wind up with less water. It's hard to say.
- Seney: I know that's what they say to you, isn't it?
- Goldsmith: That is what they say to us.
- Seney: "We don't want to be too tough on this. We're doing the best we can."
- Goldsmith: And you know, frankly, when you read the case law, what they say is backed by case law, but it's also a prediction. Whether the Supreme Court would hew to, say, the Colorado River kind of law, or whether they would have some respect for the politically derived allocations that have basically been respected over the last thirty years, even though they haven't been law, it's an open question to me.
- Seney: As you know, 101-618 is interlocking, and if

California doesn't sign, the interstate allocations don't go through. Same for Nevada. If the power company doesn't sign, they don't get their storage rights in Stampede.

Goldsmith: If the tribe doesn't, they don't get their forty million.

Seney: Their development fund, right. I guess the feds, they don't have anything to lose. I guess that interstate allocation, especially Tahoe is so important to California—

Goldsmith: It is.

Seney: —that they won't back away from it or threaten to back away from it.

Goldsmith: I think that at Tahoe, you're talking about water that is now being used, by and large, and is needed. To threaten the supply that is currently the basis of existing economic development is a scary thing. In Truckee, we're talking about our future, not our present. I think if you had to evaluate it from a statewide interest, you would probably protect your existing investment rather than your potential investment.

Seney: That's all the questions I have for you.

- Goldsmith: That's probably why they're doing what they're doing. It's been interesting.
- Seney: Anything else you want to add?
- Goldsmith: Can't think of anything.
- Seney: Okay. Well if you can, or do when you get the manuscript, we can add.
- Goldsmith: It's certainly been more fun being a water lawyer than any—I don't think I'd do any other kind of law.
- Seney: Is that right. Well, let me say thanks to you for taking part in the project. The Bureau appreciates it.
- Goldsmith: And if Fred says anything different than I've said, he's right and I'm wrong. [Laughter]

END SIDE 2, TAPE 1.. JULY 26, 1999.
END OF INTERVIEW.