

ORAL HISTORY INTERVIEWS

STEPHEN MCFARLANE



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Table of Contents

| | |
|--|-----|
| Table of Contents. | i |
| Statement of Donation. | iii |
| Editorial Conventions. | v |
| Introduction. | vii |
| Oral History Interviews. | 1 |
| Litigating Components of the DOJ. | 1 |
| Working with the U.S. Attorney’s Office. | 5 |
| Water Rights Transfers. | 7 |
| Judge McKibben. | 8 |
| Judge Lloyd D. George. | 9 |
| Nevada State Engineer’s Role. | 12 |
| Newlands Project Litigation. | 16 |
| Current Status of the Tuckee River Operating Agreement. | 17 |
| Water Rights Transfer Issues. | 19 |
| Early Life. | 21 |
| Becoming an Attorney. | 25 |
| Gaining Legal Experience. | 27 |
| Going to Work for the Justice Department’s Environmental Section. | 29 |
| Justice Department’s Natural Resources Section | 33 |
| Coming to the Sacramento Field Office. | 34 |
| Introduction to Newlands Project Issues. | 39 |
| Churchill County Litigation. | 40 |
| Fish and Wildlife Water Rights Acquisitions. | 45 |
| Fear of Groundwater Impairment. | 47 |

| | |
|---|-----|
| Cost of Litigation to TCID..... | 51 |
| Litigation Costs to the Federal Government..... | 54 |
| Involvement of Senior DOJ Attorneys..... | 57 |
| An Administrative Record..... | 60 |
| Water Right Acquisition Program..... | 65 |
| Building a Case..... | 68 |
| Depositions in the Recoupment Case..... | 71 |
| Motion for a Protective Order..... | 74 |
| Battle of Experts..... | 76 |
| Proposed Recoupment Plan..... | 79 |
| Recoupment was Always Against TCID..... | 83 |
| Mechanism to Recapture 197,000 Acre Feet. ... | 85 |
| Role of the Watermaster..... | 88 |
| Questions Concerning Donner Lake Water..... | 89 |
| Utilizing Donner Water Under OCAP..... | 92 |
| Duty of Water..... | 95 |
| Government Notice of Appeal..... | 101 |
| Role of the Solicitor General..... | 103 |
| Process of Filing an Appeal..... | 107 |
| Negotiations with TCID..... | 112 |
| TCID and Litigation..... | 114 |
| Pre and Post Judgement Interests..... | 116 |
| Destroyed Records Incident..... | 117 |
| The Secretary’s Letter..... | 121 |
| The Role of the State of Nevada..... | 122 |
| Trial Experience..... | 124 |
| Recoupment was a Challenging Case..... | 126 |
| Arguing in Appeals Court..... | 129 |
| Recoupment Remedy..... | 131 |
| TCID’s Affirmative Defenses..... | 134 |
| Fallon Paiute Shoshone Tribe..... | 140 |

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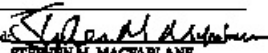
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Editorial Conventions

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; Fish and Wildlife Service 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:

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For additional information about Reclamation's History Program see:

www.usbr.gov/history

**Oral History Interviews
Stephen McFarlane**

[Note to Reader: Due to technical problems, TAPE 1, April 16, 2007, was not included as part of the transcript].

Seney: Donald Seney. I'm with Stephen M. McFarlane of the U.S. Attorney's Office, Department of Justice in his office in Sacramento, California. Today is April 16, 2007. This is our first session and our second tape.

Go ahead, Steve.

McFarlane: Yeah. Well, I'm not in the U.S. Attorney's Office. (Laugh)

Seney: I guess you're not, are you?

McFarlane: We're part of . . .

Seney: Yeah, why don't you kind of explain that.

Litigating Components of the DOJ

McFarlane: Well the, the Department of Justice has two major litigating components. The U.S. Attorney's system, which there is a U.S.

Attorney in every federal judicial district in the United States, and then each U.S. Attorney presides over a staff of Assistant U.S. Attorneys who are the, pretty much the line prosecutors. And also handle what I would characterize as routine civil litigation involving the United States, you know, tort cases, trespass actions, routine bankruptcy type cases.

Then, apart from the U.S. Attorney system there is, there are the six litigating divisions that are, that comprise what is known colloquially as “Main Justice,” and they’re headquartered in Washington D.C. Each division is presided over by an Assistant Attorney General. And so, you have the Anti-Trust, the Civil, Civil Rights, Criminal, Environment and Natural Resources, and Tax Divisions. I think that’s all of them. And so, I’m part of the Environment Division. My chain of command runs back to Washington D.C. where E-N-R-D [Environmental and Natural Resources Division] has a number of field offices. We’ve got a couple of large field offices in Denver and San Francisco, smaller field offices in Anchorage, Seattle, here in Sacramento, and in Boston, but regardless our, my chain of command runs back to

Washington D.C. where, to my Section Chief, and then ultimately up to the Assistant Attorney General.

And, although we, we do try to work very cooperatively and closely where we can with the U.S. Attorney's Offices in the districts in which we litigate, we don't report to the U.S. Attorney. And that's another difference. Generally speaking, the most, the litigation handled by most Assistant U.S. Attorneys is litigation that arises within the federal judicial district in which they're located. (Seney: Uh huh.) We go all over the West. (Seney: Ah.) I have cases, I've had cases in Arizona. I've got, obviously, a lot of litigation in Nevada. I've had cases in Oregon. A few of my colleagues here in this office go up to Washington State. Some of my colleagues here in Sacramento has a fairly substantial Court of Federal Claims docket, which actually goes back to D.C. And, . . .

Seney: Court of Federal Claims would be people seeking money from the federal government (McFarlane: Right.) for one reason or another?

McFarlane: Right. It–right. It’s alleged claims involving Fifth Amendment takings, or alleged Fifth Amendment takings, for which the government is required to pay just compensation. (Seney: Uh huh.) Cases involving or arising out of contracts with the government, where people are seeking money, damages, under the Tucker Act.¹ The Court of Federal Claims also handles litigation over patents, but that’s not something that we, the Environment Division, would get involved in.

Seney: Right. When have you had, rubbed up against the U.S. Attorneys? Anything over the Newlands Project cases?

McFarlane: The U.S. Attorney’s Office in Nevada hasn’t been too active on water issues. They’re quite happy to have E-N-R-D to handle

1. “Under the Tucker Act of 1877, the United States waived its sovereign immunity as to certain kinds of claims. Although the government is immune to lawsuits as a general rule, the Tucker Act exposes the government to certain claims. Specifically, the Act extended the original Court of Claims jurisdiction to include claims for liquidated or unliquidated damages arising from the Constitution (including takings under the Fifth Amendment), a federal statute or regulation, and claims in cases not arising in tort.” For more information, see Cornell University Law School, Legal Information Institute, “Tucker Act,” https://www.law.cornell.edu/wex/tucker_act. (Accessed 4/2017)

those, because it is a fairly specialized area (Seney: Right.) of law. We have worked with the U.S. Attorney's Office in Reno when we've needed help either in, you know, with filings back before electronic filing became the norm, or with, you know, if there were . . .

Seney: What do you mean by "electronic filing"?

Working with the U.S. Attorney's Office

McFarlane: Well, nowadays all filings that are done, I think in nearly all U.S. District Courts, are done electronically. You don't actually ship paper to the clerk's office any longer. You, you know, when you get your document finished up and ready to file you scan it as a P-D-F [Portable Document Format] file and then email it to the clerk's office. (Seney: Uh huh.) And, this has been a development over the last four or five years which has been, it has changed a lot of the way we do business. We certainly use FedEx a lot less than we used to.

And, and so the, you know, it used to be that if you had a—and this was more true of my colleagues who are based in

Washington than it is for me, but even I've had to do it. It's sometimes the case where you're coming up against a filing deadline and you need to get something filed right away. And, back before electronic filing we would often email the document to the U.S. Attorney's Office and have an Assistant U.S. Attorney sign it for us and take it over to the clerk's office and file it. (Seney: Uh huh.) But, that's not necessary any longer because we can electronically file directly from our own office P Cs [personal computers]. So.

Seney: More convenient?

McFarlane: Yeah. I mean, the U.S. Attorney's Office does do, in Nevada, does do a lot of public lands work, but it tends to be mainly for the Forest Service and B-L-M [Bureau of Land Management] rather than the water stuff, and that's—but I, I have a very good relationship with that office. I, you know, I know the Civil Chief there in Las Vegas. I think he's a great guy. The Civil [inaudible] in Reno is a great attorney. There was a, an attorney who used to be fair, used to be somewhat more active, out of that office in Reno, named Shirley Smith, who was there for a long, long time. And, Shirley was just a mainstay for D-O-J [Department of Justice]

attorneys. You know, if you ever had a question about the local rules, or what the judges expected, or what the judges were like, if you were new to the district you could always talk to Shirley and she would give you insights. And they were, they would sometimes be available as well to handle, you know, issues on an emergency basis, but generally speaking, as I said, they left the water litigation to E-N-R-D.

Seney: Right. Right. So, back to the, to water rights transfers. You, again your, the District Court is essentially an appeals court, as you said, in this case?

Water Rights Transfers

McFarlane: Right. The standard of review is essentially in the nature of reviewing, a ruling by the state engineer based upon an Administrative Record that the state engineer compiles in these evidentiary hearings. And so that's, that's, it's, you know, that has its own very characteristic rhythm, if you will. Once a state engineer ruling is appealed to the District Court, we're functioning more as appellate-style attorneys than we are as trial attorneys. In contrast, for example, to the

recoupment case (Seney: Uhm-hmm.) where we actually had a conventional civil trial in front of Judge McKibben in Reno.² And so, there, it's a very different kind of litigation.

Seney: How, what is, what is Judge McKibben like?

Judge McKibben

McFarlane: I think he's a great judge.

Seney: You smile when you say that.

McFarlane: He's certainly a no-nonsense judge.

Seney: Yeah.

2. In the United States Department of Justice, "Truckee Carson Litigation," the United States pursued "recoupment of the diversions made by the District in violation of the operating criteria in effect from 1973 until 1987. Following a four week bench trial in 2002, the district court issued judgment against the District and directed it to repay the Truckee River 197,152 acre feet of water over twenty years. In 2010, the Ninth Circuit affirmed the district court's ruling on liability, but remanded to the district court to recalculate the amount of water that the District was required to repay without adjustments that had lowered the amount under the original judgment. Remand proceedings, to recalculate the amount of water owed to the Truckee River, are pending. The case represented one of the first uses of a restitutionary remedy in the context of water rights and federal Indian trust responsibilities," <https://www.justice.gov/enrd/project-water-rights> (Accessed 4/2017).

McFarlane: But, you know, he's always been very, very patient, although he may sometimes from the bench sound impatient. You know, I think he's a straight shooter, has a good judicial temperament. He can get a little bit frustrated if counsel are dilly-dallying or not getting to the point. (Seney: Right.) I mean, but I certainly have appreciated, you know, when I've appeared in front of him, and he asks good questions. I mean, I don't think he's ever been unprepared. (Seney: Right. Right.) Not that I can, not that I can recall, at least.

Seney: How is Judge George?

Judge Lloyd D. George

McFarlane: Well, I think Judge George—Judge George is an institution in the District of Nevada. He's the, the federal courthouse in Las Vegas is named after him. (Laugh)

Seney: And he's still a sitting judge?

McFarlane: Well, he's a senior judge. (Seney: Yeah.) He's a, he's an extraordinarily nice man. I've never met a more courteous judge in my life, you know. Not that I've been practicing

for that many years, but certainly in the time I've been an attorney. Again, I think he's been a, he's been a great judge. And that's a little bit—you're getting into an area (Laugh) where (Seney: Well, I appreciate that.) I'm not inclined to, to, (Seney: No. No, I know you can't . . .) where I'm terribly . . .

Seney: I'm not expecting you to tear the bark off them. I know you're not going to do that. But, I mean, judges do differ. I mean, (McFarlane: Yeah.) there's . . .

McFarlane: I think Judge George tends to be a little bit more deliberative in the, in the way he decides cases. Not in comparison to Judge McKibben, but what I mean is that he tends to take a little longer. (Seney: Right. Right.) Although, you know, he, you know, when there's an emergency he can be right on top of it too. (Seney: Right.) So. He certainly lived with the Alpine and the Orr Ditch Decrees for a long time.³

3. The Federal Court adjudication of the relative water rights on the Carson River which is the primary regulatory control of Carson River operations today. The decree is administered in the field by a watermaster appointed by the federal district court. The decree, initiated by the U.S. Department of the Interior on May 1, 1925 through U.S. v. Alpine Land and Reservoir Company, et al., to adjudicate water rights along the Carson River. The decree was finally (continued...)

Seney: He has been.

McFarlane: He's been the Decree judge (Seney: Right.) since after Judge Thompson died (Seney: Right.) in the early 1990s.

Seney: And, Judge Thompson was kind of legendary as well, wasn't he?

McFarlane: Yes. Now, you'll have to ask Fred about him. I, Judge Thompson had passed away before I moved out here and so I never had an opportunity to appear in front of him, but I've seen transcripts of hearings he's presided over and he's certainly a man who was never shy with his opinions, (Laugh)

3. (...continued)

entered 55 years later on October 28, 1980, making it the longest lawsuit undertaken by the federal government against private parties over water rights. 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, <http://www.tcid.org/support/faq-detail-view/what-is-the-orr-ditch-decree-and-why-is-it-important> (Accessed 5/2016).

from the bench.

Seney: You know, you said that these, this water, this state engineer had been ruling in favor of the Fish and Wildlife Service on these water right transfer objections. That hasn't always been the case with the state engineer, has it? Hasn't there been, haven't there been state engineers who have maybe been a little more sympathetic to the point of view of the district?

Nevada State Engineer's Role

McFarlane: Of T-C-I-D [Truckee Carson Irrigation District]?

Seney: Yeah.

McFarlane: I think there was a time in the 1980s when the transfer applications were filed after the, after the final, after the Alpine Decree became final. There's a, there's a bit of a, I won't call it an "urban legend" but maybe it's a rural legend out in T-C-I-D that all of these transfer applications came, were filed after the U.S. Supreme Court decided *Nevada v. U.S.* But, I think it was, in fact, the finalizing of the Alpine Decree. Judge Thompson entered the final Alpine Decree in

December 1980 and there were appeals taken, including by the United States. And, the Ninth Circuit didn't issue its decision, which largely affirmed Judge Thompson, until 1983 in an opinion written by then judge, now Justice Anthony Kennedy. And, the Supreme Court denied Cert [Certiorari].⁴ There was a Cert petition taken, filed, and the Supreme Court denied Cert, declined to hear the, hear the case in 1984.

So, it was about that time that the, the Alpine Decree really and truly became the final decree. And, the principal issue that faced the Newlands Project was Judge Thompson's decision, as upheld by the Ninth Circuit, that on matters involving the administration of the Alpine Decree and including, and especially including water right transfers, that Nevada law was to be followed. Well, that meant since Nevada law was fairly specific with respect to the procedures that had to be followed if you were going to move a water right, either

4. Cornell University Law School, Legal Information Institute, "In the United States, certiorari is most commonly associated with the writ that the Supreme Court of the United States issues to review a lower court's judgment," <https://www.law.cornell.edu/wex/certiorari>. (Accessed 4/2017)

change the place of use or the purpose of use, or both, Nevada water law is quite clear. You have to file, the state engineer has to approve that transfer.

So, you have to file a transfer application and then the Nevada Water Code provides opportunities for interested parties to protest. And if there are protests filed the Nevada State Engineer then decides whether there's, a hearing is necessary and in many instances there is a hearing. And, you know, people come and, witnesses come and testify and a record is created before the state engineer at which point then the state engineer prepares a ruling. (Seney: Right.)

So it, it was after the Alpine Decree became final then people began to think about the implications of transferring water within the project, which had, up to that point, been a fairly loose and informal process, (Seney: Right.) that in fact they needed to file these transfer applications. And so, they started filing them in large numbers and the [Pyramid Lake Paiute] tribe started protesting. And that's, those protests, because of the administrative provisions of the Alpine Decree went back to Judge Thompson. And, you know, I think

there was a period of time where both the state engineer and the District Court were trying to come to terms with, “Well, what does it actually mean to say that these transfers have to follow Nevada law?” And I, one gets the impression that on, Judge Thompson on the one hand wanted Nevada law to apply, in term, as the body of substantive and procedural law that would be used to administer the Alpine Decree. On the other hand, he was, I think, very much inclined to want to allow the Newlands Project to continue to be operated the way it always had been operated. (Seney: Right.) He didn’t want to change things.

And, it was pretty clear that, that water rights had been moved around on farms by individual farmers without following the rules (Seney: Right.) because people didn’t think that those were the rules that applied. (Seney: Right.) Well, the Alpine Decree is finalized and all of a sudden the rules become much more apparent. And, there was a period in the late 1980s, the second half of the 1980s, when these transfer applications went back and forth between the state engineer and the District Court, and the Ninth Circuit a couple of times. (Seney:

Yeah.) And, as a consequence, by the time you get to the Alpine III decision, the Ninth Circuit is being much more clear and specific in giving direction to the District Court and to the state engineer about what it understands Nevada law to require when somebody is determining whether a water right's been forfeited, or abandoned, or never, was never perfected. (Seney: Right.)

And, those were the rules then that the Ninth Circuit directed the District Court to follow. But, by that time Judge Thompson had passed away and so it fell into Judge McKibben's lap. So, McKibben has had the water right transfer, what we refer to as the water right transfer litigation where the [Pyramid Lake Paiute] tribe has been the protestant. (Seney: Right.) And, Judge George has had the principal decree cases under both Alpine and Orr Ditch. And then other judges have, from time to time been assigned particular subcases, if you will.

Seney: Right. What other litigation have you?

McFarlane: With respect to Newlands or more generally?

Newlands Project Litigation

Seney: Right. Newlands.

McFarlane: Newlands? Well, recoupment. The big ones have been recoupment, the water right transfer litigation including both the tribes [Pyramid Lake Paiute and Fallon Paiute Shoshone tribes] and the litigation pursued by the Fish and Wildlife Service. The Churchill County NEPA [National Environmental Policy Act] litigation, there have been some very minor, shall we say “entanglements” in District Court. But, the other big thing that I’ve been involved in, of course, is the Truckee River Operating Agreement. (Seney: Right. Right.) The negotiations. And those will be going back to, will have to go back to the Orr Ditch Court at some point as required under the Settlement Act once TROA [Truckee River Operating Agreement] is finally signed.

Seney: Where is it, where does it stand at this point?

Current Status of the Truckee River Operating Agreement

McFarlane: The Bureau of Reclamation and the California Department of Water Resources are in the process of obtaining permission to

send the final Environmental Impact Statement and Environmental Impact Report to the printer. So, I guess, the term of art is “permission to print” (Seney: Ah.) is being actively sought. So, we are at the, very close to the end of the E-I-S [Environmental Impact Statement] process.

Seney: Did the issues with Fernley get ironed out or are those put aside?

McFarlane: The issues with Fernley as regards TROA, there was a compromise reached and the draft Operating Agreement itself was amended to reflect this compromise and that will become apparent once the revised draft TROA . . .

Seney: So, that was resolved then?

McFarlane: Well, I mean it’s, I think it may be premature to say that it’s been resolved. There are some other outstanding issues between Fernley and the [Pyramid Lake Paiute] tribe that are the subject of some negotiations, and we’ll see where those wind up. But still, it, I think it’s still kind of sensitive at this point. (Seney: Uh huh.) In terms of implementing, getting to the point where TROA, where we can go back to court. You know, once the

E-I-S is published then there is a period of time people have an opportunity, I think, to submit comments on the final E-I-S.

But at some point not too long thereafter there would be a Record of Decision issues and then, assuming that the Record of Decision supports a decision by the, you know, the decision that's documented (Seney: Right.) in the Record of Decision is a decision to sign TROA. The Secretary of the Interior will sign it. I expect there will be a signatory from the Department of Justice, because TROA also settles litigation. Each of the mandatory signatories as well as those people, those entities which have participated in and anticipate signing TROA, like Fernley for example, will sign TROA.

Water Rights Transfer Issues

In the meantime, there are water right transfer issues that have been presented both to the Nevada State Engineer and also to the California State Water Resources Control Board. And, protests have been filed by T-C-I-D and Churchill County and the City of Fallon and others in both administrative fora,

(Seney: Right.). And so that, that process is now getting underway and there will be what I would characterize as administrative litigation before the Nevada State Engineer and also the California Water Resources Control Board. And then, you know, we'll see where that winds up.

Seney: Well we--go ahead.

McFarlane: No, go ahead.

Seney: Well, why don't we leave it there, (McFarlane: Okay.) and when I come back we'll talk about your participation in the TROA negotiations and also the recoupment case.

McFarlane: To the extent I can talk about either one. (Laugh)

Seney: Well, to the extent I'll have to beat the answers out of you I guess. All right, great. Thank you, Stephen.

McFarlane: Okay.

END SIDE 1, TAPE 2. APRIL 16, 2007.

BEGIN SIDE 1, TAPE 1. AUGUST 16, 2007.

Seney: . . . 2007. I'm with Stephen M. McFarlane of the United States Department of Justice in his office in Sacramento, California. This is our first session and our first tape.

Good morning Stephen.

McFarlane: Good morning, Don.

Seney: Let me start by asking you a little bit about where, where you're from. Where did you grow up and how did you, you know, how did you get here, kind of?

Early Life

McFarlane: Well, I'm a native of San Francisco. I grew up in the Bay Area in a number of different places. Went to elementary, and middle school, and high school in the Bay Area, and then went off to Berkeley. I graduated from Berkeley in 1975 and went on to graduate school.

Seney: What did you study as an undergraduate?

McFarlane: I was a history major.

Seney: And for graduate school?

- McFarlane: Well, I went off to, to work as a graduate student in English history, early modern English history, seventeenth and eighteenth centuries, at Oxford University.
- Seney: Ah. Did you have a Rhodes Scholarship?
- McFarlane: I had a Marshall Scholarship.
- Seney: Ah, I know what that is. That's nearly as, or not as well known but very prestigious. I'm impressed.
- McFarlane: Well, it was a, it was certainly a nice thing to get. It kept body and soul together, barely, for about three years, and then I was able to cobble together some, some teaching work and finish the degree. And, I finished the doctorate in 1983, I think.
- Seney: From Oxford?
- McFarlane: From Oxford.
- Seney: A D.PHIL. [Doctor of Philosophy] is it?
- McFarlane: Yes. It's a D.PHIL.
- Seney: Right. Oh. I'm very impressed. I didn't realize you were a . . .

McFarlane: Now, the law is my second career. (Seney: Oh.) I'm a, I'm a retread.

Seney: You're a . . . (Laugh) So what, where did you teach?

McFarlane: I taught, apart from doing teaching assistant-like work at one of the Oxford colleges, my first real teaching job was a sabbatical replacement position at the University of North Carolina-Greensboro, (Seney: Ah.) which I began in 1980. It lasted a year and then I got a position at Bennington College in Southern Vermont. (Seney: Right. Yeah.) I taught there for six years. And then went, taught part-time at the State University of New York at Albany.

Seney: Well, you got into teaching at a very bad time, didn't you?

McFarlane: I did. (Laugh)

Seney: Yeah. I mean, it was one of the worst times?

McFarlane: It was not a good time, and Bennington was a, an institution that was in some considerable financial difficulty while I was there. (Seney: Right. Right.) And so, there

was a period of time when, you know, in any given semester we didn't know whether the school would reopen the next semester. And so, it was during that period that I made the ultimate decision that perhaps I should think about at least the possibility of a career shift.

Seney: Well, many did, and many did take career shifts. I think you know Wayne Mehl⁵ (McFarlane: Uhm-hmm.) was, you know, he's a Ph.D. in history as well.

McFarlane: Oh, is he? I didn't know that.

Seney: Yeah. And he began to try to teach and it didn't work out for him. He went to work for one of the senators, I can't remember which one, in Michigan and then hooked up with Senator [Harry] Reid at some point.⁶

5. Wayne Mehl was the Legislative Director for Senator Harry Reid of Nevada and participated in Reclamation's oral history program. See Wayne E. Mehl, *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, senior historian, Bureau of Reclamation, 2013, www.usbr.gov/history/oralhist.html.

6. Harry Reid was U.S. Senator for the state of Nevada from 1987 to 2017 and participated in Reclamation's oral history program. See Harry Reid, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation Oral History Interview conducted by Donald B. (continued...)

So he, you and he share that same poor judgement, (Laughter) or getting in at the wrong time.

Becoming an Attorney

- McFarlane: Well, it was a nice life while it lasted. (Seney: Yeah. Right.) I mean, I certainly enjoyed the classroom experience. I, and I have to say that the training, professional training, as a historian is one that I've found invaluable (Seney: I'll bet.) in my career as an attorney.
- Seney: Yeah. I'll bet.
- McFarlane: Now, in the 1980s my wife, who is also, was a graduate student in history as well, she was the one who jumped for law school first. And she went to, since we were living up in the Northeast at that time the nearest law school was Albany Law School in the state capitol of New York. And, she went there and enjoyed the experience, and so when she finished up I went. And . . .

6. (...continued)

Seney, edited by Donald B. Seney and further edited and desktop published by Brit Allan Storey, senior historian, Bureau of Reclamation., 2013, www.usbr.gov/history/oralhist.html.

Seney: Same school?

McFarlane: Same school. And graduated. Got my law degree in 1991, passed the New York Bar, and went off and did a clerkship for a federal judge in Washington D.C.

Seney: Ah. Appeals court or trial court?

McFarlane: That was a trial court, U.S. District Court for the District of Columbia. I was a law clerk to George Revercomb, who was a contemporary of the Chief Judge, Judge Hogan, and the current Chief Judge. And, his father had been a republican senator from West Virginia, (Seney: Uh huh.) back in I think the 1940s. And, the judge was a great guy to clerk for, a wonderful man. Unfortunately, he developed lung cancer while I was clerking for him and in the second year of—I had come down to do a two-year clerkship with him and in the second year of, the second summer I was with him he passed away. (Seney: Ah.) And so, I was his last law clerk and I spent the remainder of my clerk period helping out with some of the other judges with his cases that had been reassigned to them.

Seney: I see. Yeah.

McFarlane: And, at that point, after that clerkship finished up I joined the Justice Department in the Environment Division.

Seney: I would think that working for a trial judge like that would be very useful given to what you do now as a trial attorney for the . . .

Gaining Legal Experience

McFarlane: Well, it is, of course. I always encourage our law student interns that we have coming through the office during the summer and during the academic year. If their grades are good or if they have *Law Review* experience always to apply for a clerkship. It's one of the best law jobs you'll ever have. (Seney: Yeah.) It's wonderful training for a young attorney to basically, you know, see a case from the judge's perspective, (Seney: Right. Right.) read the briefs filed by all sides, all of the parties, and it's a, I just found it a wonderful, wonderful training for my practice. But also, you know, because federal courts deal with many, many issues these days, being able to, you know, see a broad range of subjects, legal issues, conflict disputes, and so forth, come before the judge you're clerking for. It's a, it really gives you

a breadth of experience that you're going to probably not have again in your career as you start to specialize.

Seney: So, I take it your grades were good in law school, and/or you had law . . .

McFarlane: They were passable. I was (Seney: *Law Review?*)—yeah. I was on *Law Review*. (Seney: Yeah.) And so . . .

Seney: You're sort of saying when you say they were passable. (Laugh)

McFarlane: Well, I mean, you know, I don't want to, I don't recall where I graduated but it was, it was close to the top of the class. (Seney: Right.) It wasn't that, maybe twelfth or fifteenth.

Seney: I appreciate your modesty, but obviously if you're clerking that means you've, you've done well in law school?

McFarlane: I think I did reasonably well. I had some, I also was fortunate in having some, some intern experience with a New York State trial judge in Albany, and also with the New York Department of Environmental Conservation. I worked in their

Enforcement Section (Seney: Oh.) as an intern for a summer, and then for one term, and then I also worked for a law firm in Albany, New York, that has a large regional environmental practice. So, I think I had a nice well-rounded practical aspect to my legal education, as well as the, you know, (Seney: Right.) the work in the classes and the work on the *Law Review*.

Seney: I was going to ask you, what drew you into the Justice Department's Environmental Section, but I guess you've answered my question since your experience is . . .

Going to Work for the Justice Department's Environmental Section

McFarlane: Well actually, more than anything else it was an outgrowth of a *Law Review*, note that I wrote while I was on *Law Review* that looked at a particular case that was wending its way through the, the D-C Circuit, having to do with standing, the question of standing in an environmental, an environmental context and under the Administrative Procedure Act. And, low and behold, while I was working on the case the Supreme Court granted Cert [Certiorari] and so all of

a sudden this became a much more significant issue, both in its own right and certainly for me as well. (Seney: Right.)

And, I was able to go down and see the case argued in the Supreme Court and then it ultimately became *Luhan v. National Wildlife Federation*, which is one of the major recent cases on standing under the Administrative Procedure Act that the courts issued. It came, the decision came down I think in the spring of 1991. No, it came down in 1990, in the spring of 1990, and then I spent my third year basically focusing my *Law Review* note on that.

But, the underlying issue in that litigation had to do with challenges to the way that the Bureau of Land Management was managing public lands, and particularly some of the, some of what was going on during the Reagan administration with respect, and the first Bush administration, with respect to concept, the concept of—and these are terms of art in the area of public lands—the concepts of withdrawal of a public land from entry under some of the earlier public land laws, like the Homestead Act, for example, or the general mining law. And then, the concept of a reservation in which

public land is reserved for a particular purpose.

And, the National Wildlife Federation and the other environmental plaintiffs were alleging that the B-L-M [Bureau of Land Management] was revoking reservations and had conducted a Land Withdrawal Review Program that was inconsistent with the Federal Land Policy and Management Act, otherwise known as FLPMA, (Seney: Ah.) and was also not consistent with requirements under NEPA [National Environmental Policy Act], and other environmental laws. And the, the attorney in the District Court in, this was a case that came out of the District of Columbia, that in the trial court was Fred Disheroon.⁷ (Seney: Ah.) And, I didn't know that at the time that I would later be working with Fred on Newlands matters, (Seney: Right. Right.) but he was the one who essentially pushed the standing argument in that litigation, and it

7. Mr. Disheroon participated in Reclamation's oral history program. See Fred Disheroon, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation Oral History Interviews conducted by Donald B. Seney, edited by Donald B. Seney and desktop published by Brit Allan Storey, senior historian, Bureau of Reclamation, 2010, www.usbr.gov/history/oralhist.html.

went up to the D-C Circuit.

It was, I think it was Judge Pratt had it, had the case. I could be wrong about this. He had the case in District Court. He dismissed the, ultimately dismissed the complaint for lack of standing. The D-C Circuit reversed him and then the Supreme Court reversed the D-C Circuit. So, it was in the context of doing the research into the public land—I mean, it was almost as though, while I, while the focus of my work was on the constitutional issue of, you know, “Who has the, who is a proper (Seney: Right.) plaintiff to bring a suit and what can they challenge?”

Seney: Okay. Let me stop you and say, I take it your note was published before the Supreme Court decided this case?

McFarlane: No, it was published after.

Seney: After? Okay. All right.

McFarlane: It, while the, while the constitutional issue was in the forefront I actually got very, very interested in the public land law aspect of it, and just became fascinated by both the history and the administrative practice under

the Federal Land Policy and Management Act, and how B-L-M was to balance various considerations in managing public lands. And that got me, it was that research that I did in the course of preparing the note and trying to understand the underlying set of issues (Seney: Right.) in the litigation that kind of wetted my interest in the natural resources side of environmental law.

Justice Department's Natural Resources Section

So that when I then subsequently applied to the Justice Department one of the sections that I applied to and the one that I ultimately went to work for was the General, what was then known as the General Litigation Section, which handles, handled then and handles today, although it's been renamed the Natural Resources Section, litigation against federal agencies in their land or resource management capacity. So, I often distinguish between, you know, think in terms of environmental law as existing along a spectrum with pollution control and regulation at one end and public lands management at the other end. So, while my work as an intern for New York D-E-C [Department of Environmental

Conservation] and also for Whiteman, Osterman, and Hanna in Albany had been on mainly dealing with various aspects of regulation of under the Clean Water Act, or the Clean Air Act, and so forth. Ultimately I went to work in much more of a natural resources law based practiced.

Seney: Uh huh. And not, you didn't think of private practice, right?

McFarlane: No. Not really. I mean, I believe in public service and I just find the, the opportunities to, as a Department of Justice lawyer, I mean the work is very stimulating. I think as a D-O-J lawyer you get to handle your own cases at a much earlier stage in your career. By the time I joined D-O-J, I was forty and I didn't feel like I wanted to serve a lengthy apprenticeship as a, as an associate somewhere carrying the partner's bags, and (Laugh) you know, I wanted to get on and do it. (Seney: Sure.) And so, I, I stuck with D-O-J and I've been very happy.

Seney: Great. All right. Well what, how, how did you progress out here to Sacramento?

Coming to the Sacramento Field Office

McFarlane: When I joined the General Litigation Section in the Environment Division in 1993, I was initially assigned to work on Everglades litigation, which was going hammer and tongs, very intensively. And I spent a lot of time in South Florida on various aspects of that. And, in the meantime I had heard via the grapevine that there was an opening in our Sacramento Field Office.

Now, when I went to, originally had gone to law school my wife and I had just had our daughter. She was, I think I started law school Ellen was maybe two years old, and all of my parents, well all of my family—my father's dead. My mom's still alive. My family is out here in California. My wife's parents are deceased and she has no immediate family. She's from Delaware. She had been a graduate student at Berkeley and so we also had (Seney: Uh huh.) a lot of friends still here in California.

And, we thought that at some point of making a move out to California was something that we'd like to do. So, we went down to Washington, D.C. She went to work for a law firm, a Richmond, Virginia based law firm that has a Washington, D.C.

office, Hunt & Williams. I went to work as a law clerk and then joined the Justice Department,. And low and behold I came to learn there was this opening in the Sacramento Field Office that the Section Chief of the General Litigation Section was having trouble filling. So, just before Thanksgiving 1993 I went to his office and sat down with him and said, “Look, Bill,”—this was Bill Cohen [spelling?]-I said, “Bill, you know, I know I’m a rookie lawyer but, you know, I do have some sort of job and life experience. And my wife and I would, at some point, like to move out, we’re thinking at some point it would be nice to move back to California. Would you consider me for the vacancy in the Sacramento Field Office?” And, Bill scratched his beard and said, “Well, I’ll think about it and get back to you.” And so, he talked to some of his colleagues and ultimately it was decided that, “Well, we’ll take a risk on McFarlane going out there.”

There was a Senior Attorney, Maria Iizuka, I-I-Z-U-K-A, who was here in the office at that time, and Maria has since recently retired, but and they figured she could teach me what I needed to learn. And so, in August of 1994 we moved out and

bought a house out in Carmichael, and settled in, and we've been here ever since. I think it's kind of ironic that it's, you know, as a kid growing up in the Bay Area I had the Bay Area person's view of Sacramento, (Seney: Right.) as a sleepy little cow town (Seney: Yeah.) where nothing was, ever went on except the State Legislature, and it was hotter than hell in the summertime. (Seney: Yeah. Right.) And if somebody had told me in 1975 when I graduated from Berkeley that twenty years later I'd be, not only be practicing law but living in Sacramento (Laugh) I would have said they were absolutely nuts. But, it turns out to be a very nice place to live and we've been very happy here.

Seney: Does your wife practice law or does she work?

McFarlane: She now directs the Legal Process Program at McGeorge School of Law. (Seney: Ah.) So, she's gone back to academia. And, you know, originally the idea was that I would be the academic and she would be the attorney, so our roles have reversed. (Laugh) But, she's been the director of the Legal Process Program at McGeorge now for, I think,

close to ten years.

Seney: Does she enjoy what she's doing
(McFarlane: Oh yeah.) as much as you do?

McFarlane: I think so.

Seney: Good.

McFarlane: She certainly enjoys the teaching (Seney: Yeah.) aspect of it, and she's, I think, in the, in the forefront of trying to, you know, elevate the teaching of legal research and writing as a subject and as a skill. And [she] has been very active with the Association of Legal Process Directors, and a number of national groups that are designed or intended to promote that aspect of legal education (Seney: Yeah.) as an important, as an important component.

Seney: McGeorge has become a very important law school, recently?

McFarlane: It's, it's a rising, it's certainly rising, and it's, some of its programs are becoming much better known. The current dean, Elizabeth Parker, has, I think, done a lot for the law school to raise its profile and to enhance some of the law school's strengths. So it is

a, it is becoming much better known.

Seney: Right. Right. How did you, when you got here how long was it before you became entangled in Newlands Project issues?

Introduction to Newlands Project Issues

McFarlane: I think the first time I got involved in Newlands Project issues would have been in the spring of 1995. At the time the, the water right transfer litigation that the Pyramid Lake Paiute Tribe had been pursuing, which had been up in the Ninth Circuit for a while, and had, and the Ninth Circuit had issued the decision that we now refer to Alpine III in 1993. And that entailed a remand back to the District Court and the Nevada State Engineer to, with instructions on how to conduct evidentiary hearings on the tribe's protest of these Newlands Project water right transfer applications.

And so, it looked like the litigation was really going to heat up, and I think Fred was looking for another attorney to bring on. He had worked with a, in the 1980s he had worked with a couple of attorneys, one of whom had gone on to a U.S. Attorney's

Office in Wyoming and so was no longer with, with Main Justice. And, it just, I think it made sense, since I was now based in Sacramento and was relatively close to Nevada that I would be tapped to get involved. And I, I also was looking, I looked, certainly found the idea of working with a senior attorney very attractive and also sort of getting my teeth into water issues in the West, which are obviously very important. (Seney: Right. Right.)

So, you know, Fred gave me a bunch of stuff to read and then in, there was a hearing I think in front of Judge Lloyd George, who presides over both the Orr Ditch and Alpine Decree cases. And, I came over to, to Reno and met Fred and went along to that hearing. This is in what we refer to as the Pyramid Lake Paiute Tribe's Petition Cases. And this was also, these cases also looked like they were going to heat up. But, although they didn't at that time it seemed that way in the spring of 1995. And so, I gradually got immersed in various aspects of that litigation.

Churchill County Litigation

The first big piece of litigation that I

really got heavily involved in was the challenge by Churchill County under the National Environmental Policy Act, NEPA, to the Department of the Interior's implementation of various aspects of Public Law 101-618.⁸ And, that really became my entree into the larger world of Truckee-Carson and Newlands Project litigation, although the Newlands Project was not

8. 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:

- Fallon Paiute-Shoshone Tribal Settlement Act
- Interstate allocation of waters of the Truckee and Carson rivers.
- Negotiation of a new Truckee River Operating Agreement (TROA)
- 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.
- Recovery program is to be developed for the Pyramid Lake cui-ui and Lahontan cutthroat trout
- 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
- Contingencies are placed on the effective date of the legislation and various parties to the settlement are required to dismiss specified litigation.

Source is: http://www.usbr.gov/mp/lbao/public_law_101-618.html (Accessed December, 2011).

directly at issue.

Seney: Talk about that in detail. Talk about, what were the issues that Churchill County was raising?

McFarlane: Well, this was a NEPA lawsuit. Churchill County and then the City of Fallon intervened as a plaintiff as well, were both arguing that the, that NEPA required the Secretary of the Interior to prepare a programmatic Environmental Impact Statement. They looked at the various water-related provisions of the Settlement Act as constituting a single overall program designed to change the way water was allocated within the Truckee and Carson river basins.

Now, the Department of Interior didn't see it that way. (Seney: Right.) And Interior, and I think it's certainly more, the Department's view was certainly more consistent with what I know of the history of the Settlement Act. But the Department saw the, the Settlement Act as containing a number of authorizations for the Secretary of Interior to undertake specific kinds of programs or projects, which may or may not be interlinked with one another. And, I think

over the course of the 1990s, Interior's view about combining some projects under various provisions of the Settlement Act changed a bit.

But, to give you one concrete example, Section 206A of the Settlement Act authorizes and directs the Secretary to undertake a program to acquire water and water rights to restore and maintain on a long-term average 25,000 acres of primary wetland habitat in the Lahontan Valley Wetlands. And, the lead agency for the Department was the Fish and Wildlife Service. And, during the course of the 1990s, although the Service had, had purchased some water rights and transferred them to Stillwater National Wildlife Refuge, prior to the enactment of the Settlement Act. The Settlement Act really gave, as it were, a series of marching orders to the Secretary and to the Service to undertake a, a program for of water rights acquisition with the, with the wetlands restoration goal in mind.

And so, the Service embarked on the preparation of an Environmental Impact Statement, which was finalized in 1996 and a Record of Decision was issued that year.

That Record of Decision and E-I-S was incorporated into the Churchill County litigation. The Churchill County and the City of Fallon amended their complaints to add a claim challenging the adequacy of that E-I-S. And so, the Service, you know, embarked on a Water Rights Acquisition Program, which is still ongoing, but that, that particular Water Right Acquisition Program, you know, in the end is, and I don't, is going on more or less independently of some of the other things that are authorized under the, under Public Law 101-618. (Seney: Right.) And, we pointed that out to the court and ultimately the court and the Ninth Circuit agreed.

Seney: And, the upshot of the litigation was?

McFarlane: Well, we, the case was before Judge Edward Reed in Reno, and Judge Reed initially dismissed the complaints for lack of standing. Churchill County and Fallon had appealed that decision to the Ninth Circuit, which reversed. And so, we went back to Judge Reed and had another round of Summary Judgement briefing on the merits of their complaints. And then Judge Reed, on the merits, issued a ruling in our favor, basically holding that the, the Department of

the Interior had not violated NEPA in the way it was addressing, that there was no legal obligation to prepare a programmatic E-I-S and that the Service's Environmental Impact Statement for its Wetlands Restoration Program was adequate under NEPA. Churchill County and Fallon then appealed that ruling to the Ninth Circuit, and in 2002 or 2003 the Ninth Circuit affirmed, and then that was the end of it. I don't think they, I don't recall that they petitioned for Cert. (Seney: Yeah.) So.

Seney: Why did Churchill County and Fallon, instead of T-C-I-D. . .

END SIDE 1, TAPE 1. AUGUST 16, 2007.
BEGIN SIDE 2, TAPE 1. AUGUST 16, 2007.

Seney: Go ahead Steve.

Fish and Wildlife Water Rights Acquisitions

McFarlane: I don't know. I think some attorneys who worked on the case may have thought that there was some coordination with T-C-I-D. But, candidly, the only explanation I can think of is that the, the principal issue that was sort of the underlying concern that

Churchill County and Fallon were expressing, was that the, and this was particularly with reference to the Fish and Wildlife Service's Water Rights Acquisition Program and its E-I-S. They were concerned about the potential impacts of the acquisition of water rights from agricultural lands and the transfer of those water rights to wetlands, that the impact that that program would have on groundwater supplies.

As you probably know, groundwater forms the source of drinking water in Fallon and the Lahontan Valley generally. The city of Fallon has a municipal water supply system. It pumps out of this Basalt Aquifer near Rattlesnake Hill in Fallon. Churchill County, at the time, did not have a municipal water supply system but they were concerned about potential impacts on their, on county residents who were outside the boundaries of the Fallon service area.

Seney: Who rely on private wells?

McFarlane: Who rely on private wells. And, the concern was that the, that these wells would be adversely affected by the transfer of water rights. I think the Service felt, and the court

certainly upheld this, that there was, first of all, no evidence to suggest that there would be that kind of adverse impact, particularly not in the early years of the project where most of the water rights that the Service was acquiring were very close to the refuge anyway. And, I think the Service did a very good job of working very closely with the United States Geological Survey in developing a groundwater model for the Lahontan Valley and conducting all kinds of groundwater monitoring to look at potential impacts. And, I think over time it's been able to assure itself, and frankly I think assure the public, that the kind of drying up, that you were not looking at another Owens Valley, (Seney: Right.) which was one of the things that Churchill County's attorneys tried to (taps table) tag on that.

Seney: Did they raise that specter?

Fear of Groundwater Impairment

McFarlane: They certainly did, both in the District Court and the Ninth Circuit. But there was really never any evidence.

Seney: Were they able, may I, were they able to

provide evidence to support that, or was . . .

McFarlane: Well, I didn't think so. I mean, I think the U-S-G-S reports at the time indicated that there was not likely to be an adverse, or a significant adverse effect. There could be some localized impacts but, you know, in terms of people's wells drying up (Seney: Right.) this just hasn't (Seney: No.) happened. Subsequent work by U-S-G-S has, in fact, tended to show that when you stop applying water to agricultural lands, in fact, water quality improves, because the water that generally flows in the irrigation canals and laterals is of better quality than the water that percolates into the groundwater after it's been applied to soils, (Seney: Right.) and has, you know . . .

Seney: Right. With all the fertilizer?

McFarlane: Well, and salts and so forth. (Seney: Yeah.) And, it always seemed to me that, you know, in contrast to the Owens Valley example, what was going on in the Lahontan Valley was simply moving some, moving water rights from one part of the valley to another part of the valley. And, the Service was, continued to use and continues to use to this day the irrigation system of the Newlands

Project as a way of getting its water down to Stillwater (Seney: Right. Right.) and to Wetlands on the final . . .

Seney: There's no other way, is there?

McFarlane: As a practical matter, not at this time. I mean (Seney: Right.) you know you could, you could develop or construct some, presumably construct something but I don't think there are any plans to do that. (Seney: Right. Right.) You know, you've got the irrigation, the network of canals and laterals right now and the Service just makes use of that. (Seney: Sure.) The water flows through the project it gets to the Service, gets to the refuge boundaries and then the refuge managers apply that water to wet, various units of wetlands for nesting, (Seney: Right.) and for foraging of migratory water fowl, which is precisely what they're authorized to do under Section 206A (Seney: Right.) of the Settlement Act.

Seney: And, the canals and laterals are somewhat notoriously leaky, aren't they?

McFarlane: I think that's true.

Seney: Yeah. So, I mean, it's, there's going to be . . .

McFarlane: I mean, there are some that are lined but I think that's, that has been the source of groundwater. I mean, I think one of the, one of the things that U-S-G-S had documented is that when the Newlands Project was being developed there was a significant change in groundwater in the Lahontan Valley precisely because there were all of these canals and laterals that were full of water. (Seney: Right.) And that raised the groundwater table from what it had been previously to the point where it was much more, you had a groundwater table that was much more uniform across the entire project than it had been before the project was there, and in some instances much higher than it had been. You look at the . . .

Seney: Because the previous agriculture had been using wells to irrigate and whatnot?

McFarlane: I thought there was some direct diversion from the Carson River, but I'm not a, I'm not an (Seney: Right.) expert on that early years of the project. So.

Seney: Well, I think there was both, but I could be

wrong. There was some reliance on wells.

McFarlane: I know that one of the, one of the problems that the Newlands Project faced early in its development was what to do with drain water. (Seney: Right.) And, I think that could well have been an offshoot of the fact that the water table had, had risen so much.

Seney: Right. Exactly. Yeah. Yeah. You know, one of the things we spoke about on the phone and when we were talking about arranging the interview was the cost to the Truckee Carson Irrigation District [TCID] of all of this litigation. Is there a sense, do you think, that they, forgive me for saying it this way, that Churchill County and the City of Fallon might have carried the water on this one simply out of, out of recognition of how much . . .

Cost of Litigation to TCID

McFarlane: You mean on the Churchill County litigation itself?

Seney: Yes. Right.

McFarlane: Well, that's an interesting idea. I hadn't

heard that before. I don't know. It's really hard to—they were not, let me put it this way, they were not terribly open with us at that time about what their communications back and forth with T-C-I-D might be. (Seney: Yeah.) And, you know, it's been difficult to get information from T-C-I-D about how it funds its litigation. And, in any event I'm sure that those, any discussions that might have occurred, if there were any, were probably pretty confidential (Seney: Right.) with Churchill County.

I think, you know, in the case, in the NEPA case I really—you know, you can speculate about what T-C-I-D's interests may have been. But I think, you know, that certainly from the issues that I had to deal with in that case it seemed to be much more directed towards the provision of drinking water and alleged impacts (Seney: Right.) to that than the actual operation of the project, although there is obviously a nexus through (Seney: Yeah.) the application of irrigation, of irrigation water.

Seney: Well, that's an issue that's, that I think nearly everyone I talk to in the Fallon area raised, was the relationship between irrigation and the drinking water system. And that if you

compromised the one you were going to compromise the other, and there was a lot of unfairness involved with that. What do you suppose that, do you have any sense of what that litigation might have cost Churchill County and Fallon, the City of Fallon?

McFarlane: I heard, and this is purely rumor and hearsay, but I heard that the, that there was a meeting at one point between Mary Conelly,⁹ Senator Reid's representative in Nevada, and the attorney for the City of Fallon. And if I recall correctly, the number that I think I heard was that he had gone in and asked if the senator could find a way to fund a groundwater development study that would cost about \$400,000. And, he was asked, "Well, how much has this litigation that you've been waging against the Department of the Interior cost?" And he said, "Well, about \$400,000." And, (Laugh) the point was, you know, "Don't come to the senator, you know, in terms of making, to ask for

9. Ms. Conelly participated in Reclamation's oral history program. See Mary Conelly, *Oral History Interviews*, Transcript of tape-recorded Bureau of Reclamation oral history interviews conducted by Donald B. Seney, edited by Donald B. Seney and further edited and desktop published by Brit Allan Storey, senior historian, Bureau of Reclamation, 2013, www.usbr.gov/history/oralhist.html.

things when you've been making your own choices about, the city's been making its own choices." (Seney: Right.) Now, that may be an apocryphal story. Certainly, but there was that, it was floating around Fallon in the late 1990s.

Seney: Do you, in the Justice Department, do you add up what you've spent on a case like this ever, and is that one of the things you do to see where your money is going in salaries, and overhead, and whatnot? Do you allocate it to cases?

Litigation Costs to the Federal Government

McFarlane: I don't.

Seney: Someone may?

McFarlane: I think, you know, there are reports that are generated about hours that are devoted to certain categories of cases. (Seney: Uh huh.) I mean it's certainly possible when we're dealing with an attorney's fees issue that we may have occasion to look at our own expenses, but I'm not aware that it's been done. (Seney: Right.) And in this particular instance, we won the litigation so, in the end, (Seney: Right. Right.) there was no

Bureau of Reclamation History Program

attorney's fees request that was before the court that we would have to respond to.

Seney: Oh, I see what you mean. If you had lost then they may have asked—I see what you're saying.

McFarlane: They could have. Yeah. They could have sought attorney's fees.

Seney: Have there been any cases where this has happened?

McFarlane: Where people have sought attorneys fees?

Seney: On the Newlands Project?

McFarlane: Oh, on the Newlands Project? It came up in the recoupment case, you know. In the, in that case, this is the *U.S. v. Board of Directors, T-C-I-D*. In that case Judge McKibben—you know, we, we had certified a defendant class of all Newlands Project water right holders to ensure that any judgement we obtained against T-C-I-D would be binding on them. And, there were a number of, the class was certified by the District Court and a number of landowners chose to intervene separately rather than be

represented by T-C-I-D's class, T-C-I-D's attorney as counsel for the class.

Seney: Why do you suppose that was?

McFarlane: We asked, during the course of depositions, and were told, you know, "These are my water rights. These are my lands. I want to represent myself." (Seney: Uh huh.) Or, "I would prefer to hire my own attorney." That's, at least, what we were told. The, also the State of Nevada intervened separately, you know, and, as one would expect. (Seney: Sure.) You're a, (Seney: Sure.) they're a sovereign and they will, in Nevada, an Attorney General would represent the state's interests in litigation.

So, at the end of the case the judge, Judge McKibben, dismissed the, any claim, well we never filed a claim against the individual landowners in the project. But, he essentially dismissed them from the suit and at that point Nevada and a number of the individual intervener, defendant interveners, moved for attorneys fees, and the judge denied those motions. I think, largely on procedural grounds at that point. But, that's, that was the only, that's the only example I can think of. There are certainly, I

am unaware of any instance where—well, there may have been something in the 1970s, but I’m certainly unaware of any instance in which the government has had to pay attorneys fees and costs for litigation related to the Newlands Project.

Seney: When you’re working on something like this NEPA case, is Fred Disheroon involved too?

Involvement of Senior DOJ Attorneys

McFarlane: Well, Fred’s the, you know, Fred’s the Senior D-O-J Attorney to which all of the Truckee and Carson litigation has been assigned. So he’s, yes, he’s, I mean he would, he was and continues to be the lead attorney.

Seney: Right. And, that means what, practically, as you’re going through these cases and deciding how to approach them?

McFarlane: Well, you know, it depends issue by issue, and I don’t really want to get into it in too much detail. I think, you know . . .

Seney: Well, as much as you can, (McFarlane: Well, I think . . .) to illustrate—what I’m interested

in is to illustrate the relationship between D-C on this and the Field Office, and the kind of issues that you would feel you should bring up to Fred, and the kind of, you know . . .

McFarlane: Well, I'm not going to talk about those. I think that . . .

Seney: Oh please. (Laugh)

McFarlane: You know, we're, we're very cognizant of the fact that, you know, as the Department of Justice we represent the United States and, including all federal agencies in litigation. And, if there is a, you know, if there's ever a question, if Fred thinks we should do X and I think we should do Y, Fred and I will work it out between the two of us. He's a very experienced attorney. (Seney: Right.) I mean, he's been practicing law longer than I've been alive. (Seney: Right.) And so, I think in terms of overall strategy, Fred at least, you know, unless he's overridden by somebody further up the food chain, has the final say in terms of strategy and (Seney: Right.) those sorts of things. But, we work very closely as a team.

Seney: Even on the NEPA case which is all done

and over with, etcetera? You wouldn't feel comfortable in talking about specific things that you might have discussed on a case like that to work out?

McFarlane: Well, there really wasn't much to discuss, frankly. I mean we, it seemed to us that the arguments were, you know, it was pretty clear what the plaintiffs were seeking and we were out there, essentially, to defend the Secretary. At that point, the implementation, Interior's implementation of Public Law 101-618 was being coordinated by Bill Bettenberg out of the Office of Policy Analysis (Seney: Right.) at Interior. So, Bill was our principal client representative. We also worked very closely with the Solicitor's Office, Lynn Collins, and then when, after Lynn retired some of his successors both in D-C and then out here in Sacramento.¹⁰

10. Both Mr. William Bettenburg and Mr. Lynn Collins participated in Reclamation's oral history program. See William Bettenberg, *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; Lynn Collins, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation Oral History Interview conducted by Donald B. Seney, edited by Donald B. (continued...)

But, you know, in terms of, you know, day-to-day conduct of the litigation. I mean it's, it's, there's really—and it also, frankly, in the context of a NEPA case, there's not that much to really discuss. I mean, it's pretty, pretty straightforward. You know, the Fish and Wildlife Service had actually prepared an E-I-S and issued a Record of Decision. So we worked with the Fish and Wildlife Service. They prepared an Administrative Record, which we lodged with the court. And since I was out here I assisted the service in the . . .

Seney: What's an Administrative Record?

An Administrative Record

McFarlane: Well, under the Administrative Procedure Act when a lawsuit is filed that challenges an agency decision or a, some other final agency action, the review that the court conducts is not a *de novo* trial. I mean, the court does not decide whether the agency decision was right or wrong in some policy sense. The court does not conduct a trial. The court's not supposed to, at least, conduct a trial

10. (...continued)

Seney and desktop published by Andrew H. Gahan, historian, Bureau of Reclamation, 2013, www.usbr.gov/history/oralhist.html.

where witnesses will come and testify and the court will build a record, (Seney: Right.) a trial record, in the court itself. Rather the court, the District Court, in effect reviews and under the A-P-A [Administrative Procedure Act] applies a very deferential standard of review to the agency's decision making.

Essentially what the A-P-A requires is the District Court to, first of all, ask, did the agency have jurisdiction? Was the decision within the agency's authority? Secondly, did the agency, in reaching the decision, did the agency apply the relevant factors that Congress directed the agency to apply? And third, has there been any clear error in judgment? I mean, did the agency basically sort of go off the deep end in terms of the ultimate decision that was reached? And, if the court finds that the agency had jurisdiction, that the agency applied the factors that Congress directed, and there was no clear error in judgment, end of discussion, The agency's decision is supposed to be affirmed.

This is a reflection of the separation of powers principle in our constitution. (Seney:

Ah.) Now, what does the court look at in making those determinations? Well, the court looks at the Administrative Record that the agency has presented to the court. So, what the Administrative Record is, in effect, the document, the Administrative Record documents, the decision-making process that culminated in the decision that is under challenge and under review before the court. So, one of the things that we frequently deal with in Administrative Procedure Act litigation is, early on, it's a very front-loaded process, is to get the agency to compile an Administrative Record. In which the agency goes back through its files and it pulls together all of the documents, all of, I should say, all of the non-privileged documents that are the studies, memos, correspondence, and so forth that document how the agency came to reach the decision that is ultimately before the court for review. And, these Administrative Records can be fairly substantial.

Seney: I would think, yeah.

McFarlane: The biggest one I ever dealt with was one in some litigation I handled not long after I got out here in Sacramento involving a challenge

to the Navy's, a Navy project in San Diego to construct a home port for a nuclear aircraft carrier at Naval Air Station North Island. And, that case had, there was a lawsuit filed by an anti-nuclear and an environmental group that challenged various aspects of that project: the decision to go forward on that project, under both NEPA and I think the Clean Water Act. And, the Administrative Record in that particular case, at least the non-classified portion, was something like I think over 270 binders and over 100,000 documents.

Seney: Good lord. (Laugh) Did it sound like the Navy?

McFarlane: Well, they had a very hardworking project manager who compiled all of that. It took it, it basically occupied all of the walls of a fairly large room. And, we lodged a copy of that entire Administrative Record with the court. The judge was not happy, (Laugh) but that's what we have to do. He ultimately said, "Well," he directed the parties to, to identify 500 pages out of this entire Administrative Record that he would review, and that's what he did. (Seney: Ah.)

But this, but to get back to the Fish and Wildlife Service, (Seney: Right. Right.) the Service compiled an Administrative Record that was much smaller than the Navy's in that case, but it was still a fairly substantial document. But it essentially went back and documented the process by which the Service ultimately made a decision to implement a particular water right acquisition strategy (Seney: Yeah.) in what the Service considered in the process of reaching that decision. And I think it was about twenty, maybe twenty volumes, fourteen to twenty volumes of (Seney: Yeah.) documents. And, we provided the court with a copy. We provided the plaintiffs with a copy, and it was that document, that Administrative Record then that was the basis for review in the Churchill County case. (Seney: Right.)

Now we, we also had some depositions, which is unusual in an A-P-A case. But their, Churchill County and Fallon were, one of their claims, as I indicated, was that the Department of the Interior had a legal obligation to prepare a programmatic E-I-S. And the Department's response, "Well, no we don't because there's no program. How do you document that?"

(Seney: Right.) So, there was a little bit of discovery, including some depositions, but, and so Fred and I wound up defending depositions and, and I think, I don't think we actually took any depositions. There was really no cause for that. (Seney: Right.) Yeah.

Seney: What, what's next in terms of the cases that you've worked on, other than the, and we'll get to the—oh, I can't even think here. We'll get to the recoupment case, but what other cases have you worked on?

Water Right Acquisition Program

McFarlane: Well, I've defended the Service, you know, when the Service, in implementing its Water Right Acquisition Program. The Service is required by Public Law 101-618 to transfer water rights its purchased in accordance with state law, which means it goes and it files a transfer application with the Nevada State Engineer, and there is an opportunity to, for interested parties to protest. And, Churchill County, and more recently just the city of Fallon, have filed protests of these transfer applications. And there have been evidentiary hearings which have been

conducted by the Solicitor's Office. I mean, they're conducted by the state engineer, but the Service is represented by the Solicitor's Office.

The state engineer, to date, has ruled in the Service's favor in every, every instance where there's been a contested transfer application. And, Churchill County and Fallon, and more recently just Fallon, have appealed those state engineer rulings to the U.S. District Court. We have a, because these involve water rights that are subject to the Alpine Decree on the Carson River, the decree provides that transfer applications are to be taken first to the Nevada State Engineer and then if somebody is unhappy with how the state engineer deals with the transfer application an appeal can be taken to the U.S. District Court, which presides over the decree.

So it's a, it's an unusual jurisdictional arrangement where you have the state administrative officer making, conducting fact finding that will be reviewed by a federal district court. Usually, you know, state administrative proceedings are reviewed in state court. But because the Alpine (Seney: Yeah. Right.) Decree is a federal decree the

rules are a little different. And, the Alpine Decree has administrative provisions that make this very clear and those administrative provisions have been upheld by the Ninth Circuit a number of times now. So . . .

Seney: If I may, what would be the substance of these objections by the City of Fallon or Churchill?

McFarlane: Well, they've tended to, they've tended to focus on the inadequacy of, or alleged inadequacy of the Service's analysis of potential groundwater impacts. So, they're still focusing on the, (Seney: Uh huh.) on the groundwater connection.

Seney: Which is probably all they have, I would think, in terms of substantive objections, would you think?

McFarlane: Well, I mean I don't want to speculate as to what they have and don't have. I mean, they think that this is an issue. You know, I think, frankly, the, over time the number of U-S-G-S reports, the stack of U-S-G-S reports keeps getting larger, higher. And you know every hearing, evidentiary hearing, the Solicitor's Office, the Solicitor who's

handling the case before the state engineer has a number of U-S-G-S witnesses that he or she can call and give testimony to the state engineer about the particular impacts of these transfer applications. And the state engineer has found the U-S-G-S witnesses to be credible.

Once the appeal is filed to federal district court then we get involved, and I have defended the Service on, on a couple of these. I've still got one that's pending in front of Judge George. We're waiting for a decision from him on whether to either issue a ruling or hold a hearing. I've also been involved in water right transfer litigation, although that's winding down now.

Seney: Now, let me go back to the transfer. What, what sort of thing do you do, or what sort of arguments do you make when you, unless you just say, "Well, the state engineer has looked at this and the record is clear." How do you handle something like that?

Building a Case

McFarlane: Well, I think what you, you try to work with your Solicitors to make sure there is a good a record as possible created before the state

engineer. And then, you know, the litigation, once it gets to District Court, it's kind of like the litigation that would be before a Court of Appeals. You're not making a new record. (Seney: Ah.) The District Court is reviewing a record that was before the state engineer and determining whether the state engineer, you know, made adequate factual findings that support the, and you know, properly applied the law. In the course of the transfer, water right transfer litigation there has been some debate in development of the law on questions of the proof of . . .

END SIDE 2, TAPE 1. AUGUST 16, 2007.

BEGIN SIDE 1, TAPE 1. DECEMBER 10, 2007.

Seney: In his office in Sacramento, California. This is our second session and our first tape, and today is December 10, 2007. Good afternoon, Steve.

McFarlane: Hi.

Seney: As I said, you know, I've got the waterboarding . . .

McFarlane: Oh, that's the . . .

Seney: That's the tape noise. (McFarlane: Uh huh. Okay.) It's just, I don't know why. Yeah. I've got my waterboarding equipment (Laugh) in case it's needed, and I hope I won't have to get it out. But, you know how things go these days?

McFarlane: Well, you're a tough guy, Don. (Laugh)

Seney: I'm going to ask you first of all about a, there was an exchange of correspondence between the Attorney General of Nevada, who was taking part in this case. At least, this particular letter came from Paul Taggart, the Deputy Attorney General, both to you and Fred Disheroon. Well, I mean, this one is to Fred. But, there was one to both of you and this had to do with your trying to stifle his desire to depose certain federal people: Betsy Rieke, Pat Beneke, Chet Buchanan, (Laugh) particularly.¹¹

11. Both Ms. Elizabeth (Betsy) Rieke and Mr. Chester (Chet) Buchanan participated in Reclamation's oral history program. See Elizabeth (Betsy) Rieke, *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, senior historian, Bureau of Reclamation, 2013, www.usbr.gov/history/oralhist.html; Chester Buchanan, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation Oral History Interview conducted by Donald B. Seney, (continued...)

McFarlane: This is, you're talking about the recoupment case?

Depositions in the Recoupment Case

Seney: I am, yes.

McFarlane: *U.S. v. Board of Directors, Truckee Carson Irrigation District?*

Seney: Yes. Exactly. I am. Right. And, why was it that there was a reluctance to have these people deposed?

McFarlane: This is actually not something that I can really go into in any great detail. I think it had to do with the, the schedule and the fact that the State of Nevada had not taken any discovery for quite a few years and then at the very end insisted upon doing so. So, I think that's about as much as I can say to it. We did file a motion for a protective order, which was denied, and so the depositions (Seney: Right.) went forward.

11. (...continued)
emeritus, California State University–Sacramento, edited by Donald B. Seney and desktop published by Brit Allan Storey, senior historian, Bureau of Reclamation, 2010, www.usbr.gov/history/oralhist.html.

Seney: Right. I mean, it would be very unusual, wouldn't it, for the court not to permit depositions if the, and argue with the state's, this one party wanting a deposition?

McFarlane: You know, the recoupment case was in discovery for about five years before it went to trial, (Seney: Yeah.) and during that entire period the United States and T-C-I-D exchanged documents. There were, there was an exchange of interrogatories and . . .

Seney: This means questions (McFarlane: Right.) that posed in writing and responded to?

McFarlane: And, there were many, many depositions taken, (Seney: Yeah.) by both sides. And, for the longest period of time the State of Nevada was not an active participant in, (Seney: Okay.) in much of this. But then, as we got closer to trial, as I said, they woke up and finally decided that they had better go and do something, it seems to me. (Seney: Right.) And so, I think that letter reflects an attempt on their part maybe to put a spin on a situation that was largely of their own making.

Seney: Would this letter then find itself into the hands of the judge, in other words?

McFarlane: I don't believe it was ever filed with the court.

Seney: Okay. All right. Actually, this was downloaded from the court's website.

McFarlane: Oh. Well, I wasn't aware there was a website.

Seney: Right. There, there are many documents having to do with this case on the District Court's website.

McFarlane: I'll have to go and take a look.

Seney: And, available. Right. Right. And not easy to find, I might add. It took me a good deal of sleuthing around to finally get to the website. And then you have to go to the docket, (McFarlane: Uhm-hmm.) and then you have to go through the documents to see what it is that you want.

McFarlane: This is the U.S. District Court's?

Seney: The U.S. District Court in Nevada.

McFarlane: I'm aware that there have been, that there have been state courts, including here in

California, that have established websites that are specific to individual cases. (Seney: Right.) I wasn't aware that the . . .

Seney: Well, I got this, maybe this was through FindLaw or one of those, but anyway it was, you know, it was all the documents and this was part of (taps table) that. Is this, you know, when you say you can't say much, do you mean for reasons of . . .

McFarlane: Well, you're asking me some questions that go into the government's litigation strategy (Seney: Okay.) that's protected. That's privileged information.

Seney: All right.

Motion for a Protective Order

McFarlane: You know, we, as I indicated we did file a motion for a protective order. There was a . . .

Seney: Now, that means?

McFarlane: That means we, we opposed the request to (Seney: Right. Right.) take these depositions in court. (Seney: Right.) We also, there was a hearing on this matter and at the end of the

hearing the judge, as I recall, it's been a few years, the judge (Seney: Right.) directed that certain depositions go forward, and they did.

Seney: Right. One of them was Chet Buchanan's. I take it Chet was deposed in this, (McFarlane: Yes.) and testified? I'm aware from my interview with him that he (McFarlane: Uhm-hmm.) was, (McFarlane: Yes.) and so forth. One of the things that they said in his, in wanting his deposition was that he was, oversaw the Qui ui Recovery Program and was responsible to some extent for the Qui ui Recovery Program, and overseeing that program. And, there's been a good many allegations from the District, T-C-I-D, that the Qui ui are really in better shape than some people have let on. Was there any problem with, with having Chet discuss the Qui ui and how well it had come back or was it the view of the government, the U.S. government in this case, that that didn't really matter, that that had no bearing on the recoupment issue?

McFarlane: I think it was the latter. It was not a relevant issue in the case, we did not believe at least.

Seney: Right. Right. I mean, whether or not . . .

McFarlane: And, we said so in open court.

Seney: Yeah. Whether or not they'd come back or not had nothing to do with the fact that they, there had been too many diversions taken in the, (McFarlane: That's right.) in the case? Right. You know, one of the things that was very interesting in the judge's decision, I thought, was the, the battle of the experts here. And, you're kind of grinning. The tape won't pick that up. Smirking may be more like it, verging into a grin. Apparently their expert was deemed more credible than your expert, Orloff, Dr. Orloff [spelling?] the government's expert, and Mr. Bender, I believe, was . . .

Battle of Experts

McFarlane: Binder.

Seney: Binder?

McFarlane: You know, the judge's ruling speaks for itself. I'm not going to comment on it one way or another. That's a, those are all issues that are currently on appeal.

Seney: Maybe at least you'd tell me this. I took, I take it Dr. Orloff [spelling?] didn't come to

you as someone without experience in these matters? Had he, had you used him before? Had the federal government used him before?

McFarlane: Fred Disheroon had.

Seney: Had used him before, right?

McFarlane: Yes.

Seney: With, I take it, good results?

McFarlane: He found him to be a very effective witness in other litigation, yes.

Seney: Right. Right. Was it clear? I mean, you say that the judge's decision speaks for itself, and I don't want to go into that, but was it clear when this testimony was going on that, that there were problems with your testimony and, and maybe Mr. Binder, I guess you say it, is there were perhaps not so many problems with his?

McFarlane: Uh, you know, Don, that's not something I can comment on.

Seney: Well, this was in open court?

- McFarlane: It was, it was in open court but you're asking me for my, my perceptions about my own witness and I'm not going to give them to you.
- Seney: No matter how many times I ask?
- McFarlane: No matter how many times you ask.
- Seney: How many clever ways I go at this?
- McFarlane: Good luck. (Laugh)
- Seney: Well, you know, it's, did it surprise—let me just ask you this. Did it surprise you that in the decision it seemed to come down to these two witnesses so heavily?
- McFarlane: I think any case of this kind is going to involve expert witness testimony and the court will have to make its own determinations. I think the judge's ruling was not based solely on his assessment of expert witness credibility. (Seney: Right. Right.) As we said in our post-trial brief we believed that we had established that T-C-I-D had over diverted water in violation of OCAP [Operations Criteria and Procedures] from the Truckee River during the 1973-1987 time period, of, in the order of

between, of something around 700,000 acre feet. And, the judge obviously found a much lower (Seney: Right.) number. (Seney: Right.) I think the important point, one important point, though, is that he did find that T-C-I-D had violated the OCAP (Seney: Right.) and did impose liability on them at least for the 297,000 acre foot figure that he did find.

Seney: Right, 197,000?

McFarlane: One hundred—I'm sorry. (Seney: Yes.) You're correct, 197,000.

Seney: You know, your, the recovery plan that you had submitted to the court before the ruling took place . . .

Proposed Recoupment Plan

McFarlane: You're talking about the Recoupment Plan?

Seney: Yes, right. That's right. Right. Let me get the right title up here. (Turning pages) This is the (McFarlane: Yes.) proposed Recoupment Plan. Right.

McFarlane: Right.

Seney: And this was submitted November, or at least received by the court November 12, 1999. And in this you lay out a, you know, it seems to me it would be a good plan, if the court liked it or not. But their big problem with this was they were not about to assess the individual water right holders for this? I mean, all of this plan really revolves around taking how much water had been illegally diverted, how many, you know, less the [Pyramid Lake Paiute] Indian tribe, the [Fallon Paiute Shoshone] Fallon tribe's irrigation amount, how many acre feet were then, (turning pages) or how many acres were then—and, I should have marked it so I could come to it quickly—but how many acres were then on the, actually irrigated, then dividing that and arriving at how many per acre. And, and again did that surprise you when, when he ruled that this was not going to be assessed against the individual water right holders?

McFarlane: Well no, and let me make a couple of comments on this. First of all, this was a proposed Recoupment Plan that was prepared and submitted to the court because the, the defendants had requested it. (Seney: Uh huh.) They had basically said, “Well, we don't know how the government is going to

seek to recover water that it has alleged T-C-I-D over diverted. And so, the judge basically directed the United States to put together a proposed plan and we did, and we submitted it to the court.

Seney: Is that unusual?

McFarlane: I'm, this whole case was unusual. (Seney: Yeah.) I don't know that, you know, it was a, it was a proposal that was submitted before trial. (Seney: Right.) Obviously the details of how much water would be recovered and how it would be (Seney: Right.) recovered would have to await critical findings by the court during the trial, (Seney: Right. Right.) and as a consequence of the trial. And so, this was a, a first attempt by the government to lay out a plan or some concepts (Seney: Right.) to recover water, assuming that we won everything we asked for. (Seney: Right.)

The second thing I would, I would say, and this has, this has been I think a, there's been a lot of misunderstanding about this. The United States' claim for recoupment was not against individual water users. It was against T-C-I-D. We did certify a

defendant class, because as we, again as we've said in our briefs we, it was important that the class of Newlands Project water users be bound by any judgment against T-C-I-D so that they couldn't come back later on and collaterally attack it.

Seney: What does that mean?

McFarlane: That means that, that we wanted to avoid a situation in which T-C-I-D was found liable by the court to repay water to the Truckee River, (Seney: Right.) only then having to be subjected to lawsuits by individual water user; that (Seney: Uh huh. Uh huh.) T-C-I-D could not take any actions that would result in any reduction in deliveries to the, to individual project water users. (Seney: Right. Right.) And so that, it was for that reason we sought, we even, and the court granted it to certify the defendant class consistent with all Newlands water right owners.

Seney: Well, if I may, this had been tried by Norm Fry, Frey [spelling?], hadn't it, in a way, when he asked for a summary judgement letting him out of the, any kind of loss due to the recoupment business?

McFarlane: Well, I've forgotten the details of Norm's motion.

Seney: Well, he asked for a summary judgment to declare that he not be held liable, that this was T-C-I-D's [Truckee Carson Irrigation District] problem. It wasn't his problem.

Recoupment was Always Against TCID

McFarlane: Right. And the court, the court did not grant summary judgement because the court, I think, deferred all of those issues to trial. (Seney: Right. Right.) But ultimately the court did enter an order and it's, I think it's reflected, frankly, in the court's judgement, final judgement, too, that liability was against T-C-I-D and not against the individual water users. (Seney: Right. Right.) And, the United States' claim for recoupment was always against T-C-I-D. We were, we were seeking to recover water from T-C-I-D on account of its own actions.

Now, it may be that in repaying that there could be some consequences that would be felt by the project as a whole. (Seney: Right.) How that, you know, what those consequences are and how, how those

might be experienced in any given year will depend upon a lot of factors. But, so I think the, the point about the proposed Recoupment Plan was, that I would want to emphasize, was that it was something that the court and the other parties asked for, and we submitted it. And ultimately the judge, as a consequence of the evidence that was produced at trial, and the findings that the judge made, the judge went in a somewhat different direction.

Seney: Right. I, it struck me, I'm sure T-C-I-D would have another view, but it struck me as a, as a rather gentle plan. I mean, a good deal of time would have been permitted to pay back people who had transferred water rights subsequent to all of this would not be held liable for any of the, or at least that would be retired, that portion, say if I bought a 1,000 acres of water rights then that would be subtracted from the recoupment so I would not, after the fact, be held liable.

McFarlane: Well, I think we did spend, give this plan a good deal of thought. This was not something that was whipped together on the spur of the moment. (Seney: Right.) And, it was intended to balance on the one hand the need to recover water that we alleged was

owed to the Truckee River. (Seney: Right.) At the same time, trying to be fair to, trying to work out some reasonable basis on which to do that. And, as I say, you know, ultimately the trial came and the judge made findings. Some of those findings are on appeal. In the meantime, the Watermaster, with the assistance of the United States, T-C-I-D, and the tribe are implementing the terms of the judgement that the court did enter.

Seney: Right. Right. Has there, has there now been a mechanism put in place to, to recapture the water that was, that the 197,000 acre feet?

Mechanism to Recapture 197,000 Acre Feet

McFarlane: Yes. I mean, that is, if you look at the court's, the judgment that was entered in February of 2005 that specifies a mechanism by which (Seney: Okay.) over a twenty-year period water would be recovered and gives T-C-I-D a number of options, (Seney: Right. Right.) that it can use to pay back water. (Seney: Right.) And that, that process is currently underway.

Seney: Is that process, you know, you know and I

know that there have been allegations made by ditch riders on the project itself that there have been some irregularities in the way that the water has, that water has been accounted for and in a way that would inflate savings and to pay back the recoupment. Has that—and there is an active investigation going on. I mean, I'm not sure where it is at this point, but has that in any way put on hold, until that's resolved, the question of whether or not there were some misrepresentations on the part of the district as to savings that would accrue to get rid of this debt of water? Has that put anything on hold or had an impact?

McFarlane: There was a, this past spring the United States requested a stay of the implementation of the judgement for this year because we became aware of this, of an investigation. The court granted that stay with the direction to the United States to come back in ninety days and advise the court how it wanted to proceed. And, we did and we came back in ninety days, in early, I believe, the end of June and advised the court that at that point we did not seek a further stay. And that the process of preparing, that the Watermaster goes through in preparing a recommendation to the court on what the

Watermaster submits to the court, a Certification of Compliance by T-C-I-D with the judgment for the twelve-month period ending in February of this year, that that process could resume and it did. And, a, a Certification of Compliance was submitted by the Watermaster. The court adopted it. And, T-C-I-D recently asked for reconsideration of a portion of that. That's been briefed and we're waiting to hear what the judge is going to do.

Seney: So, essentially it got put back in the lap of the Watermaster to decide it?

McFarlane: Well, that's what the judgment requires. (Seney: Right.) I mean, the judgment that the court entered in 2005 directs the Watermaster to oversee an annual process involving consultation with T-C-I-D, the United States, or I should say the Department of the Interior, and the tribe over how much water T-C-I-D has repaid to the Truckee River in the previous, you know, in a given twelve-month period.

Seney: February to February, roughly?

McFarlane: Right. Yeah. It runs at anniversary dates

and the judgment was entered in, I believe, on February 15, 2005.

Seney: And, you say T-C-I-D is appealing? Does that mean that, is it still Gary Stone?¹² Is Gary still the Watermaster?

McFarlane: Yes. He's still the Watermaster.

Role of the Watermaster

Seney: Yeah. Did that mean that Gary Stone maybe found fault with some of their, some of the submissions by the district and has disallowed them and now the district is appealing them?

McFarlane: No. I wouldn't say--well, I think Gary Stone disagreed with certain of the recommendations made by T-C-I-D, just as he disagreed with certain of the, with the recommendations made by the tribe. And, on one issue in particular involving the use of Donner Lake, water that's stored in Donner

12. Mr. Gary Stone participated in Reclamation's oral history program. See Garry Stone, *Oral History Interview*, Transcript of tape-recorded Bureau of Reclamation Oral History Interview conducted by Donald B. Seney, Bureau of Reclamation, August 15, 1994, in Reno, Nevada, edited by Donald B. Seney, www.usbr.gov/history/oralhist.html.

Lake, (Seney: Right.) whether that can be counted towards repayment of recoupment. Gary's certification to the court reflects that because of a lawsuit that T-C-I-D has brought against the Truckee Meadows Water Authority and Sierra Pacific Power Company that's, that's pending in state court here in California. Until that lawsuit is resolved, the Watermaster is not going to consider Donner as part of the annual payback. The District Court's entered an order in October that affirmed the Watermaster's, or adopted the Watermaster's Certification of Compliance,. And then T-C-I-D filed a motion for reconsideration on the, on that particular ruling involving Donner, (Seney: Ah.) the use of Donner Lake. (Seney: Right. Right.) So that's, that a matter that is now in the judge's, (Seney: Right.) before the judge waiting for him to decide that, (Seney: I see. I see.) how he wants to proceed on that particular issue.

Seney: Now, as I understand it the amount in Donner Lake that goes, that belongs to T-C-I-D is 5,000 acre feet?

Questions Concerning Donner Lake Water

McFarlane: That's a complicated question. (Seney: Is it?) Because the, the, there's a water right that allows water to be stored in Donner Lake. That water right is owned by, now by the Truckee Meadows Water Authority and T-C-I-D (Seney: Ah.) as tenants in common, which means that each of them has an undivided fifty percent interest (Seney: Right. Right.) in that right.

Seney: I guess I'd always heard the number at 10,000 acre feet and five had belonged to Sierra Pacific as the, it was the predecessor to (Seney: Right.) the water authority, and five went to, but there's, it's more complicated than that?

McFarlane: I don't, I don't think it's . . .

Seney: An even ten, or that?

McFarlane: No.

Seney: Yeah. Yeah. Less?

McFarlane: I believe it's less now, in part because I think there have been some, there's some issue with siltation around the dam which has (Seney: Ah.) reduced the storage capacity of (Seney: Right. Right.) Donner Lake. But,

the specific amount of water that's stored under that right is currently owned by T-C-I-D and TMWA [Truckee Meadows Water Authority], as Sierra Pacific's successor-in-interest. As tenants in common, it's my understanding that part of the litigation between Sierra and TMWA, that's pending in California state . . .

Seney: T-C-I-D and TMWA?

McFarlane: And TMWA.

Seney: Right.

McFarlane: Involves a counter suit by TMWA to partition the right so that it could, you know, each, T-C-I-D and TMWA would each have a divided (Seney: Right.) fifty percent interest (Seney: Right.) and, you know, that's a matter for the California courts to decide.

Seney: Does it matter when it comes to the Donner Lake water that the Secretary of the Interior had long ago stopped giving permission for them to take that water through the Truckee Canal?

Utilizing Donner Water Under OCAP

- McFarlane: Well, our position, and we've said, as we've stated in our papers in court, the, our position is that the Donner water can be taken over when it's allowed under OCAP. In addition . . .
- Seney: How would it be allowed? I mean, if you've got a low water year on the Carson (McFarlane: Right.) and it's needed to meet the minimum storage targets, and so forth, in Lahontan?
- McFarlane: Yes. Under, under those circumstances OCAP would allow it in addition because Donner water is non project water. Under Reclamation law, T-C-I-D would need to get a contract under the Warren Act, which is a 1911 statute that allowed the Bureau of Reclamation to contract for the use of excess capacity (Seney: Yeah.) when people wanted to use Reclamation facilities to transport or store non project water. And, Reclamation, in a, has in the past advised T-C-I-D that when OCAP allows it and if T-C-I-D obtains a Warren Act contract, that under certain circumstances, you know, when OCAP permits then Donner water can be brought over to and stored in Lahontan Reservoir.

- Seney: Right. Has it been done?
- McFarlane: I think it has been done in the past on a very limited basis.
- Seney: Yeah. Right. Right. I mean, it, if it's anywhere near 5,000 acre feet that wasn't much when they, the assumed deficit through the recoupment was over a million acre-feet. But, when you're talking a little under 200,000 acre feet that's a fair amount of water?
- McFarlane: Well, I mean that's your characterization of it. (Laugh)
- Seney: And a very good one, I think. (Laugh)
- McFarlane: It, I . . .
- Seney: Is it not? I mean, doesn't it amount to a bit more now that there's, there's not much and will it be, can it be used? I mean, the government did want to sell that water and take the money to retire other rights. That, I guess, is off the table now?
- McFarlane: I, you know, it, I can't really comment on that.

Seney: Which means it's not off the table?

McFarlane: No, I mean I can't comment on it.

Seney: Okay. All right.

McFarlane: You know, there have been some—I don't know who you've heard that from but there have been some, there have been, there have been a number of attempts over time to try to settle the recoupment issue (Seney: Yeah.) and I can't comment on the, you know, the details of proposals and counter proposals are all confidential.

Seney: Okay. All right. (Laugh) He just—the tape won't see the lawyer smirk I just got for that attempt. (Laughter)

McFarlane: Just a pleasant smile, actually.

Seney: Well, I appreciate that there are things that you can't say and things you won't say. I'm just trying to get you to say the things you won't say (Laugh) as opposed to the things you can't say.

McFarlane: I know you are Don. (Laugh)

Seney: That's what the Bureau pays me a fabulous

salary for.

McFarlane: I'm sure. (Laugh) I'm sure.

Duty of Water

Seney: You know, one of the interesting aspects of all of this was this business under the Preliminary Order, having to do with the Alpine Ditch Decree, which allowed 2.92 acre feet for every 3.5 acre feet. And, I guess that's the notion that there's some consumptive use there or some needs to flow back down to the . . .

McFarlane: Are you talking about the water duties under the . . .

Seney: Yeah, I am. I'm sorry. I'm switching back to another, to a different aspect over here. And how much the court put on that, the idea that the calculations were made based on the 2.92 when, as a matter of fact, after the 1980 final decree of the Alpine Ditch thing it was, the water duties were then 3.5 and 4.5 depending on bottom and bench lands. Did that surprise you that, that you had used the preliminary figures and then the court said, "No. No. No. Once this is over

with we go back and apply the final figures to that”?

McFarlane: No, not at all because the District Court in *Tribe v. Morton*, the 1973 decision, imposed a decree that relied upon what was then the water duty, applicable under the Alpine, under the temporary Alpine (Seney: Right.) restraining order.

Seney: And that was 2.92?

McFarlane: And, that was 2.92. (Seney: Right.) In calculating the amount of, the total, well what was known as the “maximum allowable diversion for the project.” Ultimately you’re correct. When the, in the final Alpine Decree in 1980 the court adopted a higher water duty and from that point on that became the applicable water duty under the decree.

Seney: Right. Right. But, the court, in this recoupment case said, “No. No. We’re going to . . .”

END SIDE 1, TAPE 1. DECEMBER 10, 2007.

BEGIN SIDE 2, TAPE 1. DECEMBER 10, 2007.

Seney: Make that retroactive. For example the,

from '74 to '84 the . . .

McFarlane: I don't, I don't actually think the court said that.

Seney: Didn't they?

McFarlane: I think the court was characterizing T-C-I-D's position.

Seney: Okay. But, but then it no longer was the 2.92, because between '74 and '84 the maximum project diversion, under the existing OCAP, was 288,129 acre feet, from both rivers. But then, when you get up to, after the final Alpine Decree in '85 it was then 335,000 acre feet. In '86, under the Interim OCAP, it was three hundred and fifty. In '87, it was three hundred and sixty-two. So, I mean, that makes quite a difference in the amount they have or have not over drafted from the river. I mean, you're talking, to begin with, say two-ninety you're talking 45,000 acre feet. You're talking 60,000, 72,000 acre-feet. And, the court then went with the higher numbers and went back, didn't they, and say that even for those earlier years that we're going to have the . . .

McFarlane: Show me where the judge's decision actually does that.

Seney: Uhm . . . this is reading from the decision. "The court concludes that the total amount of water diverted, excess of that allowed under the OCAP between '73 and '87, for Truckee River spills subject to recoupment is 24,131 acre feet. This reflects the court's conclusion that there was no spill subject to recoupment for the years '73 through '78, and for the years '85, '86, and '87. It further reflects that court's conclusion that in 1979 the spill subject to recoupment amounted to 11,938 acre feet. In 1980 the spill subject to recoupment amounted to 12,000 acre feet. The court finds there were no excess diversion to the Truckee division subject to recoupment during the period 1973 . . ." (turning page)—and I'm afraid it cut me off a little there and I can't read,—1980 . . .

McFarlane: I, I would need to go and look, because it was . . .

Seney: Yeah.

McFarlane: You know, I . . .

Seney: But then it says, if I may, then it goes on to

say, “The court further concludes the total amount of excess diversions to the Carson Division between ‘73 and 1981, and then again, in 1987 there’s 173,000 acre feet.” So, they have gone back, obviously, and then they go on to say, “There were no excess diversions to the Carson Division subject to recoupment in ‘73, ‘76, ‘77, ‘85, ‘86, and ‘87.” This must be ‘87 then. “The court has concluded during 1974 the excess diversions to the Carson subject to recoupment in the amount of 45,000 acre feet (McFarlane: Uhm-hmm.) plus or minus seventy-five, 24,000 plus or minus in,” and again I can’t tell what year that is. Maybe I can see it.

McFarlane: And where do you conclude that, in reaching those conclusions the court is sort of retroactively applying the water duties from the final Alpine Decree.

Seney: Uhm . . .

McFarlane: Because, I certainly don’t read that section that you’ve read as, as saying that. I think the court, I read that as the court basically drawing conclusions upon the actual evidence that the court heard.

Seney: Yeah. It says here, and forgive me it doesn't indicate which page, "The '73 OCAP and the OCAPs that followed, until 1985, were based on the 2.29, 2.92," pardon me, "acre feet per acre average water duty established in the Alpine temporary restraining order. After December 1980 the OCAPs did not give proper weight to the water duties in the final Alpine Decree. That's, that's what I thought.

McFarlane: After, what does he say? After what date?

Seney: If you'd like to read it, here it is. It's right here. So, so I guess I'm, I'm . . .

McFarlane: Right. I think the judge, I mean, you know, this is a, this is an issue that I can't really comment on very much because, again, it's on appeal. What the judge appears to have done is concluded that the instant the final Alpine Decree was entered . . .

Seney: If I may. I don't expect you to say how you feel about it, if you could just describe what is going on here that would be great.

McFarlane: Right. I mean, I think, I think the court—I don't see in the decision the court going back and retroactively, for the '73 to 1983 . . .

Seney: No, you're right. I misspoke on that. Yeah. It looks like it's only back to '81, the final order is, is entered.

McFarlane: That's right. And I think what the court is then, is then saying, in effect, is that as soon as that order was entered there should have been a recalculation or a reissue of OCAP that established duties that were consistent with (Seney: Right.) the duties in the (Seney: Right.) final decree.

Seney: Now, is the government appealing that part of it?

McFarlane: You know, I, I'm not in a position to say what the government is appealing at this point because . . .

Seney: You haven't filed the appeal? Or . . .

Government Notice of Appeal

McFarlane: We have filed a Notice of Appeal. (Seney: Okay. But you haven't . . .) But, it doesn't require us—we haven't filed our brief yet.

Seney: Okay. I understand. I understand. Right. If you had filed the brief I'd have to get out the waterboarding equipment.

McFarlane: But, no. No. (Seney: All right.) (Laugh) We haven't, we haven't filed our brief yet.

Seney: Have you, have you been discussing this on what, what you're going to be appealing on? I mean, you filed the Notice, because you have to do that within a certain period of time, (McFarlane: Right.) I think, right?

McFarlane: Right. Right. Right.

Seney: Now, are you discussing what you're, what the content of that appeal's going to be?

McFarlane: Well, I think it's fair to assume that when the government files a Notice of Appeal we have some basis.

Seney: Right. Right.

McFarlane: Ultimately, though . . .

Seney: I, I don't want to know what, because I know you won't tell me what the substance of it is. I'm just curious what the process is there.

McFarlane: Right.

Seney: Are you and Fred discussing it, and who else? When you, when you talk about this kind of thing who, who is part, sitting at the conference table, or on the conference call when you're talking about this sort of thing?

Role of the Solicitor General

McFarlane: All appeals filed by the United States in any litigation have to be approved by the Solicitor General.

Seney: Right. Right.

McFarlane: So.

Seney: So, there's someone from the Solicitor's Office?

McFarlane: No. Not the Solicitor's Office. The Solicitor General.

Seney: I'm sorry, yes. I'm sorry. The Solicitor is something different. (McFarlane: Right.) The Solicitor General is in the Attorney General's Office, (McFarlane: Right.) and who oversees all appeals? So, there would

be someone from the Solicitor General's Office?

McFarlane: The S-G's [Solicitor General] Office reviews recommendations that come up from the litigating division, (Seney: I see.) and makes a final determination whether to allow, whether to allow an appeal to go forward, on what issues, or whether in fact not to appeal, not to pursue the appeal.

Seney: Right. What, but again I'm curious, is, if you could say, and I don't know why you couldn't really say, who among you is talking about when you say, "Okay, we're going to file the Notice of Appeal. That decision's made." Maybe you just do that automatically within the time frame?

McFarlane: Well, we were . .

Seney: If you're, is that sort of an automatic thing?

McFarlane: No. I mean, it's something that we're aware that the clock is ticking. (Seney: Right.) So in order to preserve the government's ability to pursue and appeal, we don't want to have the clock run out. (Seney: Right. Right.) And so, we file a Notice of Appeal. And, but whether we pursue the appeal or wind up

dismissing the appeal is something that ultimately is a decision that is made by the S-G, with input from the client agency, and the litigating divisions within Justice.

Seney: I see. So, the litigating, that would be Fred I would think?

McFarlane: Well, it would be the Natural Resources Section in the Environment Division.

Seney: That would be you?

McFarlane: Well, that would be Fred too?

Seney: That would? That's also Fred?

McFarlane: Yes.

Seney: Because, now we're talking about the Justice Department. He is . . .

McFarlane: He's, yes, he's in the Justice Department.

Seney: I know, I understand that. (Laugh) But, but you know, always, it never really gives him much of a title. You know what I mean?

McFarlane: Well, he's a Special Litigation Counsel.

He's very senior attorney. He is now working, you know, institutionally within the Natural Resources Section. (Seney: Right. Right.) And so, you know, that's . . .

Seney: Well who, who drafted the appeal?

McFarlane: When you say, "Who drafted the appeal?" what are you referring to?

Seney: (Laugh) This is what we were just talking about here.

McFarlane: You mean the Notice of Appeal?

Seney: Well, yeah, the Notice of Appeal. Who drafted that?

McFarlane: I did.

Seney: You did? Okay.

McFarlane: It just simply says, "The United States appeals from the judgment." It doesn't offer any reasons (Seney: Okay.) or explanations.

Seney: And have you done any, have you put in your reasons or explanations yet to the court?

McFarlane: We have not filed our brief yet.

Seney: Has it gone to the Solicitor General yet?

McFarlane: Yes.

Seney: Who drafted that?

McFarlane: Who drafted what?

Seney: The one that went to the Solicitor General?

McFarlane: The one what? (Laugh) I mean, there's an internal—now, I'm not, I'm not trying to be obtuse here. There is a recommendation process (Seney: Right. Right.) that is internal to the Department of Justice. All of these communications are privileged.

Seney: Right. Right. Well, I'm not trying to get to the substance of what you're saying here.

McFarlane: And it's a . . .

Seney: I'm must curious about who does what?

Process of Filing an Appeal

McFarlane: There are recommendations that come up

through the litigating divisions. In this instance, the Environment and Natural Resources Division, and there are also recommendations from the client agency. And, those are put together and put before the Solicitor General's Office. And the S-G's Office reviews them ultimately and will make the decision whether to allow, authorize the appeal or, and if so on what basis?

Seney: I'm going to keep trying here counselor.

McFarlane: I can't go into any further details.

Seney: I don't want to know anything about the substance. Are you the client agency?

McFarlane: No. The Department of the Interior's the client agency.

Seney: And who do you work for?

McFarlane: I work for the Department, I'm with the Department of Justice.

Seney: Oh, all right. Okay. (McFarlane: Sure.) All right. All right.

McFarlane: So, I'm their lawyer. (Laugh) I'm a hired

gun.

Seney: You're a hired gun? All right. So, I'm must, I'm really just curious about who, you know, who does what, and you have meetings with people afterwards and you say, "Well, you know, some of it we like. A lot of it we don't like. We think we've got grounds for appeal. This is what we think those grounds of appeal are." I don't want you to tell me that. I just, I'm just curious who sits down and discusses these things together?

McFarlane: Well, you know, it's a process that goes on. In every instance we have, in E-N-R-D [Environmental and Natural Resources Division] and, we have a separate Appellate Section, which handles appeals before the Courts (Seney: Yeah.) of Appeals. Once a case, once there's a final judgment in a case, the question then becomes whether the United States, you know, whether it's a, if, and if, if the judgment is at least, there are parts of it that may be adverse then the question becomes, "Well, do we appeal?" And, that's a, that is something that is the subject of an internal process that involves not just the line attorneys, Fred and me, but also our Appellate Section. It also involves

input from the client agency.

Seney: In this case?

McFarlane: The Department of the Interior.

Seney: The Department of the Interior. And who in the Department of the Interior is the person that you talk to about this sort of thing?

McFarlane: Well, it would be, we would be, we would be dealing with the Solicitor's Office, (Seney: Okay.) the Bureau of Reclamation. I think we were also consulting with the Bureau of Indian Affairs. And, ultimately there is a recommendation that comes over from the Department of the Interior. And that . . .

Seney: The Solicitor, then, I take it would coordinate sort of dealing with (McFarlane: Yes.) Reclamation and Indian Affairs, (McFarlane: Yes.) and get back to you, and get back to Fred?

McFarlane: Yes. (Seney: Right.) And then that is put together with recommendations from E-N-R-D, and it goes up to the S-G. (Seney: Right.) And it's that process.

Seney: And the, how long does that take usually to (McFarlane: Oh.) get through something like that?

McFarlane: I mean, it can vary. It usually takes, it usually takes longer than the time period that we have to file a (Seney: Right. Right.) Notice of Appeal though, under the, (Seney: Right.) under the rules.

Seney: And, I . . .

McFarlane: And it depends upon, it depends upon the nature of the litigation. It can also depend upon whether there are settlement discussions going on. It can depend upon . . .

Seney: Are there?

McFarlane: You know, I can't comment on that one.

Seney: All right.

McFarlane: I, you know, I said that there have been.

Seney: Right.

McFarlane: But, you know, it's, it really does vary

enormously from case to case.

Seney: I wouldn't think somehow that this would, there would be a lot of urgency here, in terms—I mean, some cases, maybe if you're dealing with endangered species and something is likely to happen unless you get on it quickly then you might, then there might be a tendency to move a little more quickly. But, I wouldn't think that this would be regarded as an urgent matter for the process that you're describing. Would it?

McFarlane: I don't think it, I mean it certainly hasn't had the kind of time imperatives that (Seney: Right.) some other litigation has had, for some of those reasons or for other reasons.

Negotiations with TCID

Seney: Right. Right. Right. So, there were negotiations before the litigation commenced with T-C-I-D on all of this, were there not?

McFarlane: We had a court-ordered mediation session in front of a magistrate judge before, in the fall of 2001, shortly before the case went to trial.

Seney: Did that session last very long?

McFarlane: A day.

Seney: Was there any, did it look like there was going to be any hope for settlement through that? He's smiling again.

McFarlane: Hope? (Laugh) I, you know, I really can't comment on that. (Seney: Yeah.) It's hard . . .

Seney: Well, you know and I know that T-C-I-D has had its feet pretty firmly set on this matter, that they really think they didn't do anything wrong, that they don't owe anybody anything on this. I mean, that's no secret. They say that all the time.

McFarlane: Yeah. No, I've heard them say that.

Seney: Yeah.

McFarlane: You know, you, there are many different reasons why parties get into settlement negotiations. Sometimes they are willing, the parties are willing to set aside their legal positions and decide that in order to avoid the expense and uncertainty of a, of a trial that they'll compromise. Sometimes they're, although they feel pretty, a party may feel

that although it has a strong case, you know, things could go the other way. The judge could decide all or part of it against them and so that they may be better off cutting the best deal they can now rather than taking the case to trial.

There may be reasons to settle the case that have absolutely nothing to do with the merits of the case, but perhaps desire, a desire to get something behind you and to move on and try to forge a new relationship. I'm not saying that any of these things entered into the, any of the dynamics of the government, the [Pyramid Lake Paiute] tribe, and T-C-I-D. But they, you know, just because T-C-I-D says that it's, you know, doesn't believe it owes anything to anybody, and believes the government's case was wrong doesn't mean that, that, you know, given a particular dynamic that they wouldn't enter into some kind of compromise.

Seney: Right. Although, T-C-I-D is not known for its compromises?

TCID and Litigation

McFarlane: It is certainly not, there certainly doesn't seem to be a lengthy record of (Seney:

Right.) negotiated resolution of issues
(Seney: Yes. Exactly.) with T-C-I-D.

Seney: Right. Far more a record of litigation?

McFarlane: That has been the, that has been the history.

Seney: Right. Right. One of the things that the court did say is, "Because of the long delay in bringing this action by the United States, and because the United States has destroyed records that would have been helpful in the court's final assessment of diversions in this case, of diversions in this case, the court concludes that the United States should not be allowed any interest in kind." What does that mean?

McFarlane: I think what the judge is doing there is talking about, I believe, prejudgment interest. The judgment, the final judgment that the court entered in February 2005 did award post judgment interest on the, on the . . .

Seney: Can you explain the prejudgment and what is, what did you mean it doesn't have any "prejudgment interest"?

Pre and Post Judgement Interests

McFarlane: The court determined that the amount of water that T-C-I-D would be liable to repay would not be subject to interest that either dated from the time the United States (Seney: Ah.) had brought the claim or that the time the claim of, for recoupment accrued, up to the date the court entered the judgment. That's prejudgment interest.

Seney: I see. Okay.

McFarlane: What the court did do, however, was award post judgment interest under the terms of the judgment that the court entered in February of 2005, at a rate of two percent per year on the unpaid balance. And, this is judgment, interest in kind. So, it's part of the water (Seney: I see.) debt (Seney: I see.) that T-C-I-D (Seney: Right. Right.) owes.

Seney: All the government asked for previous was two percent, right?

McFarlane: I think that's correct. I don't believe that we ever asked for more than two percent.

Seney: Yeah. There was some allusion to the fact that six percent was probably not unfair, but

two percent would be fine.

McFarlane: I can't comment on that, you know. I would have to—we filed a ton of briefs (Seney: Right.) in this case.

Seney: Right. I know. There was a huge number.

McFarlane: I, I, I'm not sure that I recall every last (Seney: Right.) detail of every one of them, but I don't believe that we ever sought more than two percent interest (Seney: Right.) in kind.

Seney: Okay. What does it mean, in terms of “destroyed records that would have been helpful”?

Destroyed Records Incident

McFarlane: That's a reference to an incident that occurred during discovery when a certain number of file folders over in the Bureau of Reclamation's central files were inadvertently shredded as part of a document cleanup of some old property records. After documents that we had tagged for copy had actually been copied and produced to—well, they had been copied and they were

subsequently produced to T-C-I-D.

Seney: But, the originals were shredded?

McFarlane: The originals were shredded.

Seney: And, that's a problem? Even if you have . . .

McFarlane: Well, I think it was a, it was a very unfortunate circumstance. Yes. But . . .

Seney: Where, where did this shredding take place?

McFarlane: It apparently took place in the, in the central file facility that Reclamation maintains over at Cottage Way in Sacramento. (Seney: I see.) And, we had understood that there was, over a weekend, there was a group doing a routine culling, if you will, of property records that were no longer needed and under Record Retention Rules that Reclamation no longer had to retain them. And so, they were, they were being fed through a shredder and somebody mistakenly ran some additional files that were, had not been put back on the shelves through the same shredder. This all came out in subsequent depositions that T-C-I-D took.

Seney: Yeah. Yeah. Did it sound funny to you?

McFarlane: Well, I think it sounds—I mean, there was never any proof that this was, and I don't believe that this was, this was something that was either intentional or, you know, the result of some malevolence. It, it was certainly embarrassing. It was certainly unfortunate. I think it's something that, you know, we certainly don't condone. (Seney: Right. Right.) I think the, the net consequence of this is a bit overblown frankly, because the documents had been searched and tagged for potentially relevant documents pursuant to a T-C-I-D discovery request and that they had been copied, and . . .

Seney: And sent to T-C-I-D?

McFarlane: And sent to T-C-I-D.

Seney: So, they had the copies if not the originals?

McFarlane: So, they had the copies. That's correct.

Seney: Is there some certification process for copies like this that if you send them off, does someone say, "These are accurate reflections of the documents requested"?

McFarlane: Well nobody's, nobody's ever challenged the fact that these were accurate copies. (Seney: Uh huh.) I don't think T-C-I-D has alleged that the copies themselves (Seney: Yeah.) were inaccurate. (Seney: Yeah.) But, there's no formal certification process. I mean, basically you're, you're operating under the federal Rules of Civil Procedure.

Seney: And you're on your honor?

McFarlane: Yeah.

Seney: Yeah.

McFarlane: And you're subject to, you know, sanctions. The court could impose sanctions under the rules if you violate discovery orders. (Seney: Right.) And, and misuse the discovery process. But I, you know, as I say this was a very unfortunate thing, nevertheless, even though I don't think it had any, you know, significant consequences in that it—I mean, let me put it this way. I don't think that there, there was never any evidence, and I don't believe there was any evidence, that documents that were relevant to the issues in the recoupment case, were destroyed without having been copied.

Seney: Right. Right. You know, on the documents issue it's been said to me by people out at the district [TCID] that, you know, that this letter, so-called letter from Morton, Secretary Rogers Morton,¹³ having to do with recoupment, can't ever be found, threatening the district with dire consequences if it didn't live up to its responsibilities and not divert more water under the OCAP.

The Secretary's Letter

McFarlane: You mean, this is the letter that was sent to T-C-I-D advising them that their contract was being canceled?

Seney: Right.

McFarlane: Well, I don't know what T-C-I-D has in its, its records. I'm surprised they don't have a copy of that letter because Reclamation kept a copy. (Seney: Right. Right.) And that copy's been part of the . . .

Seney: Well, this is I think maybe one that preceded it that said, "If you don't, we'll cancel

13. Rogers C.B. Morton served as Secretary of the Interior under the Nixon and Ford administrations, 1971-1975.

your—if you don't live up to the OCAP we'll cancel your, your thing, and all the water has to be paid back that you're taking above the OCAP.”

McFarlane: I believe there, I believe that there were letters produced in discovery (Seney: Okay.) to that effect.

Seney: Yeah. All right. I just, I don't want to say myths, but perhaps misunderstandings that flourish in Fallon (Laugh) sometimes.

McFarlane: Well I, you know, I, I can't comment. You know, we certainly had discovery requests in to T-C-I-D for all relevant documents in T-C-I-D's records, and we saw, they produced documents which they claimed were in response to those discovery requests and we reviewed them. So.

Seney: What role did the State of Nevada play in this lawsuit and how, you said they came late, when we began talking. You said they came late at least to the discovery process. What was their interest in this?

The Role of the State of Nevada

McFarlane: Well, the State of Nevada, through the

Nevada, I think, Department of Public Lands, I'm not sure of the exact title, the State Lands Department¹⁴ and the Nevada Division of Wildlife, have interests in the wetlands out at Carson Lake and Pasture. The state has also, over time, acquired water rights and has transferred those water rights to Carson Lake and Pasture Wetlands, which it wants to administer and ultimately wants title transferred so that those lands moved from federal ownership into state ownership. (Seney: Right.) And, as I understand it the state intervened. The state intervened in the case. I mean, well let me back up a minute. By dint of the fact that the state owned Newlands Project water rights it was, it became part of the recoupment case. The state then, because the state, like all governmental entities wants to represent its own interests and not be represented by somebody else, the state intervened separately and, as a defendant, and participated in that capacity.

Seney: They were fearful that, that some of their water rights would be on the table if the recoupment went against the district?

14. Nevada Division of State Lands, within the State Land Office.

McFarlane: Well, you'll have to talk to them about what they were fearful of. (Laugh) I mean, this is, it was never our intent to adversely affect water rights that the state had acquired for wetlands restoration purposes because the federal government has done the same thing. (Seney: Right. Right.) And, if you'll notice I think our 1999 proposed Recoupment Plan addressed, tried, (Seney: Right.) addressed issues having to do with wetlands protection. (Seney: Right. Right.) But, for whatever reason the state chose to intervene as a defendant and did participate in the trial.

Seney: Right. Let me change this.

END SIDE 2, TAPE 1. DECEMBER 10, 2007.

BEGIN SIDE 1, TAPE 2. DECEMBER 10, 2007.

Seney: His office in Sacramento, California. This is our second session and our second tape. Today is December 10, 2007.

One thing I did want to ask you about was how does, how many of these kinds of cases now have you been part of?

Trial Experience

McFarlane: Define "kinds of cases."

- Seney: Well, I . . .
- McFarlane: You mean cases involving the Truckee and Carson (Seney: Well, no I mean it . . .) watersheds?
- Seney: You know, just in terms of litigation since you've been in the office you're in now here in Sacramento. How many cases are we talking, ten, fifteen, twenty?
- McFarlane: Total?
- Seney: Yeah.
- McFarlane: All kinds of litigation?
- Seney: Every kind. Yeah.
- McFarlane: You know, I haven't counted.
- Seney: There are so many? There are lots?
- McFarlane: Well, there are certainly a lot.
- Seney: Yeah. I was just curious how you would compare this case to some of the others that you've participated in?

McFarlane: The recoupment case?

Seney: Yeah.

McFarlane: Well it was a very, it was a, a very challenging case, a very . . .

Seney: Why do you say “challenging”?

Recoupment was a Challenging Case

McFarlane: It was challenging because the, the claim for relief that we were asserting against T-C-I-D there aren't very many precedents for doing precisely this kind of thing, recovering water in kind. Although it is a kind of equitable restitutionary type remedy. (Seney: Right.) We were authorized by Congress to seek recoupment of water that had been unlawfully diverted in violation of applicable OCAP and for the Ninth . . .

Seney: This is under Public Law 101-618?

McFarlane: That's correct. And, the time period was, was, there weren't a lot of witnesses. Well, there were no witnesses who still worked for the Bureau of Reclamation who were working for the Bureau of Reclamation back in the period. So, we had to basically try this

case on a paper record and do a lot of document research in order to put our case together and that was very challenging. It was also extremely interesting, frankly, because it got us back into the history of the Newlands Project during it, and events involving the Truckee River during a very contentious period in, you know, the longer history of the Newlands Project. So, I would say, you know, it's also unusual in the sense that we were the plaintiff in this case. And, in most of the cases that I've handled I've represented the United States in a defensive capacity.

Seney: How is that different?

McFarlane: Well, it's very different in the sense that when you're representing the United States as a defendant you have issues involving waivers of sovereign immunity that, that need to be examined (Seney: Ah.) very carefully to determine under what circumstances the United States consents to be sued. In this instance, the jurisdiction is merely by dint of the fact that the United States is the plaintiff, under 28 U-S-C 1345. The federal courts have jurisdiction anytime the United States is a plaintiff in a case. (Seney: Right.) So, the

jurisdictional issues are not as, I would say, not as much in the forefront as they are when you're defending the United States or one of its agencies.

And, most of the litigation that I've handled, not all but most, in the time I've been here in Sacramento, has been Administrative Procedure Act litigation, where you're proceeding on an Administrative Record that is prepared by an agency that is the Administrative Record that was before the agency at the time the agency made the decision that's under challenge. (Seney: Right. Right.) In this instance, of course, we were seeking to recover water in violation of OCAP. So we had to establish what the OCAPs were that were in effect at any particular time. And then we had to produce evidence that T-C-I-D had violated them. And, it was a much more conventional civil trial in the sense that you were building the record in the District Court itself during the trial and not as a result of agency, agency administrative process. (Seney: Right.) So, those are some salient differences.

Seney: So, it sounds, sounds more fun, more interesting?

McFarlane: Well, it was a lot of work. It was, it was, it was very interesting. (Seney: Yeah.) I'm not sure I would say it was more fun, (Laugh) but it was certainly . . .

Seney: Maybe "fun" is the wrong word, huh?

McFarlane: It was a, it was a, it was a fascinating case to be involved in.

Arguing in Appeals Court

Seney: Yeah. And it still goes on? I mean, will you do the arguing before the Appeals Court, before the Ninth Circuit?

McFarlane: Probably not.

Seney: Who would do that, the, someone in the Solicitor's Office?

McFarlane: Uhm, it

Seney: Solicitor General, I should say.

McFarlane: No. Probably somebody in our Appellate Section.

Seney: I see. I see. Will you be there? I mean, will

you take part in that in some way, do you think?

McFarlane: Well, I, I, you know, in all of the cases that we have on appeal, if it's a case of mine I tend to work very closely with the Appellate Section lawyer. I review the briefs that he or she drafts, and provide comments on them. I help them, help answer questions about (Seney: Right.) the record, you know, if there are particular documents or portions of the record that are particularly important. I might point those out or help, in a case like this the, where the record is very voluminous, help point the appellate attorney towards, you know, the documents in the record that they should be aware of.

And, you know, do I participate at trial, or during oral argument? No, because oral arguments in the Court of Appeals are generally limited to twenty minutes a side, and the court is not there to really, the panel, the three-judge panel is not there really to make findings or to, and it certainly doesn't weigh evidence. It's there basically there to ask questions based on the briefs that they've, (Seney: Right.) that have been filed with the court and, you know, explore portions of the parties' arguments.

Seney: I understand one of the things that may be new about this particular case is that you did use some sort of a recoupment remedy with, the court thought it was reasonable in this case, and I'm reading from an article from—I can't (turning pages) first page. This is from—it doesn't give me the whole thing. (McFarlane: Hmm.) It says, "U.S. District Court in Nevada allows recoupment of illegally-diverted water," and it's written by Debbie A. Schostack [spelling?] of McDonald, Carano, Wilson of Reno, Nevada.

McFarlane: Oh, I think I may have been—I don't know that I've actually read this but I think it's, is this done for like a practitioner's . . .

Seney: Yeah. Some kind of a note (McFarlane: Right.) I would call it. An economist would call this a "note."

McFarlane: Okay.

Recoupment Remedy

Seney: Yeah. It says, "If the recoupment remedy used by the court in this case is deemed to be a reasonable form of equitable restitution it

will likely make water users more cautious about exceeding their allotments. Until this decision, this water has become a more precious commodity. Users may have been inclined to gamble on the possibility of money damages for excess diversions. Now, the prospect of being forced to give back that water in the future may add an extra enforcement incentive to water users that has not existed historically.” Does that sound fair to you?

McFarlane: I think it’s an interesting observation.

Seney: Yeah. I thought it was too. Yeah. Yeah. Because you never, you never talked about money damages here did you?

McFarlane: No. In fact, we made it very clear, and again our filings, particularly early on in the case, I think we actually came right out and said this, that we weren’t interested in money. (Seney: Right.) We were interested in getting water back.

Seney: Right. Right. And that’s exactly what the court in this case has given you, and . . .

McFarlane: That’s, that’s correct.

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- Seney: And, assuming that the Appeals Court, whatever they may do with your objections to the decision affirms this part of it then that's fairly significant isn't it?
- McFarlane: I think so. (Seney: Yeah.) And I think the fact that the court awarded the restitutionary remedy for violations of the Secretary's regulations and violations of the decrees is, is significant.
- Seney: Yeah. Yeah. Well, I do, I thought that was, as well, an interesting observation about what, what this may come to mean given the value and, some might say, increasing scarcity of water in the West. And, I would think it would be, to the extent that people become aware of the payback in kind as opposed to the cash it would be something that would make them think twice.
(McFarlane: Uhm-hmm.) There's another thing here is, that I want to ask you about. T-C-I-D had argued that the, and I love this, "usufructuary"?
- McFarlane: Usufructuary.
- Seney: "Usufructuary nature of water rights precluded the equitable remedy of
-

restitution.” And then, would you like me to read what more she says here about this?

McFarlane: Yeah, cause I’m–yeah.

Seney: “In other words, because the right to beneficially use the water ended with its consumption, T-C-I-D reasoned there was nothing left of the right to give back to the United States and the tribe. (Laugh) And finding for the United States and the tribe the court rejected these contentions and acknowledged that its, that its equitable jurisdiction encompassed the restitution of illegally-diverted water.” This must, I would think that you, this would come under the heading of an affirmative defense, their claiming this?

McFarlane: I would think so.

Seney: Yeah. What other affirmative defenses do you recall that they, they put across?

TCID’s Affirmative Defenses

McFarlane: There was one based upon—I believe this was an affirmative defense. There was one based upon a—they, T-C-I-D alleged that the government had entered into a commitment

not to enforce OCAP until the lawsuit that T-C-I-D had filed to stop the Secretary from taking over the project and canceling their contract was resolved. (Seney: Ah.) This was a separate lawsuit called *City of Fallon vs. Morton*. And, it basically challenged the takeover of the project without the preparation of an E-I-S [Environmental Impact Statement] under NEPA [National Environmental Policy Act]. And, T-C-I-D alleged, but I think failed to prove, that there was a, that the United States had made a commitment not to enforce the OCAP, or that the OCAP would not be enforced until the other lawsuit, U.S., or (Seney: Oh.) *T-C-I-D vs. Secretary* was resolved. So, that was one other affirmative defense.

Seney: But they were able to produce documentary or, or testimony, documentary evidence or testimony to that effect?

McFarlane: They did call the Chief Justice of the Nevada Supreme Court as a witness, but he was unable to recall any specific promise or commitment by the United States to do what T-C-I-D alleged. And there was no, there was no documentary evidence that we ever saw that convinced us, certainly, that there

was any such promise.

Seney: Was the Chief Justice called as, he had heard this as Chief Justice, or (McFarlane: No.) was he in another position?

McFarlane: Back when he, back when he was an attorney for, I believe, the City of Fallon.

Seney: Ah. Okay.

McFarlane: So, he was testifying about things which had happened many years ago, (Seney: Right. Right.) but still he believed it to be the case.

Seney: I would think it would be unusual to have a state chief justice testifying in a case like this?

McFarlane: It was, I would tend to agree with you.

Seney: What was the atmosphere like in the courtroom?

McFarlane: Well, it was very, it was very respectful. (Seney: Right.) He was, you know, I think he was a . . . we didn't have an opportunity to take his deposition before he was called as a witness. We did have an opportunity to informally ask him some questions. But,

yeah, I think beyond that I wouldn't want to characterize his testimony.

Seney: No. I wasn't asking that. But it, it didn't turn, he couldn't recall anything of value, I guess, to the T-C-I-D's . . .

McFarlane: Well, I think, you know, I think when, when probed about his specific recollection he could not recall that there was anything other than what was already in the record (Seney: Ah.) on this particular issue. And, what there was in the record was a, I believe, a letter from either the Under Secretary or an Assistant Secretary of Interior saying that the United States would not take over the project until it had a court order allowing it to do so. (Seney: Oh.) That it would not result in self-help, so to speak. But that, that letter says nothing about (Seney: Yeah.) not, not enforcing the OCAP, or that the OCAP was somehow suspended during this time period. (Seney: Right.) We took the position that the OCAP remained in effect and T-C-I-D remained, retained the obligation to comply with them during this entire period.

Seney: Well, during this period T-C-I-D said that

they weren't going to obey the OCAP?
They never said it wasn't in effect. They
said they weren't going to obey it, right?

McFarlane: That's correct.

Seney: Yeah. Right. And, saying, "It's not in
effect," and "We're not going to obey it," is
two quite different things.

McFarlane: I think that's a fair statement.

Seney: Well, I'm glad you at least agree with that.
(Laugh) What other affirmative defenses do
you recall?

McFarlane: You know, it's been a while since I've
looked at T-C-I-D's counterclaim and their,
their answer. I, (sigh) . . .

Seney: Now, they're not appealing it, are they?

McFarlane: Oh yes.

Seney: Oh, they are?

McFarlane: Oh, they have, they've, they have filed a
brief.

Seney: Ah, because, because (McFarlane: Yes.) they

said initially they weren't going to. Oh, this is wonderful. Mike Mackedon said, "We have no quarrel with this decision." And . . .

McFarlane: Well, Mackedon doesn't represent T-C-I-D.

Seney: Right. Right. I know, he's the City of Fallon attorney. (McFarlane: Right.) Right.

McFarlane: Yeah. His clients are off the hook entirely.

Seney: Ah. His were the individual water users?

McFarlane: Well, he represented some individuals and he also represented the City of Fallon. (Seney: Ah.) So, he's, he, you know, and the court dismissed those individual interveners, as I said, from the case (Seney: Right. Right.) at the end of the trial. And so, you know, they, they don't have to worry about pursuing an appeal, although I gathered that they've, that they have joined in T-C-I-D's appeal. So.

Seney: Interesting. You know, one, one more question that has to do with the Fallon [Paiute Shoshone] Tribe, which was not in any way included in this, the theory being—well, what was the theory?

Fallon Paiute Shoshone Tribe

- McFarlane: We did not feel that it was appropriate, because I don't believe that the Fallon Tribe was receiving deliveries of water for irrigation purposes. And, I think there's even a question whether the Fallon Tribe's reservation is part of the Newlands Project, to make the Fallon, to bring, make the Fallon Tribe the defendant in this case. And so, we did not pursue (Seney: Right. Right.) their inclusion. (Seney: Right.) I mean, they could have intervened if they wanted to. I don't recall whether they did. I don't believe they did as a defendant.
- Seney: I don't think so.
- McFarlane: They were monitoring, but (Seney: Yeah.) not participating.
- Seney: Well, I know they're very anxious to have it understood that they're not part of T-C-I-D. They won't become part of the board. They see T-C-I-D as simply a conveyance mechanism to bring their water rights to them.
- McFarlane: That's, that, that I can understand that position.

Seney: Right. Right. Right. All right. That's about all I have to ask you about this.

McFarlane: Okay.

Seney: Any other comments you'd care to make?

McFarlane: No.

Seney: No? (Laugh) Well, thank you Stephen, very much. I appreciate it.

END SIDE 1, TAPE 2. DECEMBER 10, 2007.
END OF INTERVIEWS.