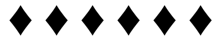
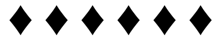
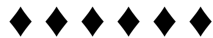
ORAL HISTORY INTERVIEWS
FRED DISHEROON



STATUS OF INTERVIEWS:
OPEN FOR RESEARCH



Interviews Conducted and Edited by:
Donald B. Seney in 1994 and 2006,
California State University-Sacramento
For the Bureau of Reclamation's
Newlands Project Oral History Series



Interview desktop published–2010
By Brit Allan Storey, Senior Historian

Oral History Program
Bureau of Reclamation
Denver, Colorado

SUGGESTED CITATION:

DISHEROON, FRED, ORAL HISTORY INTERVIEWS. 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. Repository for the record copy of the interview transcript is the National Archives and Records Administration in College Park, Maryland.

Record copies of this transcript are printed on 20 lb., 100% cotton, archival quality paper. All other copies are printed on normal duplicating paper.

Table of Contents

Table of Contents i

Statements of Donation xxiii

Introduction xxvii

Oral History Interviews 1
Early Life and Education 1
Grew up in Hot Springs, Arkansas, and Los Angeles 1
Born in Hot Springs, Arkansas, in 1931 1
Was in Los Angeles During World War II 2
Attended Hendrix College in Arkansas Studying Political Science and History, Graduating in 1953 4
Attended Law School at Southern Methodist University, Graduating in 1956 4
In the Army Served in the Judge Advocate General's Corps 4
After Leaving the Army Started Private Practice in Dallas, Texas 5
Represented Casualty Insurance Companies 6
Went into a Law Firm that Represented a Bank . . 6
Goes to Work for the Army Corps of Engineers . . 7
Moved to Washington, D.C., in 1970 7
". . . the Department of Justice essentially does the litigation for all Federal agencies with some limited exceptions, so that the attorneys for the agencies do not actually do the litigation work: they provide the information and help and assist . . ." 8
". . . did that for about five years . . . their big area of practice was . . . contract litigation, which

was primarily disputes over how much a contractor was due under his contract. . . ." 8
Litigation Arising out of Federal Environmental Legislation 9
". . . in 1970, when I went, there was sort of a sea change in Federal law because that was the start of the environmental litigation. . . . Before that, the government litigation was primarily financial. In fact, prior to 1970, it was difficult to sue the government . . . because Congress had not provided the necessary authorization or waiver of sovereign immunity. But, in these environmental statutes, they basically changed the rules and opened up the courts to subject Federal decisions to judicial review. . . ." 9
". . . I got involved in sort of the beginning of this type of litigation, and I spent most of my time working on environmental matters, rather than contract matters . . ." 10
". . . much more interesting. It was an area where the law wasn't fixed, it was developing, and you had to sort of anticipate and reason by analogy rather than just looking at the precedent and applying it. . . ." 10
Going to Work for the U.S. Justice Department . 11
"So I transferred over in 1975, and have been at the Justice Department ever since handling all different types of environmental litigation, but I specialize in District Court trial work . . ." 11
"I've branched out significantly beyond water: I've handled cases in just about every area of environmental law that you can think of. . . ."

. . . . 12
Became Involved in the Newlands Project in about 1984 12
". . . I was made a special litigation counsel in 1978, which is sort of a roving attorney who is available to handle complex cases of any particular type without regard to particular subject matter. . . ." 12
The 1983 Decision in *Nevada v. U.S.* Activated a 1968 Suit Against the Department of the Interior Filed by the Pyramid Lake Paiute Tribe 13
Assigned the Reactivated Case Because the Previously Assigned Attorneys Were Gone 13
"So I picked that case up and it essentially involved issues as to Indians' water rights, endangered species, and the whole gambit of environmental issues. . . ." 13
"It was rather bewildering to try to get a handle on exactly what the issues were. It's the type of case where . . . there are these concepts that people have developed over the years where they'll have their own particular language . . . unique to the particular area and the controversy. . . . its complexity was far beyond the usual one, it just took a long time to really become . . . fully conversant . . ." 14
"When I say 'this case,' I don't just mean the Pyramid Lake Case because as a result of that case I got involved in a number of other related cases where sometimes we were on the same side as the tribe, sometimes we were on opposite sides. Sometimes they weren't a party and we were. It was just all an

outgrowth of essentially this dispute over the uses of the water of the Truckee River, and all of the ramifications and all the litigation. . . ." 15
". . . this case over the years, the time is varied but it's taken anywhere from a third to a half of my time. . . ." 16
The Truckee River Cases Are Probably His Second Most Complicated Case 16
". . . you have almost every issue in the water right environmental area that you're likely to find in the American West. . . ." 17
Issues in the Newlands Project Litigation 17
Conflicting Federal Interests 18
"One needs to understand that when we go into Federal Court, we, the Justice Department, represent the United States. We don't represent necessarily the Interior Department or sub-agencies of the Interior Department. . . ." 18
"Ultimately, the Justice Department is charged with making the decision as to what that position should be. We don't do that in isolation, we do it in consultation with our clients. . . ." 18
". . . one of the interesting things about this case is even in representing the Interior Department, there are three branches of the Interior Department who have a direct interest. . . . Bureau of Indian Affairs, . . . Bureau of Reclamation, . . . and you have the Fish and Wildlife Service . . ." 19
"If you have one client, which ultimately you can say you do in the sense that the Secretary of [the] Interior is responsible and has all these conflicting obligations to the extent they have

developed a policy as a result of consultation with their attorneys and they say, 'This is our policy.' The Justice Department will defend that policy as long as there's a legal rational basis for that, so we don't try to second-guess them on their conclusions . . ." 20
". . . in this case there have been different views between the Bureau of Reclamation and the Fish and Wildlife Service. We've always been able to obtain a resolution of that through the Secretary of the Interior . . ." 22
Recent Litigation Involving the Newlands Project 24
". . . *Pyramid Lake Tribe v. Morton*. This was a case that the tribe initiated against the Federal government . . . complaining that the Secretary of the Interior had violated the trust responsibilities to the tribe by not securing adequate water to protect Pyramid Lake and the fishery in the lake. . . ." 24
"This wasn't an Endangered Species Act suit, although the cui-ui had been listed as an endangered species, but it was based on their trust responsibility, that Interior had a responsibility to help maintain the Indian culture. . . ." 25
Brief History of Newlands Project Litigation . . . 25
United States v. Orr Ditch and *United States v. Alpine Land and Reservoir Company* Were Cases Brought by the United States to, Respectively, Obtain Water Rights on the Truckee and Carson Rivers 26
"It's particularly important to note that in the Orr Ditch Case on the Truckee River, the United States applied not only for water rights for

irrigation for the Newlands Project . . . but also irrigation rights for the Pyramid Lake [Paiute] Tribe. But they did *not* seek water rights to maintain the lake. . . ." 27
"From 1926 until roughly 1968, when TCID was running the project and was diverting . . . as much water as they possibly could for the irrigation district . . . the lake level in Pyramid Lake dropped by some . . . seventy feet because the water supply that had been coming down the Truckee wasn't coming any longer. . . ." 29
Operating Criteria and Procedures (OCAP) for the Newlands Project 29
Pyramid Lake V. Morton 30
". . . their lawsuit was against the Secretary of Interior and the law, up until that point in time, was generally, if you want to sue a Federal agency, you sued them in Washington. Congress hadn't really liberalized the rules where you can now sue a Federal agency almost anywhere you want to. . . ." 31
". . . there were new OCAP issued in '72. The Court ultimately found those to be arbitrary because they were not stringent enough and found that the secretary *had*, in fact, abused his discretion, and had *not* carried out the trust responsibility, so he ordered more stringent OCAP put into place in 1973 . . ." 31
Gesell Decree 32
". . . the OCAP put a limit of total diversion of water that could be available to the Newlands Project, I think it was 292,000 acre feet. . . . Which would have been *less* than that from the Truckee River, and would have

substantially reduced diversions from the Truckee River to the Carson Division. . . .” 32
The 33
“The secretary then . . . directed TCID to implement the new OCAP. TCID refused, they said, ‘We were not a party of the litigation, we’re not bound by it and you, Mr. Secretary, don’t have the authority to tell us [what to do]. We have water rights, we’re entitled to the amount of water, and you can’t direct us to follow these OCAP and we’re not going to do it.’. . .” 33
“. . . the Pyramid Lake Paiute Tribe after the Gesell Decision . . . talked to Interior and said, ‘The Court has found a violation of the trust responsibilities, we’ve lost this water over the last fifty years and we’re entitled to damages.’ . . . Federal government did ultimately three things to try to remedy that because the Federal government . . . recognized that there had been this failure to carry out the trust responsibility. One of the things, I’ll come back to, is to try to enforce the OCAP to reduce the amount of water. Second was, we entered into a monetary settlement with the tribe. . . . And the third was to try to take care of the future problems. . . .” 34
“The Justice Department and Interior had a theory that the water rights for the project were held in the name of the United States, not in the name of the individuals, and that the United States *could* apportion the water rights between the farmers and then transfer the remainder to the Indians. . . .” 35

United States v. Truckee-Carson Irrigation District 35
Nevada v. United States 36
Truckee-Carson Irrigation District Contract to Manage Newlands Project Terminated . . 37
". . . between 1926 when TCID took over the project and 1970 or '75 . . . both of the two decrees . . . had in them limitations that the water rights for the project were subject to limitations that farmers would be entitled to three-and-a-half acre feet per acre, *maximum,* for bottomlands and four-and-a-half acre feet, *maximum,* for benchlands, based upon alfalfa as the primary crop, and enjoined the use of water in excess of those amounts. . . ." 38
TCID Changed the Water Allocation in the 1930s Based on an Average of Water Deliveries from 1928 to 1933–Often Well in Excess of 4.5 Acre Feet per Acre–in Spite of the Limitations Imposed in the Orr Ditch Decree and Alpine Ditch Decree 39
" . . . there was a big controversy over which lands were bench and bottom because the decrees didn't classify the lands as bench or bottom. . . ." 39
"So from 1933 to 1970, TCID was delivering water far in excess of the amounts permissible under the decrees. And this is documented record. This is why the farmers are all upset when I make these type of statements in court . . ." 40
"In 1977 . . . it finally dawned on someone that they were not even in compliance with the Orr Ditch and Alpine decrees . . . they reduced all of the allocations that had been above the four-and-a-half acre feet. After 1977, they at

least were ostensibly complying with the three-and-a-half, four-and-a-half acre feet. . . .” 41
“ . . . the other practice that they had over the years was that . . . they would sell extra water . . . if they had more water . . . In addition to the four- and-a-half, farmers could get more water just based on the fact that it was available in Lahontan Reservoir, and TCID charged extra for that. . . .” 42
“. . . we have this long history in TCID of excess diversions, they didn’t keep very good records, they didn’t check on how much water the farmers put on their land or even whether they put it on the land that they had the contract on. . . .” 42
“And it was primarily because of what I will call mismanagement . . . failure to comply with the secretary’s directions, which were basically, you’re only supposed to deliver water to those lands that have a water right, to lands that are actually irrigated and within the limitations, the four-and-a-half, three-and-a-half acre feet that the decrees called for, which would have worked a *substantial* reduction out of water that was delivered to the project, and TCID refused to do so. . . .” 43
From 1975 to 1983 TCID Ran the Project Without Legal Authority 44
In 1984 the Supreme Court Affirmed the Secretary’s Authority to Terminate the Contract with TCID 44
“. . . they entered into an interim agreement with TCID, which was about two pages long . . . So since that time, TCID has been operating

under that interim agreement. . . .” 45
TCID Still Over-Diverted Water 45
Judge Gesell Ordered the Secretary of the Interior to Enforce the OCAPS 46
“So here he was telling the Secretary of the Interior to go make TCID comply, and TCID was still saying, ‘You can’t make us do that, we’ll decide how much water we’re entitled to.’ . . .” 46
Transferred the Case to Nevada Where TCID Became a Party to the Case 47
Controversy over Bench and Bottom Land Designation by TCID 49
Reclamation Decided to Develop a New Benchland and Bottomland Map Based on Soil Characteristics and Water Table Depths . 50
The New Map Resulted in Another Long and Drawn out Court Case 50
Basically the judge said “. . . they wouldn’t be putting it on if they didn’t need it, which in some respects sounds very logical, until you look at the actual practices and you’ll see that in many cases, the crops were wilting because of a high water table and the farmers’ solution was to put more water on it, which would help the crop initially but ultimately, they kept raising the water table to the point where it was within a few inches of the surface and didn’t leave room for the crops’ roots to grow. . . .” 51
The Ninth Circuit Court Determined it Was the Secretary of the Interior’s Responsibility to Determine Which Lands Were Bench or Bottom and Returned the Case to the District Court 54
TCID Had Allowed Farmers to Transfer Water

Rights to Different Lands 55
TCID Apparently Informally Approved Transfers of Water among Tracts 55
". . . no matter what crop you were growing or where you were putting it, if it was within your maximum water right, [TCID felt] you were entitled to it. That was it, and there was no checking on what they did with it, very little monitoring. It was an honor system, the farmer would call up and say, 'I want so much water' and TCID would deliver it within one day, anywhere in the project without regard to how efficient it was. . . ." 56
"Another outgrowth of that was that the farmers then in 1984 and '85 decided they wanted to legalize their, quote, "illegal" [unquote] irrigation. . . ." 56
"There were a series of decisions by the Nevada state engineer from 1985 to about 1992, in which he affirmed all of the transfers that people asked for. And the Pyramid Lake Tribe was the principal challenger of the transfers, and they had two primary objections. One, that it wasn't in the public interest, . . . And secondly, the water rights in most cases had either been abandoned or forfeited or perhaps never perfected . . ." 57
". . . the state engineer approved all of those transfers and basically made rather perfunctory findings on forfeiture and abandonment . . ." 58
Litigation over the 1988 OCAP 60
The New OCAPs Called for a Diversion Goal of 320,000 Acre Feet Annually–a Substantial Reduction 60

"This was headgate delivery so it's not the total amount of water, because you have also all of the transportation losses of water from the Truckee Canal and from Lahontan [Dam and Reservoir] to the headgates . . ." 61
State of Nevada, TCID, and Others Sued Us over the New OCAPs 61
Another Issue Was Towns That Took Water from the Water Tables That Were High Due to Seepage and Over-application of Water . 62
Some of the Case Had to Do with the National Environmental Policy Act 63
The Fallon Paiute Shoshone Tribe Asserted it Had Never Received All the Water it Was Entitled to Receive 63
The Farmers Were Asserting the Right to a Full Lahontan Reservoir as Drought Protection 64
Senator Harry Reid Becomes Interested in the Project Because of Water Supply for Reno and Sparks 64
"Senator Reid came along and basically said, 'Wait a minute. Can't we arrive at some kind of negotiated settlement of these issues?'. . ." 65
"The idea of storage that you could get your full entitlement every year *and* a full reservoir, meant that your water right went basically beyond what was necessary for beneficial use and there was no precedent for that argument. . . ." 66
"What they were arguing with regard to the wetlands was . . . that was a beneficial use of water so technically while the farmers wasted it, it really went to a good use. And we pointed out the Alpine and Orr Ditch Decrees said,

'You're entitled to a maximum of three-and-a-half, four-and-a-half acre feet. You took all of this extra water, you had no right to do that. The fact that the wetlands benefitted was fine, but you can't argue that we should continue to exceed the decree because it benefitted the wetlands.' . . ." 66
"So even though each of the three bureaus would argue for a position to reflect the views of their constituency, we had to try to determine what the law was, and that's the way we based the case. . . ." 67
Senator Reid Organizes Settlement Negotiations 67
California and Nevada in 1966 Agreed to Allocate the Waters of the Truckee, Carson, and Walker Rivers, but the Congress Never Approved the Agreement 68
Wayne Mehl, of Senator Harry Reid's Staff, Worked to Facilitate Negotiations Which Resulted in P.L. 101-618–which TCID Never Attended and Never Brought Forward Any Proposals for Resolution 69
TCID ". . . came to the table and they'd sit and discuss, but they never put anything on the table and they never accepted anything that anyone else offered. Candidly, they missed a number of significant opportunities during the negotiation where people tried to evaluate it from their point of view, but all of which required some change or accommodation on their part. And for whatever reason, they were just unable to do it. . . ." 70
Why TCID Does Not Negotiate a Settlement . . . 70
"They just were, in a sense, almost caught in a time warp where they would have been solid citizens and unassailable in 1920 or 1930, but

this was 1990, and with the environmental demands and Indians and wetlands and endangered species, all had become recognized and entitled to protection, but the farmers had most of the water and the fight was over the water. They weren't willing to bend to accommodate to recognize these others. . . ." 71
Sierra Pacific Power and Westpac Utilities 73
"They're probably the best players and most knowledgeable in the whole equation, including the Federal government. . . .and they know what they're doing, and they have gotten a lot out of this settlement . . ." . . . 74
". . . the Pyramid Lake Tribe entered into negotiations with Sierra Pacific . . . and worked this out among themselves to allocate storage in Federal reservoirs–which the tribe had no right to do without involving the Federal government . . ." 74
The Pyramid Lake Paiute Tribe 76
Bob Pelcyger Represented the Pyramid Lake Paiute Tribe 76
". . . the Pyramid Lake Tribe was very adroit . . . And a lot of it was due to TCID's intransigence that they . . . were jeopardizing things that other people needed. Nevada wanted the interstate allocation, Sierra Pacific wanted the storage in the Federal reservoirs. The farmers were becoming an obstacle, rather than an ally . . ." 77
The Role of the Courts in Settling Disputes 79
Water Rights Transfers Issues Should Be Decided Within a Few Years 83
Negotiating the New Truckee River Operating Agreement 83

Timetable and Requirements for New Truckee River Operating Agreement in P. L. 101-618 . . 84
". . . that's the thing that's unique about this: normally, you'd do an environmental impact statement on a proposed action. Well, the proposed action here is the adoption of an operating agreement which hadn't been written, and yet we're trying to analyze the environmental effects of that agreement . . . So you have to make all of these surmises as to what is going to happen when you have no guide as to what it will be, and that's *very* difficult to do. . . ." 85
Prospects for the Settlement II Negotiations 86
"I don't see that TCID has particularly changed its point of view. Until they're willing to accept the fact that their project is going to change substantially, whether they like it or not. It's not going to be done by force, but either the economics or the fact that the Federal government is now buying water for the wetlands, they're going to have their project reduced by at least half, even if they do nothing. . . ." 87
TROA Negotiations Were in Full Swing by the Mid-1990s 88
Settlement II Negotiations 89
". . .TROA negotiations have been going on . . . ever since that time. . . . one of the things that has to be done for the TROA is to prepare an Environmental Impact Statement under the National Environmental Policy Act . . ." . 89
"Since the passage of 101-618, apart from the recoupment litigation, we've had no litigation with TCID. . . . So, we haven't had the litigation with TCID that we had just

constantly before the Settlement Act. But they have been active in criticizing all the administrative actions that have been taken. . . .” 91
The Recoupment Lawsuit 93
“The recoupment suit was sort of a *side* issue under 101-618. There’s a provision . . . that requires the secretary to *pursue* recoupment of the water that was diverted in contravention of OCAP from 1973 on. . . .So we, in the early ‘90s, we went through a round of negotiations with TCID with an effort to resolve it, which got nowhere. . . .” 94
How the Justice Department Arrives at Policy . . 95
The Initial Figure for Recoupment Was 1,058,000 Acre Feet of Water 96
How Justice Works with Interior to Determine the Direction to Be Taken 98
TROA Issues and Assistant Secretary Mark Limbaugh 101
“We didn’t get the million acre feet we asked for. We had subsequently found that there were some errors in the calculation and that the figure should have been something around 750,000 [acre feet]. . . .” 109
“The judge gave us right at 200,000 acre feet. He found that they had clearly, blatantly, intentionally, violated the OCAP . . .” . . 110
The Judge Relied on Two Issues to Reduce the Amount of Water Awarded in the Recoupment Lawsuit 110
“. . . he did issue a judgement and he directed TCID [Truckee-Carson Irrigation District] to repay . . . over twenty years, and he ordered them to pay two percent interest each year on the

unpaid balance. . . .” 113
“. . .they just have a mindset that they have a certain right to do this and by God nobody’s going to tell them different. And they’re just unwilling to adjust to accommodate the changed circumstances. So, they just continue to fight and delay, and in the meantime, you know, changes are really *ratcheting* down on them. They are *much* worse off *now* in the sense that offers that were made to them over time, including in the recoupment case, they would have been much better off to have accepted them. And each time they don’t accept it, the next time there’s less and less being offered. So, I do think the delay is just putting off the inevitable. . . .” 116
“. . . the last couple of water years, there haven’t been any diversions to Lahontan and the difficulty is if you’re not diverting to Lahontan you can’t repay recoupment because the only way you can effectively repay it is to *reduce* diversions. . . .” 116
Water Issues for Fallon, Fernley, Etc. 118
Issues a Farmer Would Have in Trying to Sell a Water Right Entitlement on the Newlands Project 120
The Washoe Tribe’s Water Rights 123
Water Recoupment Payments Might Be Made by TCID Turning over its Rights in Donner Lake 124
Sierra Pacific and Truckee Meadows Water Authority (TMWA) 125
“. . . what we could do is take it and sell it to TMWA or someone else, but TMWA’s the logical . . . entity, and then take that money and buy up

rights in the Carson Division and retire them and that way reduce the demand. . . .” . . 125
TCID Has to Repay about 190,000 Acre Feet, and the Interest on That Water Debt Is Significant 126
TMWA and Sierra Pacific 128
Two Issues Still Stand in the Way of Getting TROA Completed 132
Why Negotiating TROA Has Taken So Long . . 133
Changes and Continuities in the Negotiators . . . 134
Bill Bettenberg 135
California Interests and Issues on the Upper Truckee River 137
“. . . the basic . . . two things. One is . . . we *don’t* put anything in that would adversely affect TCID’s legal rights. And, the other is to work with the Bureau on their environmental analysis . . . so that when it comes down to it we can establish, hopefully, that there will not be any significant adverse effects. . . .” . 141
“. . . there were two proposed draft EISs that are in the record, one of which is now called the Report to Negotiators, that we reviewed and said, ‘This won’t cut it.’ . . .” 142
“. . . they have now finally proposed alternatives that . . . as far as I can tell the only adverse effect . . . on TCID is it will *not* preclude them from taking all the water they’re legally entitled to *if* it’s available . . . What TROA would do would allow upstream users with a higher priority to more effectively use their water rights, put them in storage, for example, so that at some times there may be *less* water in the river. . . .practically, if there’s less water in the river then there’s less for them [TCID] to take. . . .” 143

TCID, in the Past, Benefitted from the Inability of Senior Water Rights Holders to Store Their Water 144
“. . . you can’t repay water under recoupment if you don’t need it. . . .” 145
“There is, now, in OCAP a credit storage provision in Stampede Reservoir, which is basically where the, they tell TCID not to take a certain amount of water over to Lahontan, but then they hold a block of water, which is really fish water, in Stampede against the eventuality that it turned out that they [TCID] do need it. . . . It benefits TCID in the sense that it ensures that they get their legal entitlement. But, it also carries out the requirement in 101-618 that the secretary operate within the directives in *Pyramid Lake v. Morton* that to the extent that it’s not needed that the water goes to Pyramid Lake. ” 146
How the Old Truckee River Agreement Affects TROA and the Signatories 148
“. . . obviously TCID’s going to come in, and we’ll probably have a significant evidentiary hearing to establish why what we’re doing is, does not . . . affect their legal rights. . . .” 152
The State of Nevada Looked after TCID’s Interests During Negotiations 152
Remaining Issues with Fernley and Credit Storage in Reservoirs 154
“. . . TROA has what was considered a placeholder that would allow [Fernley] . . . to get credit storage for their municipal water supply and would have assigned them a particular priority in storage. But, that was *presumed* to

be contingent upon their reaching an agreement with the tribe as to their basic water supply. . . . They've been buying up Truckee Division water and they've sought to transfer some of it. But, they want to continue to take it out of the Truckee Canal . . . They recognize that there's twenty or thirty thousand acre feet of seepage every year that they use, that they have wells for. . . ." . 155
". . . the tribe has said . . . they won't agree to their plan unless they agree to get off the Truckee Canal. . . . They said, 'Put in a pipeline.' Fernley said, 'Well, if we do that we'll lose the seepage. So, we want to be made whole.' . . ." 156
"There is this one issue in TROA that would allow them, and the tribe says, 'No they can't be in, if they don't reach an agreement with us.' There's another provision in TROA that would allow them to come in later, but they wouldn't necessarily have the same priority. . . ." 157
Rebecca Harold 158
Fernley Needs Contracts to Put Water into Federal Reservoirs and to Take Water from the Newlands Project 158
". . . we just need to do something, sort of put a placeholder in TROA (Seney: Right.) and not let TROA become hostage to resolution of these *other* (Seney: Right.) bigger issues that really aren't part of TROA. . . ." 160
The "Fork in the Road" 162
". . . everybody has to have you know, their input to make sure they get what they think they've agreed to. So, that's why we got what we got. TROA's not easy to read. . . ." 163

". . . we've all agreed to set up this operation in the federal watermaster's office. So that they are working to actively understand everything and be prepared to implement it if it ever goes into effect-when it goes into effect. . . . And we've been providing funding for several years, to his office, you know, set up the computer system and . . . everything else." 164
Believes TROA Will Be a Model for Other Areas of the West 166
"You kind of get away from the rigid concepts of first in time, first in right and a more cooperative approach to water. . . ." . . . 167
"The salmon problem [on the Columbia River] is still insoluble. This one has a solution. . . ." 168

(Intentionally blank)

STATEMENT OF DONATION
OF ORAL HISTORY INTERVIEW OF
FRED DISHEROON

1. In accordance with the provisions of Chapter 21 of Title 44, United States Code, and subject to the terms, conditions, and restrictions set forth in this instrument, I, FRED DISHEROON, (hereinafter referred to as "the Donor"), of WASHINGTON, D.C. do hereby give, donate, and convey to the National Archives and Records Administration (hereinafter referred to as "the National Archives), acting for and on behalf of the United States of America, all of my rights and title to, and interest in the information and responses (hereinafter referred to as "the Donated Materials") provided during the interview conducted on AUGUST 25, 1994, at RENO, NEVADA and prepared for deposit with the National Archives and Records Administration in the following format: tape recording and transcript. This donation includes, but is not limited to, all copyright interests I now possess in the Donated Materials.

2. Title to the Donated Materials remains with the Donor until acceptance of the Donated Materials by the Archivist of the United States. The Archivist shall accept by signing below.

3. a. It is the intention of the Archivist to make Donated Materials available for display and research as soon as possible, and the Donor places no restrictions upon their use.

   b. The Archivist may, subject only to restrictions placed upon him by law or regulation, provide for the preservation, arrangement, repair, and rehabilitation, duplication, and reproduction, description, exhibition, display, and servicing of the Donated Materials as may be needful and appropriate.

   c. For Donated Materials with restrictions, the National Archives will provide access to the Bureau of Reclamation, if the Bureau of Reclamation presents written permission of the Donor specifying the types of information and proposed uses of said information.

4. Copies of the Donated Materials that do not have Donor restrictions on their use, may be deposited in or loaned to institutions other than the National Archives, including the Bureau of Reclamation. Copies of unrestricted Donated Materials may also may be provided to researchers. The Bureau of Reclamation may retain copies of tapes, transcripts, and other materials if there are no Donor restrictions on their use, and Reclamation may obtain copies of tapes, transcripts, and other materials at the time that Donor restrictions on the use of the materials ends.

5. The Archivist may dispose of Donated Materials at any time after title passes to the National Archives.

Date: 8-25-94 Signed:
FRED DISHEROON

INTERVIEWER: DR. DONALD B. SENEY

Having determined that the materials donated above by FRED DISHEROON are appropriate for preservation as evidence of the United States Government's organization, functions, policies, decisions, procedures, and transactions, and considering it to be in the public interest to accept these materials for deposit with the National Archives and Records Administration, I accept this gift on behalf of the United States of America, subject to the terms, conditions, and restrictions set forth in the above instrument.

Date:__________________ Signed:______________________________
Archivist of the United States

STATEMENT OF DONATION
OF ORAL HISTORY INTERVIEW OF
FRED DISHEROON

1. In accordance with the provisions of Chapter 21 of Title 44, United States Code, and subject to the terms, conditions, and restrictions set forth in this instrument, I, FRED DISHEROON (hereinafter referred to as "the Donor"), do hereby give, donate, and convey to the National Archives and Records Administration (hereinafter referred to as "the National Archives), acting for and on behalf of the United States of America, all of my rights and title to, and interest in the information and responses (hereinafter referred to as "the Donated Materials") provided during the interview conducted on AUGUST 9, 2006 at Reno, Nevada, and prepared for deposit with the National Archives and Records Administration in the following format: tape recording and transcript. This donation includes, but is not limited to, all copyright interests I now possess in the Donated Materials.

2. Title to the Donated Materials remains with the Donor until acceptance of the Donated Materials by the Archivist of the United States. The Archivist shall accept by signing below.

3. a. It is the intention of the Archivist to make Donated Materials available for display and research as soon as possible, and the Donor places no restrictions upon their use.

   b. The Archivist may, subject only to restrictions placed upon him by law or regulation, provide for the preservation, arrangement, repair, and rehabilitation, duplication, and reproduction, description, exhibition, display, and servicing of the Donated Materials as may be needful and appropriate.

   c. For Donated Materials with restrictions, the National Archives will provide access to the Bureau of Reclamation, if the Bureau of Reclamation presents written permission of the Donor specifying the types of information and proposed uses of said information.

4. Copies of the Donated Materials that do not have Donor restrictions on their use, may be deposited in or loaned to institutions other than the National Archives, including the Bureau of Reclamation. Copies of unrestricted Donated Materials may also may be provided to researchers. The Bureau of Reclamation may retain copies of tapes, transcripts, and other materials if there are no Donor restrictions on their use, and Reclamation may obtain copies of tapes, transcripts, and other materials at the time that Donor restrictions on the use of the materials ends.

5. The Archivist may dispose of Donated Materials at any time after title passes to the National Archives.

Date: Aug. 9, 2006

Signed:
FRED DISHEROON

Having determined that the materials donated above by FRED DISHEROON are appropriate for preservation as evidence of the United States Government's organization, functions, policies, decisions, procedures, and transactions, and considering it to be in the public interest to accept these materials for deposit with the National Archives and Records Administration, I accept this gift on behalf of the United States of America, subject to the terms, conditions, and restrictions set forth in the above instrument.

Date:__________________ Signed:______________________________
Archivist of the United States

Introduction

In 1988, Reclamation began to create 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. Roger Patterson, 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.

The senior historian of the Bureau of Reclamation developed and directs the oral history program. Questions, comments, and suggestions may be addressed to the senior historian.

Brit Allan Storey
Senior Historian
Land Resources Office (84-53000)
Policy and Administration
Bureau of Reclamation
P. O. Box 25007
Denver, Colorado 80225-0007
(303) 445-2918
FAX: (720) 544-0639
E-mail: bstorey@usbr.gov

For additional information about Reclamation's history program see:
www.usbr.gov/history

Oral History Interviews
Fred Disheroon

Seney: Today is August 25, 1994. My name is Donald Seney, and I'm talking with Mr. Fred Disheroon of the Department of Justice, and we're at the headquarters of the Sierra Pacific Power in Reno, Nevada. Good afternoon, Mr. Disheroon.

Disheroon: Good afternoon.

Early Life and Education

Seney: I want you to begin by just telling me a little bit about your family, about your parents, where they were from, where you were born, and could you work your birth date in there if you would, for me, and give me a sense of your early life and education?

Grew up in Hot Springs, Arkansas, and Los Angeles

Disheroon: Alright.

Born in Hot Springs, Arkansas, in 1931

I was born in Arkansas in Hot Springs in 1931. My father was also born in Arkansas, he was a city bus driver in Hot Springs for his entire career. My mother was from Hope, Arkansas, and she's now deceased but she was living in Hot Springs for a number of years. At that point, my mother and father were separated, so we moved with her to Los Angeles, California. I went to school there for

three years and then I moved back to Hot Springs with my father in 1945–I guess it was–and finished high school in Hot Springs.

Seney: Can you remember the differences between Los Angeles and Hot Springs?

Was in Los Angeles During World War II

Disheroon: Well, they were quite significant, obviously. Hot Springs was at the time around 15,000-20,000. I was in Los Angeles during the Second World War, so it was [a][1] night and day difference.

Seney: You would have been a teenager?

Disheroon: Yes, I was eleven the time we moved there. In fact, we left on my eleventh birthday as I recall.

Seney: What is your birth date? You said your year.

Disheroon: November 11, 1931, 11/21/31. So I was there during '42, '43 with the blackouts, and I don't

1. Note that in the text of these interviews, as opposed to headings, 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.

think they had any blackouts in Hot Springs–I'd be surprised. I was there in '45 when Franklin Roosevelt died, I remember that quite vividly.

Seney: Tell me about that.

Disheroon: I don't know if it's much to remember other than Franklin Roosevelt had been President practically my whole life at that point in time.

Seney: Were you a Democrat?

Disheroon: I don't know as a child what I was, but I was very impressed with the President at that time. Of course, it was a very traumatic episode, having FDR die in the middle of a war.

Seney: A good deal of public reaction, do you remember that?

Disheroon: Oh yes, I remember I put together a scrap book of newspaper clippings for a school project. I had an inch-thick album of just newspaper articles. It was quite moving. I remember that quite well. And then [in] '45, I think I was at home in Hot Springs that summer during the time that the atomic bomb was dropped and the war was over.

Seney: [Do you] remember your reaction hearing about the atomic bomb?

Disheroon: It was very scary, really there wasn't a lot of information about what it was. Everyone was glad the war was over but as to what it

portended for the future, it was really quite scary.

Attended Hendrix College in Arkansas Studying Political Science and History, Graduating in 1953

Anyway, I moved back to Hot Springs in '45 and went to high school [and] graduated in '49. [It was a] relatively uneventful time. I was living with my father and my grandmother. Then I went to college in Arkansas to Hendrix College and mastered in history and political science, and received a A.B. degree in 1953.

Attended Law School at Southern Methodist University, Graduating in 1956

I went to law school in Dallas, Texas, at Southern Methodist University, I got a scholarship to go there, and graduated in 1956, with–then, it was an Ll.B. Degree, later they changed it to a Juris Doctor degree.

In the Army Served in the Judge Advocate General's Corps

At that point, after getting out of law school, I'd been deferred from the military service while I was in college and law school, so I was called up for the draft. The draft was still in force and [I] went into the Army and served for a two-year term. I spent about a year as an enlisted man, then applied for a direct commission, in the Judge Advocate General's Corps, and was commissioned and

went to Fort Leonard Wood, Missouri, and spent two years there doing court martial cases.

Seney: Was that interesting?

Disheroon: I found it interesting. It was the first trial work, obviously, I'd ever done. I did about six or eight months as a defense counsel and then I spent about fifteen months as a trial counsel, which is the prosecutor.

Seney: Which did you prefer?

Disheroon: I enjoyed being the prosecutor more than defense counsel.

After Leaving the Army Started Private Practice in Dallas, Texas

Then I was released from the Army in 1959 and went back to Dallas, Texas, rather than Arkansas. I had been admitted to the Texas Bar when I graduated from law school, I took the bar exam and passed that. I wasn't admitted in Arkansas, so I would have had to try to establish a new license and so forth. So I went back to Texas and went to work there. I was in private practice in Texas doing primarily insurance, personal injury trials, for about ten years. During that time, I was married and had two children, who are both still living.

Seney: What are their names?

Disheroon: I have a daughter named Susanne and a son named John.

Seney: They're going to read this, and they'll want to see their names.

Represented Casualty Insurance Companies

Disheroon: Right, certainly. My daughter's living in Texas now, and my son is in California. Most of what I did during that period was I represented casualty insurance companies. I'd travel around the state trying cases in Texas, mostly in state courts, once in a while in Federal Court.

Seney: Texas is a big insurance state isn't it? A lot of insurance companies have incorporated in Texas.

Went into a Law Firm that Represented a Bank

Disheroon: Yes, right, nearly *all* of them I would say, and Dallas, where I lived, was an insurance center as well. Then the last two years I was in Texas, I went with a law firm that represented a bank and they had some financial cases and it was a change of pace. I thought it was interesting, I thought I might like that.

The last year I was there I went into an arrangement with one other fellow–we were going to set up a law firm–he had political connections and was bringing in a lot of business and he needed someone to do the legwork for him. But it didn't work out, I'm

not sure what the reason was, but I probably wanted more recognition for the fact that I was doing most of the work.

Goes to Work for the Army Corps of Engineers

Then in 1970–I had visited Washington, D.C., a number of times–I was in the Army Reserves after having left active duty and had been on some acting duty tours in the Pentagon. I had thought about perhaps working for the Federal government so I had asked some of my associates in Texas, who were in the Army Reserves, who worked for the Federal government, about [the] possibility of finding a position in Washington. One of them was the Division Counsel for the [U.S.] Army Corps of Engineers in Dallas, and he said he knew of a position in the Corps of Engineers' headquarters in Washington working in litigation, and would I be interested. I said I thought perhaps I would. They flew someone down from Washington and interviewed me and offered [me] the job and I accepted it.

Moved to Washington, D.C., in 1970

So in 1970, I moved to Washington to work for the Corps in their litigation office. The responsibilities there were to serve as essentially the liaison between the Corps of Engineers and the Department of Justice on all the matters [the Corps had] in litigation.

Seney: Am I right in thinking that the litigation

matters pursued by the Corps would still have to be approved by the Department of Justice before you could proceed?

". . . the Department of Justice essentially does the litigation for all Federal agencies with some limited exceptions, so that the attorneys for the agencies do not actually do the litigation work: they provide the information and help and assist . . ."

Disheroon: Yes, the Department of Justice essentially does the litigation for all Federal agencies with some limited exceptions, so that the attorneys for the agencies do not actually do the litigation work: they provide the information and help and assist, but when you actually go to court, it's the Justice Department attorneys who do the speaking.

Seney: So you would go before them and make a presentation, in a sense, "We'd like to pursue this case for the Army Corps of Engineers." And they'd say, "Okay, work it up, bring it to us and we'll pursue it."

". . . did that for about five years . . . their big area of practice was . . . contract litigation, which was primarily disputes over how much a contractor was due under his contract. . . ."

Disheroon: Yes, right. I did that for about five years and I was involved with a number [of cases]. The Corps had a wide range of litigation. Historically, their big area of practice was government contracting, because the Corps

built these huge dams and flood control projects and navigation projects, and they were extensively into contract litigation, which was primarily disputes over how much a contractor was due under his contract.

Litigation Arising out of Federal Environmental Legislation

“. . . in 1970, when I went, there was sort of a sea change in Federal law because that was the start of the environmental litigation. . . . Before that, the government litigation was primarily financial. In fact, prior to 1970, it was difficult to sue the government . . . because Congress had not provided the necessary authorization or waiver of sovereign immunity. But, in these environmental statutes, they basically changed the rules and opened up the courts to subject Federal decisions to judicial review. . . .”

But [in] 1970, when I went, there was sort of a sea change in Federal law because that was the start of the environmental litigation. [In] 1970, Congress passed the National Environmental Policy Act. Shortly after that, there was the Clean Water Act, the Clean Air Act–a whole host of new legislation designed to protect the environment.

Before that, the government litigation was primarily financial. In fact, prior to 1970, it was difficult to sue the government in many cases, because Congress had not provided the necessary authorization or waiver of sovereign immunity. But, in these environmental

statutes, they basically changed the rules and opened up the courts to subject Federal decisions to judicial review. And much of that happened in the environmental area and in the environmental statutes.

". . . I got involved in sort of the beginning of this type of litigation, and I spent most of my time working on environmental matters, rather than contract matters . . ."

So I got involved in sort of the beginning of this type of litigation, and I spent most of my time working on environmental matters, rather than contract matters, although I had some involvement in that.

Seney: [Did you] find that more interesting?

". . . much more interesting. It was an area where the law wasn't fixed, it was developing, and you had to sort of anticipate and reason by analogy rather than just looking at the precedent and applying it. . . ."

Disheroon: Yes, much more interesting. It was an area where the law wasn't fixed, it was developing, and you had to sort of anticipate and reason by analogy rather than just looking at the precedent and applying it.

Seney: Did it give you a chance to make a little policy even, maybe, if that's the right term?

Disheroon: Be involved in it, yes, in making recommendations as to how to proceed. And

there were a number of lawsuits brought against Corps projects, and they had to all be evaluated and justified.

Seney: These were on environmental grounds?

Going to Work for the U.S. Justice Department

Disheroon: On environmental grounds, yes. I did that for five years. Then I was offered a position with the Justice Department. At that time, the environmental–if you will–litigation part of the Justice Department was in the Land and Natural Resources Division and there was a group called the Pollution Control Section, which had about fifteen people in it. They basically did handle all forms of environmental litigation, including affirmative cases for the United States, so they did both cases, where you would sue on behalf of the United States or defend cases on behalf of the United States, depending on who was suing.

They asked me to come over–I had spent a lot of time in the water area because that was the Corps' particular involvement–and to head up a team working in water. In fact, they divided the section up into water and air for purposes of functional control, and I was to head up the water team.

"So I transferred over in 1975, and have been at the Justice Department ever since handling all different types of environmental litigation, but I specialize in District Court trial work . . ."

So I transferred over in 1975, and have been at the Justice Department ever since handling all different types of environmental litigation, but I specialize in District Court trial work and I've been doing that since, as I've said, since 1975.

"I've branched out significantly beyond water: I've handled cases in just about every area of environmental law that you can think of. . . ."

I've branched out significantly beyond water: I've handled cases in just about every area of environmental law that you can think of. I've tried a number of cases involving alleged takings of property through government regulation, cases involving construction of big Federal projects, disputes over endangered species activities.

Became Involved in the Newlands Project in about 1984

I got involved in the case here that we're going to talk about in 1984.

". . . I was made a special litigation counsel in 1978, which is sort of a roving attorney who is available to handle complex cases of any particular type without regard to particular subject matter. . . ."

[To] back up a little bit, I was made a special litigation counsel in 1978, which is sort of a roving attorney who is available to handle complex cases of any particular type

without regard to particular subject matter.

The 1983 Decision in *Nevada v. U.S.* Activated a 1968 Suit Against the Department of the Interior Filed by the Pyramid Lake Paiute Tribe

This case had been dormant for a long period of time insofar as court action was concerned, awaiting a decision by the Supreme Court on the case that became *Nevada v. U.S.* that had been pending since 1970. The decision from the Supreme Court came out in 1983, and once that was resolved, it activated a lot of other litigation, particularly a suit by the Pyramid Lake Indian Tribe against the Interior Department that had been filed back in 1968 but which, because of other litigation, was effectively dormant during that period of time.

Assigned the Reactivated Case Because the Previously Assigned Attorneys Were Gone

I was asked to pick that case up, because the previous attorneys who had been working on it were gone and it was obviously going to take a lot of time and effort.

"So I picked that case up and it essentially involved issues as to Indians' water rights, endangered species, and the whole gambit of environmental issues. . . ."

So I picked that case up and it essentially [involved issues as to] Indians' water rights, endangered species, and the whole gambit of environmental issues.

Seney: When you say you "picked the case up," the Pyramid Lake Paiute Indians that have filed suit against the Federal government I take it.

Disheroon: Yes, the suit had been filed against the Federal government–I think it was in 1970.

Seney: So you were now defending the Federal government against this suit?

Disheroon: Yes, right. The attorneys who had been working on it, I think had either retired or left the [Justice] Department, so someone had to assume the responsibility for the defense of the case.

Seney: What was your first reaction to this case?

"It was rather bewildering to try to get a handle on exactly what the issues were. It's the type of case where . . . there are these concepts that people have developed over the years where they'll have their own particular language . . . unique to the particular area and the controversy. . . . its complexity was far beyond the usual one, it just took a long time to really become . . . fully conversant . . ."

Disheroon: It was rather bewildering to try to get a handle on exactly what the issues were. It's the type of case where, you've talked to Mr. [Robert] Pelcyger obviously, there are these concepts that people have developed over the years where they'll have their own particular language, you know, talk about the "OCAP" [Operating Criteria and Procedures] and the

other phrases that are unique to the particular area and the controversy. It's almost like learning a new language to start with, to get involved in the case. And then its complexity was far beyond the usual one, it just took a long time to really become -- and I don't know if I've become -- fully conversant, even to the present.

Seney: Even after ten years?

Disheroon: After ten years, all the nuances and the interrelationships and how one issue bears on another and who's affected by it. But, I've learned a lot, but it took quite a while.

"When I say 'this case,' I don't just mean the Pyramid Lake Case because as a result of that case I got involved in a number of other related cases where sometimes we were on the same side as the tribe, sometimes we were on opposite sides. Sometimes they weren't a party and we were. It was just all an outgrowth of essentially this dispute over the uses of the water of the Truckee River, and all of the ramifications and all the litigation. . . ."

I found it extremely interesting. When I say "this case," I don't just mean the Pyramid Lake Case because as a result of that case I got involved in a number of other related cases where sometimes we were on the same side as the tribe, sometimes we were on opposite sides. Sometimes they weren't a party and we were. It was just all an outgrowth of essentially this dispute over the

uses of the water of the Truckee River, and all of the ramifications and all the litigation. I essentially became responsible for all of the Federal litigation.

Seney: Is this pretty much what you do, is [it] your full-time responsibility now?

". . . this case over the years, the time is varied but it's taken anywhere from a third to a half of my time. . . ."

Disheroon: Oh, no, no, this case over the years, the time is varied but it's taken anywhere from a third to a half of my time. Right now it's probably about a quarter.

Seney: Is this the most complicated case you've dealt with in your career with the Justice Department?

The Truckee River Cases Are Probably His Second Most Complicated Case

Disheroon: It's probably the second most complicated case.

Seney: What is the first?

Disheroon: It's another case I'm working on now involving the endangered Snake River salmon in Washington and Oregon, which is the biggest, most complicated environmental case that I think has ever come down the pike. It would take several hours to explain that one to you.

Seney: That's all right, I was just curious what was number one, if this was number two. This is a pretty big number two I would think.

". . . you have almost every issue in the water right environmental area that you're likely to find in the American West. . . ."

Disheroon: Yes, this would [rank as] the second [largest] to almost any other case I can think of. The thing you have here–I guess they're present in some respects in the salmon case too–but you have almost every issue in the water right environmental area that you're likely to find in the American West.

Seney: Can you be specific about that and kind of tick them off? I mean if you miss one or two that's okay.

Issues in the Newlands Project Litigation

Disheroon: Yes, well, you start with Indians and trust responsibility that the Federal government has to Indian tribes. You have disputes over water rights which are of utmost importance, as you know, in the West. Water rights are ranked ahead of God and motherhood apparently. The endangered species, the cui-ui and the Lahontan Cutthroat Trout. We have wetlands, which are increasingly important. You have an irrigation district that the government established in 1902, probably the oldest irrigation district. You have municipal urban water requirements. You have pollution, clean water and clean air, as a result of the

urban activities. You have Lake Tahoe in California and Nevada having different requirements for water. The recreational uses in California, sewage treatment plant problems from what are they going to do with their effluent and the contamination that causes. I think those are the major points.

Conflicting Federal Interests

Seney: Well, not only do you have Indians here but you have *two* Indian tribes on either side of the question–they don't agree.

"One needs to understand that when we go into Federal Court, we, the Justice Department, represent the United States. We don't represent necessarily the Interior Department or sub-agencies of the Interior Department. . . ."

Disheroon: Yes, right, they don't agree. One needs to understand that when we go into Federal Court, we, the Justice Department, represent the United States. We don't represent necessarily the Interior Department or sub-agencies of the Interior Department.

Seney: Or the Bureau of Reclamation.

"Ultimately, the Justice Department is charged with making the decision as to what that position should be. We don't do that in isolation, we do it in consultation with our clients. . . ."

Disheroon: Or the Bureau of Reclamation, or the Fish and Wildlife Service. We represent the United

States and our duty is to advocate positions on behalf of the entire Federal government. Ultimately, the Justice Department is charged with making the decision as to what that position should be. We don't do that in isolation, we do it in consultation with our clients.

". . . one of the interesting things about this case is even in representing the Interior Department, there are three branches of the Interior Department who have a direct interest. . . . Bureau of Indian Affairs, . . . Bureau of Reclamation, . . . and you have the Fish and Wildlife Service . . ."

But one of the interesting things about this case is even in representing the Interior Department, there are three branches of the Interior Department who have a direct interest. You have the Bureau of Indian Affairs, which is, as you pointed out, the two Indian tribes who have divergent interests, almost conflicting interests. You have the Bureau of Reclamation, who built the irrigation project, and you have the Fish and Wildlife Service, which has a sort of a conflict within itself because it's charged with protecting a wildlife refuge and protecting endangered species; and in this case, even *that* requirement sort of has a conflict because they're both competing for the same water, and they both need water, and if you devote it to one, you can't use it to the other.

Seney: Meaning, if you give it to the Pyramid Lake Cui-ui, you can't give it to the Stillwater

Marsh?

Disheroon: That's right. So they're both competing for this limited resource. And the Justice Department–myself in this case–is charged with the responsibility of standing up in court and speaking on behalf of the Federal government for all of these conflicting interests.

Seney: How do you decide amongst these conflicting interests? How does that process work?

"If you have one client, which ultimately you can say you do in the sense that the Secretary of [the] Interior is responsible and has all these conflicting obligations to the extent they have developed a policy as a result of consultation with their attorneys and they say, 'This is our policy.' The Justice Department will defend that policy as long as there's a legal rational basis for that, so we don't try to second-guess them on their conclusions . . ."

Disheroon: Well, there are two ways of doing it. If you have one client, which ultimately you can say you do in the sense that the Secretary of [the] Interior is responsible and has all these conflicting obligations to the extent they have developed a policy as a result of consultation with their attorneys and they say, "This is our policy." The Justice Department will defend that policy as long as there's a legal rational basis for that, so we don't try to second-guess them on their conclusions unless we arrive–and it's extremely unlikely that we would–[at

the conclusion] that it's not legally defensible.

Seney: Any time that's happened?

Disheroon: Rarely, but it has happened yes, that an agency has taken a position perhaps in conflict with another Federal agency. I can give you an example in another context, where I was defending both the Corps of Engineers and the Environmental Protection Agency in a wetlands case in Louisiana in which the issue was of whether a particular area, bottomland hardwood swamp was a wetland, which would then be classified as water of the United States under the Federal Clean Water Act, whereby, if you want to conduct any activities that result in the discharge of a pollutant, it requires a Federal permit, if you classify it as a wetland.

Seney: Which is what the EPA probably wanted to do.

Disheroon: The EPA said, "We've reviewed it, yes, it's a wetland." The Corps had reviewed it and said, "No, it's not." They were both sued, we were charged on defending them, and they couldn't reach an agreement. So we, Justice, reviewed the case and reviewed the statute and made the determination that *legally*, under the Clean Water Act the EPA was given by Congress the final responsibility for making these type of judgments. So we said to the Corps, "We can't represent your position because you're legally wrong. The EPA is entitled to make the choice." So we

advocated the EPA's position and ultimately succeeded.

Seney: But you've never been faced with that here in the litigation on the Newlands Project, say, having to choose between the Bureau of Reclamation and Fish and Wildlife?

". . . in this case there have been different views between the Bureau of Reclamation and the Fish and Wildlife Service. We've always been able to obtain a resolution of that through the Secretary of the Interior . . ."

Disheroon: No, because in this case there have been different views between the Bureau of Reclamation and the Fish and Wildlife Service. We've always been able to obtain a resolution of that through the Secretary of the Interior and they have come up with decisions that we have felt were defensible.

Seney: Would you say–if they come to you and you're aware the Bureaus are quarreling among themselves–would you say to the Secretary of the Interior, the Solicitor General, whomever it is in the Interior Department, "Work this out among yourselves and bring us back a position we can defend?" Or do they know they've got to do that before they ever come to you?

Disheroon: They know they have to do it, but that doesn't always mean they'll do it, because you're dealing with a lot of individuals. In many cases, and in *this* case, I have, in a number of

instances have said to the Interior, "We can't go in and argue both of these positions. You're going to have to get it worked out. If you can't work it out, I'll have to decide, because I can't go into court and say `we don't have a position.'" In some instances, they haven't arrived at a conclusion, so by default the Justice Department has had to determine which [position to defend]. But we don't do it in a vacuum. We have previous records and positions we've taken in the case, so we try to maintain the same course of action.

Seney: Can you remember any specifics that you can tell me about when that has happened? Because I think this is, if I may, one of the problems out here in this project is to get these competing entities to agree. The BIA has one view, Bureau of Reclamation has another, and as you say, there's a little schizophrenia almost, in Fish and Wildlife, over what their position should be.

Disheroon: I can't think of a *particular* incident, where it's actually got to that point. I just remember any number of times where there was quite a bit of disagreement, and you would never get a clear resolution from a written position from the Interior Department. Much of it because perhaps they simply didn't have time.

Seney: Let me turn this over.

END SIDE 1, TAPE 1. August 25, 1994.
BEGIN SIDE 2, TAPE 1. August 25, 1994.

Seney: We're talking about disputes between them, and you say that no specifics really come to mind?

Disheroon: Yes, I was trying to think of a good example.

Recent Litigation Involving the Newlands Project

Seney: Why don't we try it this way: If you could give me a kind of summary of the litigation that you've handled on this project and the issues involved, and maybe if we approach it that way something may come to mind.

". . . *Pyramid Lake Tribe v. Morton*. This was a case that the tribe initiated against the Federal government . . . complaining that the Secretary of the Interior had violated the trust responsibilities to the tribe by not securing adequate water to protect Pyramid Lake and the fishery in the lake. . . ."

Disheroon: Okay. We started out with the first case I mentioned, *Pyramid Lake Tribe v. Morton*. This was a case that the tribe initiated against the Federal government in 1969 or 1970. As I said, I wasn't involved in it at the time. They had brought the suit complaining that the Secretary of [the] Interior had violated the trust responsibilities to the tribe by not securing adequate water to protect Pyramid Lake and the fishery in the lake.

Seney: Which is their culture.

"This wasn't an Endangered Species Act suit,

although the cui-ui had been listed as an endangered species, but it was based on their trust responsibility, that Interior had a responsibility to help maintain the Indian culture. . . ."

Disheroon: Which is their culture, right. This wasn't an Endangered Species Act suit, although the cui-ui had been listed as an endangered species, but it was based on their trust responsibility, that Interior had a responsibility to help maintain the Indian culture. As you know, Pyramid Lake is on the Pyramid Lake Indian Reservation and the lake is the focus of the tribal culture. (Seney: It's an aquatic fish culture.) Yes, right. So effectively, their fear was the lake was being destroyed, the fish were being destroyed.

Seney: Was there a treaty here? (Disheroon: No. No, there was no treaty.) No treaty between the Pyramid Lake Paiutes and the government?

Brief History of Newlands Project Litigation

Disheroon: No, not in this case. To understand the background, I'm going to have to go back and give you a little history. In 1902 when the Reclamation Act of 1902 was passed, the Federal government was put into the business of developing the West for irrigation purposes. One of the first projects that was designed–in fact, the first project that was designed–was the Newlands Project in Fallon, Nevada. The Bureau of Reclamation–then called the Reclamation Service–had made a

survey and had made an estimate that you could sustain an irrigation project, I think it was 240,000 acres near Fallon, Nevada, if you used the waters of the Carson River on which the area was located and supplemented it by taking water from the Truckee River and bringing it over for irrigation.

If you will recall, this was the time of progressive development in the Federal government, but the idea was that making the desert bloom was the goal and that water that discharged into wetlands or lakes that had no economic purpose essentially was not a valid purpose, so that was not anything that they were concerned about. The design was to build a canal between the Truckee and the Carson Rivers which, as you know, run about thirty miles apart, from the Sierra Nevadas to divert as much water as possible to supply this irrigation project. The government began advertising the lands for homesteading for people to come and move and guaranteed them a plot of land with a water right.

United States v. Orr Ditch and *United States v. Alpine Land and Reservoir Company* Were Cases Brought by the United States to, Respectively, Obtain Water Rights on the Truckee and Carson Rivers

In order to obtain the necessary water rights, the United States filed two lawsuits to obtain the water rights necessary for the project. One was *U.S. v Orr Ditch* case, which was filed to obtain rights to the Truckee

River;[2] and the other was the *United States v. Alpine Land and Reservoir Company*, which was filed to obtain rights to the Carson River.[3] In both cases, there were ultimately decrees entered awarding the United States rights for irrigation and some other purposes.

"It's particularly important to note that in the Orr Ditch Case on the Truckee River, the United States applied not only for water rights for irrigation for the Newlands Project . . . but also irrigation rights for the Pyramid Lake [Paiute] Tribe. But they did *not* seek water rights to maintain the lake. . . ."

It's particularly important to note that, in the Orr Ditch Case on the Truckee River, the United States applied not only for water rights for irrigation for the Newlands Project

2. "Newlands Reclamation Project, initiated and completed by the United States pursuant to the Reclamation Act of 1902, 32 Stat. 388.Fn Judicial approval for this diversion was [412 U.S. 534, 537] sought by the United States in a suit brought by it in 1913 in the United States District Court for the District of Nevada. *United States v. Orr Water Ditch Co.*, Equity No. A-3 (1944). The decree entered in this action in 1944 authorized the United States to divert Truckee River water at Derby Dam for delivery to the Newlands Project; it also declared the prior right of the United States to sufficient Truckee River water to irrigate some 3,130 acres of bottom land and 2,745 acres of bench land on the Pyramid Lake Indian Reservation. . . ." Source: http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=412&invol=534, accessed September 7, 2010, about 1:20 P.M.

3. "The Alpine Land litigation on Carson River water rights parallels the Orr Ditch litigation. Begun in 1925, and long governed by a 1950 temporary decree, the litigation reached its endpoint when the Nevada district court entered the final decree in 1980. *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877 (D.Nev.1980), aff'd as modified, 697 F.2d 851 (9th Cir.1983) (Alpine I)." Source: http://openjurist.org/914/f2d/1302/united-states-v-orr-water-ditch-company, accessed September 7, 2010, about 1:35 P.M.

to be diverted, but also irrigation rights for the Pyramid Lake [Paiute] Tribe. But they did *not* seek water rights to maintain the lake. So the consequent water right for the Pyramid Lake Tribe, which was the most senior priority on the river was for irrigation but it was for something like 30,000 acre feet, which in the scheme of things is not nearly enough to maintain the lake or the fishery.

But they obtained a diversion right for 1,500 hundred cubic feet per second to be diverted from the Truckee to the Carson River. And, by the same token, obtained in the Alpine Case a water right for the United States to all the water that reached Lahontan Reservoir, which was constructed by the Bureau of Reclamation on the Carson River, whereby, the Truckee Canal was built between the Truckee River and Lahontan Reservoir so that water from the Truckee could be put into the Lahontan Reservoir and then serve the bulk of the Newlands Project.

In 1926, the project had developed to the point of, I think 73,000 acres that had been water-righted–not the 240,000 that they originally envisioned. The project was turned over by contract to the Truckee-Carson Irrigation District for management, which was the typical way the Bureau of Reclamation handled [it]. They'd build the projects, they'd get them going, then they'd turn them over to a local organization and essentially, except for periodic reviews, left them alone.

"From 1926 until roughly 1968, when TCID was

running the project and was diverting . . . as much water as they possibly could for the irrigation district . . . the lake level in Pyramid Lake dropped by some . . . seventy feet because the water supply that had been coming down the Truckee wasn't coming any longer. . . ."

From 1926 until roughly 1968, when TCID was running the project and was diverting, through those years, as much water as they possibly could for the irrigation district, it was during that period of time that the lake level in Pyramid Lake dropped by some, I think it was estimated, seventy feet because the water supply that had been coming down the Truckee wasn't coming any longer. I think the Pyramid Lake Indian Tribe probably complained about this over the years but until 1968 basically limited their activities to administrative complaints.

Seney: One of the problems with the Orr Ditch Decree was that the Federal government represented *both* the Indians *and* the farmers on that and they were antagonists.

Disheroon: Yes, but the Federal government was giving priority at that time to the irrigators and very little recognition of its obligations to the Indians. They thought as long as they provided for irrigation, that was all that was necessary.

Seney: They weren't farmers, they were fishermen.

Operating Criteria and Procedures (OCAP) for the Newlands Project

Disheroon: They were fishermen, that's right, but the Bureau of Reclamation didn't recognize that. At some point, around 1965, the Interior Department did begin to become aware that they had an untenable situation. This was when I think Stuart Udall was Secretary of [the] Interior. So Interior did begin to issue regulations called OCAP, Operating Criteria and Procedures, for the Newlands Project.

I think this was one of the first times–maybe the only time, I'm not sure–they ever actually did that to a Reclamation project. But they recognized that the Pyramid Lake Tribe had not been adequately provided for, and [the] OCAP were designed to at least try to limit the amount of water that was taken out of the Truckee. The OCAP were in place for a couple of years until 1970. There's no evidence that it accomplished anything material. And then the Pyramid Lake Tribe at that time filed this lawsuit, the *Pyramid Lake v. Morton* case, alleging that the secretary had *not* carried out his trust responsibilities.

Pyramid Lake V. Morton

Following the filing of the lawsuit, I think in 1972, Interior issued new regulations, which were challenged by the Pyramid Lake Tribe as being inadequate. In a decision in 1973–this lawsuit, by the way, was filed in Washington, D.C.

Seney: That was peculiar, was it not, to file it there? I know TCID complained that it was filed there.

“. . . their lawsuit was against the Secretary of Interior and the law, up until that point in time, was generally, if you want to sue a Federal agency, you sued them in Washington. Congress hadn’t really liberalized the rules where you can now sue a Federal agency almost anywhere you want to. . . .”

Disheroon: Well, from the tribe’s standpoint, their lawsuit was against the Secretary of Interior and the law, up until that point in time, was generally, if you want to sue a Federal agency, you sued them in Washington. Congress hadn’t really liberalized the rules where you can now sue a Federal agency almost anywhere you want to.

So it was compatible with the practices at the time, and the suit was against the Secretary of [the] Interior to require him to carry out his responsibilities–not against the irrigation district. The irrigation district could have moved to intervene, but they chose not to do so. So they stayed out of the case, so it was a suit between the Pyramid Lake Tribe and the Secretary of [the] Interior [with the] Justice Department representing the Interior.

“. . . there were new OCAP issued in ‘72. The Court ultimately found those to be arbitrary because they were not stringent enough and found that the secretary *had*, in fact, abused his discretion, and had *not* carried out the trust responsibility, so he ordered more stringent OCAP put into place in 1973 . . .”

As I said, there were new OCAP issued in ‘72. The Court ultimately found

those to be arbitrary because they were not stringent enough and found that the secretary *had*, in fact, abused his discretion, and had *not* carried out the trust responsibility, so he ordered more stringent OCAP put into place in 1973: Judge Gerhard Gesell. People refer to that as the Gesell Decree or the Gesell OCAP.

Gesell Decree

The Secretary of [the] Interior reviewed the decision and found it to be acceptable and decided not to take an appeal, so that decree then remained in effect from 1973 until roughly 1987. After it was implemented, the secretary instructed the Truckee-Carson Irrigation District to comply with the new OCAP ordered by the court.

“. . . the OCAP put a limit of total diversion of water that could be available to the Newlands Project, I think it was 292,000 acre feet. . . . Which would have been *less* than that from the Truckee River, and would have substantially reduced diversions from the Truckee River to the Carson Division. . . .”

And the OCAP put a limit of total diversion of water that could be available to the Newlands Project, I think it was 292,000 acre feet.

Seney: From the Truckee River?

Disheroon: No, total. Which would have been *less* than that from the Truckee River, and would have substantially reduced diversions from the

Truckee River to the Carson Division.

"The Newlands Project has two divisions, a Truckee Division and a Carson Division. Truckee Division is served *only* by the Truckee River, but the Carson Division gets its water from both. . . . in the Gesell Decree, the judge made the ruling that the primary source of water for the Newlands Project, meaning the Carson Division, should be the Carson River with the Truckee only being supplemental, which is a primary principle that the Interior Department has adhered to ever since that time. . . ."

The Newlands Project has two divisions, a Truckee Division and a Carson Division. Truckee Division is served *only* by the Truckee River, but the Carson Division gets its water from both. I should point out that in the Gesell Decree, the judge made the ruling that the primary source of water for the Newlands Project, meaning the Carson Division, should be the Carson River with the Truckee only being supplemental, which is a primary principle that the Interior Department has adhered to ever since that time.

"The secretary then . . . directed TCID to implement the new OCAP. TCID refused, they said, 'We were not a party of the litigation, we're not bound by it and you, Mr. Secretary, don't have the authority to tell us [what to do]. We have water rights, we're entitled to the amount of water, and you can't direct us to follow these OCAP and we're not going to do it.'. . ."

The secretary then, as I've said,

directed TCID to implement the new OCAP. TCID refused, they said, "We were not a party of the litigation, we're not bound by it and you, Mr. Secretary, don't have the authority to tell us [what to do]. We have water rights, we're entitled to the amount of water, and you can't direct us to follow these OCAP and we're not going to do it." The United States took three actions as a result. I'm trying to remember the sequence because again, I was not directly involved in this.

". . . the Pyramid Lake Paiute Tribe after the Gesell Decision . . . talked to Interior and said, 'The Court has found a violation of the trust responsibilities, we've lost this water over the last fifty years and we're entitled to damages.' . . . Federal government did ultimately three things to try to remedy that because the Federal government . . . recognized that there had been this failure to carry out the trust responsibility. One of the things, I'll come back to, is to try to enforce the OCAP to reduce the amount of water. Second was, we entered into a monetary settlement with the tribe. . . . And the third was to try to take care of the future problems. . . ."

I should back up a little bit: the Pyramid Lake [Paiute] Tribe after the Gesell Decision, had potentially talked to Interior and said, "The Court has found a violation of the trust responsibilities, we've lost this water over the last fifty years and we're entitled to damages."

The Federal government did ultimately three things to try to remedy that because the

Federal government accepted the fact and recognized that there had been this failure to carry out the trust responsibility. One of the things, I'll come back to, is to try to enforce the OCAP to reduce the amount of water. Second was, we entered into a monetary settlement with the tribe.

Seney: Was that the $8,000,000?

"The Justice Department and Interior had a theory that the water rights for the project were held in the name of the United States, not in the name of the individuals, and that the United States *could* apportion the water rights between the farmers and then transfer the remainder to the Indians. . . ."

Disheroon: Yes, for the past damages. And the third was to try to take care of the future problems. The Justice Department and Interior had a theory that the water rights for the project were held in the name of the United States, not in the name of the individuals, and that the United States *could* apportion the water rights between the farmers and then transfer the remainder to the Indians.

United States v. Truckee-Carson Irrigation District

So a lawsuit was filed, it's titled *United States v. Truckee-Carson Irrigation District*, to get the court's determination that the secretary had the authority to carry out those activities. This is one of the cases that held up the *Pyramid Lake Tribe v. Morton* during this period of time. In fact, that was a

primary case–the other I will come back to in just a minute–to confirm the authority, to make that allocation of water. That case was brought in Nevada because it had to include the Truckee-Carson Irrigation District *and* the individual farmers, since they were the ultimate recipients of the water rights, not TCID, which was the manager of the project, but which owned no water rights.

The U. S. Court of Appeals held that the United States had in the Orr Ditch case asked for *all* of the water rights in the river, essentially, and that decision had already been made and therefore, there were no water rights left that could be transferred to the Indian tribe. Nor could–and I'm sort of summarizing this–the United States take water rights that belonged to the farmers and give them to the Indian tribes.

Seney: They rejected the government's position.

Nevada v. United States

Disheroon: They rejected the government's argument and that case ultimately went to the Supreme Court and became *Nevada v. United States*. The State of Nevada intervened in the case and asserted the rights of the farmers. In that case, the Supreme Court held that while it was true that the Federal government did have the legal title to the water rights under the Reclamation law, the beneficial use belonged to the farmers and that the right of the United States were essentially in the nature of a lien to secure repayment, and that the United

States could not take those rights away without payment of compensation.

Seney: Because they said there weren't so many bushels of wheat.

Disheroon: Right, to be traded. And they pointed out, they said, "We recognize there is a conflict here between the trust responsibilities to the Indians and your obligations under contract to the farmers, but that's the way Congress intended it and if the secretary's charged with, quote, 'carrying water on both shoulders,' (unquote), that's his job, that's what we'll have to do. He can't pick between the two of them, he has to meet his obligations to both of them." Which was very wonderful but it doesn't tell you how to do it. That came out in '83.

After that guidance came down, then it became clear to the secretary that his remedies in satisfying obligations to the Pyramid Lake Tribe could be carried out in one of two ways: he could enforce legal limitations on the use of water in the Newlands Project so that while the farmers got the water they were entitled to, they didn't get any more water than that. And [he] began to consider other ways including purchasing water to make up the deficit, but had to forego the option of reallocating water rights.

Truckee-Carson Irrigation District Contract to Manage Newlands Project Terminated

The other development, going back to

1974, was that after TCID refused to abide by the OCAP, they were put on notice that if they didn't comply, their contract to manage the project would be terminated. TCID continued to refuse, so in 1974 the secretary terminated the contract with TCID and was going to take over management of the project.

". . . between 1926 when TCID took over the project and 1970 or '75 . . . both of the two decrees . . . had in them limitations that the water rights for the project were subject to limitations that farmers would be entitled to three-and-a-half acre feet per acre, *maximum,* for bottomlands and four-and-a-half acre feet, *maximum,* for benchlands, based upon alfalfa as the primary crop, and enjoined the use of water in excess of those amounts. . . ."

I should point out that historically between 1926 when TCID took over the project and 1970 or '75–whatever period you want–throughout this whole period of time, both of the two decrees under which water rights were provided, had in them limitations that the water rights for the project were subject to limitations that farmers would be entitled to three-and-a-half acre feet per acre, *maximum,* for bottomlands and four-and-a-half acre feet, *maximum,* for benchlands, based upon ~~wheat~~ [alfalfa] as the primary crop, and enjoined the use of water in excess of those amounts. These were orders from the courts in both cases that were in effect as of 1926 for both rivers. Notwithstanding that, when TCID took over the project, [the] Interior Department was basically complying

with those limitations.

TCID Changed the Water Allocation in the 1930s Based on an Average of Water Deliveries from 1928 to 1933–Often Well in Excess of 4.5 Acre Feet per Acre–in Spite of the Limitations Imposed in the Orr Ditch Decree and Alpine Ditch Decree

TCID managed the project for about five years, and in the early 1930s came up with a new method for allocating water to the farmers. They took an average of all of the water that had been delivered to farmers between the periods, I think it was 1928 to 1933, not on whether it was needed or not, but just whether it had been delivered, and then said, "Based on that five years' average, we're going to classify all of the lands in the project– not as bench[land] or bottom[land], but by amount of water they're entitled to. So in effect, they gave them an allocation based on the amount of water they had used during this five-year period. In many cases, the water rights were far in excess of four-and-a-half acre feet. So there were lands that were being served up to eight acre feet per year, despite the fact that the decree said, "*No* land gets more than four-and-a-half acre feet."

Seney: And it's got to be benchland at that.

" . . . there was a big controversy over which lands were bench and bottom because the decrees didn't classify the lands as bench or bottom. . . ."

Disheroon: And that had to be benchlands. And there was

a big controversy over which lands were bench and bottom because the decrees didn't classify the lands as bench or bottom.

Seney: And that's still going on today.

Disheroon: Yes, we just had a recent decision about a week ago which, we hope has put an end to that decision, but time will tell.

"So from 1933 to 1970, TCID was delivering water far in excess of the amounts permissible under the decrees. And this is documented record. This is why the farmers are all upset when I make these type of statements in court . . ."

So from 1933 to 1970, TCID was delivering water far in excess of the amounts permissible under the decrees. And this is documented record. This is why the farmers are all upset when I make these type of statements in court, but it's a documented fact that their records themselves demonstrate that they made these kind of allocations.

Seney: The TCID delivery records, water cards.

Disheroon: Yes, right. And their own board of directors' minutes, in bench/bottom case–which I'll tell you about in a minute–we went through all of TCID's board of directors' minutes going back to 1926, and each year TCID would set allocations by categories, and they had drawn maps of the allocations, and colored them differently for each amount of water, and they were multi-colored maps because they had five, six, seven different colors. They would

set a specific allocation for lands "A," "B," "C," in the board of directors' minutes and they document they went anywhere from one-and-a-half to eight acre feet. They're right there in the board of directors' minutes. You look at the map and you can see which land's got what. And that went on until 1977. That was forty years.

"In 1977 . . . it finally dawned on someone that they were not even in compliance with the Orr Ditch and Alpine decrees . . . they reduced all of the allocations that had been above the four-and-a-half acre feet. After 1977, they at least were ostensibly complying with the three-and-a-half, four-and-a-half acre feet. . . ."

In 1977, [perhaps] as a result of the litigation that the United States brought [against] TCID, it finally dawned on someone that [they were] not even in compliance with the Orr Ditch and Alpine decrees, whatever the dispute with the Federal government. So they passed a resolution, the board of directors–and I think they passed it, and then they revoked it, and then they passed it again, but ultimately it passed–where they reduced all of the allocations that had been above the four-and-a-half acre feet. After 1977, they at least were ostensibly complying with the three-and-a-half, four-and-a-half acre feet.

Seney: According to the official record, at any rate.

" . . . the other practice that they had over the years was that . . . they would sell extra water . . . if they had more water . . . In addition to the four-

and-a-half, farmers could get more water just based on the fact that it was available in Lahontan Reservoir, and TCID charged extra for that. . . .”

Disheroon: Right, according to their allocations. But the other practice that they had over the years was that in many years they would sell extra water. So if they had more water than they needed that year, they would let a farmer come in and buy extra water. In addition to the four-and-a-half, farmers could get more water just based on the fact that it was available in Lahontan Reservoir, and TCID charged extra for that.

“. . . we have this long history in TCID of excess diversions, they didn’t keep very good records, they didn’t check on how much water the farmers put on their land or even whether they put it on the land that they had the contract on. . . .”

So we have this long history in TCID of excess diversions, they didn’t keep very good records, they didn’t check on how much water the farmers put on their land or even whether they put it on the land that they had the contract on.

“If they had a water right . . . say they had a hundred acres and they were irrigating fifty acres, TCID would deliver the full water right for a hundred acres and they could put it anywhere they chose. So a lot of people were irrigating lands other than those that had the water right, and the water right traced back to the contract because all of the water rights stem from contracts with the Bureau of Reclamation with the individuals who specify the amount of the acreage and the amount of water they were entitled to. . . .”

If they had a water right–let's say they had a hundred acres and they were irrigating fifty acres, TCID would deliver the full water right for a hundred acres and they could put it anywhere they chose. So a lot of people were irrigating lands other than those that had the water right, and the water right traced back to the contract because all of the water rights stem from contracts with the Bureau of Reclamation with the individuals who specify the amount of the acreage and the amount of water they were entitled to.

Seney: Now there was also another problem that's come up, too, related to this, and that is that, say, an eighty-acre parcel, they might have only contracted for seventy-five acres of that because there would be a sand streak or a sand pile in the middle of it that they had made. Over the years they leveled that out and they're really irrigating all eighty acres and they only have a right to seventy-five.

"And it was primarily because of what I will call mismanagement . . . failure to comply with the secretary's directions, which were basically, you're only supposed to deliver water to those lands that have a water right, to lands that are actually irrigated and within the limitations, the four-and-a-half, three-and-a-half acre feet that the decrees called for, which would have worked a *substantial* reduction out of water that was delivered to the project, and TCID refused to do so. . . ."

Disheroon: Seventy-five, that's right. TCID, going back, filed a lawsuit after the secretary terminated

the contract. And it was primarily because of what I will call mismanagement–others can put their own label on it–and failure to comply with the secretary's directions, which were basically, you're only supposed to deliver water to those lands that have a water right, to lands that are actually irrigated and within the limitations, the four-and-a-half, three-and-a-half acre feet that the decrees called for, which would have worked a *substantial* reduction out of water that was delivered to the project, and TCID refused to do so.

They sued the secretary, claiming he had no authority. That was filed, I think in '75.

Seney: This was to terminate their contract?

From 1975 to 1983 TCID Ran the Project Without Legal Authority

Disheroon: Yes, but it was TCID that sued to *stop* the cancellation. The suit was never officially stayed, but Interior did not physically move to take over the project, which is what they would of had to have done, because the TCID wouldn't voluntarily vacate. So we had that situation from approximately '75 to 1983. TCID ran the project under no legal color of authority whatsoever, other than the fact that they had a lawsuit pending, challenging the authority of the secretary.

In 1984 the Supreme Court Affirmed the Secretary's Authority to Terminate the Contract with TCID

After the *Nevada v. U.S.* case was decided, the court here in Nevada affirmed the authority of the secretary to terminate the contract, and there was an appeal taken and that was ultimately affirmed. So as of approximately 1984, then you had obtained a decision from the Supreme Court, the secretary had obtained a decision affirming his authority to terminate the contract.

". . . they entered into an interim agreement with TCID, which was about two pages long . . . So since that time, TCID has been operating under that interim agreement. . . ."

In the meantime, in '83 I think someone said, "We just can't have TCID continuing to operate this project without any authorization." So they entered into an interim agreement with TCID, which was about two pages long, which basically said, "Pending the outcome of the litigation, we will allow you to continue to operate the project. If you agree, you'll abide by all the regulations of the secretary and this project contract can be terminated on ~~thirty~~ [ninety] days' notice, effectively." So since that time, TCID has been operating under that interim agreement.

TCID Still Over-Diverted Water

After the two cases were over, that's when *Pyramid Lake v. Morton* [was reactivated]. The tribe then came in, and in

one summer, I think it was–and this was the first thing I was involved in–the TCID had again, been over-diverting water and the tribe went to the secretary and said, "It's time to enforce the OCAP. They haven't been complying with them. Your authority's been confirmed. Cut off the water, stop the diversion."

So the secretary went out and closed down the diversions on the Derby Dam. TCID went to the Federal Court and talked to the Federal watermaster and said, "You're drying up our crops, we're not getting our water rights." So the watermaster went and opened the gates and let the water go through.

Judge Gesell Ordered the Secretary of the Interior to Enforce the OCAPS

The tribe went to Judge Gesell and complained, and the Judge's only question was, "Why aren't you complying with my directives? I said if you want to change the OCAP, you can do it by agreement with the tribe or you can come get my permission. Otherwise, you comply with them."

Seney: Did he say this to TCID?

Disheroon: No, he said this to the Secretary of Interior. TCID still wasn't in the case.

"So here he was telling the Secretary of the Interior to go make TCID comply, and TCID was still saying, 'You can't make us do that, we'll decide how much water we're entitled to.' . . ."

So here he was telling the Secretary of the Interior to go make TCID comply, and TCID was still saying, “You can’t make us do that, we’ll decide how much water we’re entitled to.”

We did two things as a result of that. It became clear that this wasn’t going to work. We couldn’t have Judge Gesell in Washington telling the secretary what to do, but no control over TCID who was effectively in charge of the project.

Seney: And Judge Gesell is not the kind of judge to put up with that for very long, is he?

Transferred the Case to Nevada Where TCID Became a Party to the Case

Disheroon: No, absolutely not, he didn’t put up with it at all. So we moved to transfer the case to Nevada. We said, “That’s where the focus is, and that’s where the decisions are made,” and Judge Gesell agreed. So he transferred the case here to Nevada.

TCID then intervened in the case, and that was, I think, in 1985. And for the first time, we had both of the relevant parties before the same judge. So Interior would then come in and we began a practice in, I think it was 1985, [of] providing interim OCAP. The OCAP that were issued in ‘73, there were some complaints that they didn’t fully comply and there were problems with them, so Interior got agreements with the tribe for a couple of years to provide interim OCAP

which had higher limits.

END OF SIDE 2, TAPE 1. AUGUST 25, 1994.
BEGIN SIDE 1, TAPE 2. AUGUST 25, 1994.

Seney: [Today is August] 25th, 1994, my name is Donald Seney, I'm with Mr. Fred Disheroon, of the Department of Justice, in the headquarters of Sierra Pacific Power. Go ahead, Mr. Disheroon.

Disheroon: I was talking about the OCAP case being transferred to Nevada and TCID being joined in it.

Seney: And the new OCAPs, that there was going to be a little change there?

Disheroon: Right. So everyone recognized that some changes were required to the OCAP, but also, we had the new laws, that weren't that new then, the NEPA and so forth, that required environmental impact statements before you issue regulations.

Seney: The National Environmental Policy Act.

Disheroon: Right, and OCAP were ultimately regulations by the secretary. So they had these procedures and notice, [and] opportunity for comment. What we did in the meantime for each year pending, while Interior was working on developing new OCAP, we would go to the court and say, "Here is interim OCAP, we've got agreement with the tribe, we would like you to order those into effect." Each year, over TCID's objection, the court did adopt the

OCAP that we proposed. But every year we'd have a round of litigation over whether the OCAP were appropriate or whether they were too stringent or whether they interfered with the farmers' rights.

Controversy over Bench and Bottom Land Designation by TCID

At that point, we began to get other lawsuits as sort of an outgrowth of this. We had, I mentioned the bench-bottom controversy. Well, one of the things Interior did in the draft OCAP was to say TCID ostensibly had a classification for bench- and bottomland maps, which they call "bench and bottom Criteria." But what the bench and bottom criteria were, they had simply taken the map they had developed in the 1930s, with the up to eight acre feet, when they reduced it in 1977 to four-and-a-half, they classified all of the lands that weren't getting four-and-a-half as bench[land] and all the other lands as bottom[lands] and they created a new map which looked like bench[land] and bottom[land], but it wasn't predicated on any geological or soil based information, it was just a transliteration, if you will, or the transmutation of the other map into a, quote, "bench and bottom map," [unquote], and that's what they had been using.

The Bureau reviewed it and said, "This doesn't make any sense." Because ostensibly they had made an estimate in 1926 of the amount of lands of bench and bottom in the project and at that time they had estimated

there were about 8,000 acres of benchland and I think 56,000 acres of bottomland. And at that time they expected that there were around 65,000 acres that were actually being irrigated out of 73,000 total acres of water-righted land. The actual irrigation is probably somewhere closer to 58,000 acres.

Reclamation Decided to Develop a New Benchland and Bottomland Map Based on Soil Characteristics and Water Table Depths

TCID had around 17,000 acres of benchland on their map and the Bureau asked, "Where do you get this from?" Nobody knew the answer. We found out how it had happened later by going back and reviewing their records, because the people who were there said, "Well, that's just the way we've always done it." So the Bureau said, "From now on, we're going to develop a new bench- and bottomland map, and you will follow it." So in 1985 they came out with a report and it was based on soil characteristics and water table depths, both which were relevant to the amount of water that was available to the crop from the water table and the root zone, which has apparently a direct correlation to the productivity, the yield of the alfalfa crop, and they classified all of the lands. TCID came into court and said, "No, those are not scientifically based," and asked the judge to direct that they not be required to follow them.

The New Map Resulted in Another Long and Drawn out Court Case

This began a round of another lawsuit called the *Bench and Bottom Case*, in which we, hopefully, just obtained a final decision about two weeks ago, so it took almost ten years. We had three separate trials, the judge initially found that the TCID map was a historical map and that's what he had intended when he had been involved in the Alpine case and issued the final decree in 1981, specified the rights and he said, "That's consistent with what I had in mind." And we, the Justice Department, said, "But judge, you didn't define bench- and bottomland maps in your decree, so the Secretary of Interior has the authority now to make a decision and your job should be to review that decision." He said, "No."

Seney: Well, the Alpine judge had said the farmers won't put more water on the land than they need. (Disheroon: Right.) So if they put it on there, they obviously needed it, so that's the criteria.

Basically the judge said ". . . they wouldn't be putting it on if they didn't need it, which in some respects sounds very logical, until you look at the actual practices and you'll see that in many cases, the crops were wilting because of a high water table and the farmers' solution was to put more water on it, which would help the crop initially but ultimately, they kept raising the water table to the point where it was within a few inches of the surface and didn't leave room for the crops' roots to grow. . . ."

Disheroon: Right, basically, they wouldn't be putting it on

if they didn't need it, which in some respects sounds very logical, until you look at the actual practices and you'll see that in many cases, the crops were wilting because of a high water table and the farmers' solution was to put more water on it, which would help the crop initially but ultimately, they kept raising the water table to the point where it was within a few inches of the surface and didn't leave room for the crops' roots to grow. I won't get into that, that would take a long time.

So the judge affirmed TCID's map, because at that point we hadn't done this review of where the bench/bottomland map came from but we came in and we said, "Judge, there's this discrepancy in the Alpine case– which was finally decided in 1981– TCID put on *undisputed* testimony that there were 9,000 acres of benchland in the project and 56,000 acres of bottomland. Now this map that they have told you is their historic map has 16,000 acres of benchland, where'd this extra 7,000 acres come from?" The judge said, "You've got a good point. I'm setting aside my order, we're going to have a re-hearing." At that point, we went back and did this review of TCID's records, board of directors' minutes, water delivery orders, and put together a historical package that clearly reflected what I've already told you.

Seney: It must have been a great deal of work.

Disheroon: It was, it was. It was kind of fun, because, you know, you're ferreting out, if you're a

historian, What really happened here? Because you ask all of the people currently in TCID, “How did you get there?” And they basically didn’t know. They said, “Well, we were relying on this map.” They used the terms bench [and] bottom, so they assumed that there was some basis for it, but in fact, there wasn’t.

So we put that record before the court, the judge said, “Fine, we’re not going to use the TCID map. What are we going to do?” He didn’t like the map the Bureau had provided. I said, “Why don’t you remand it back to the secretary and give him another opportunity to document his findings?” So the judge said, “Okay, we’ll do that.” So the secretary went back, went through a new study, came through with new criteria, brought it back to the court and said, “Okay, here you are.” We had another trial–this was about ‘87, I guess. Then TCID hired their experts and they came in and they drew up a new map so they had a new bench/bottom map, we had a new bench/bottom map and the judge listened to all of it. See, *his* objective at that time was not to review what he said, “It’s not the secretary’s job to determine this, it’s *my* job. The question is, what did I intend when I issued the Alpine Decree?” And he reviewed all of the maps and said, “None of them really have any merit, but I guess I’ll just stick with the historical map because it is what people have been relying on and a pox on both of your maps!” Except, in one case there was about 1,500 acres of land where *both* the Bureau and the new map had agreed they

should be bottomland rather than bench. So he said, "But in that one case, I'll change those but everything else stays the way it was."

The Ninth Circuit Court Determined it Was the Secretary of the Interior's Responsibility to Determine Which Lands Were Bench or Bottom and Returned the Case to the District Court

So we took an appeal from that case to the Ninth Circuit and argued primarily that the judge had erred, in effect making the decision himself, instead of reviewing the secretary's decision. The Ninth Circuit agreed with the government and said, "You're right, the judge didn't define them, it's within the secretary's authority over the project to initially make that determination subject to the judge's review for reasonableness and an explanation."

So they sent it back to the court for a new determination, the secretary prepared a new map which was finished in 1992, then it went through a public comment period, they gave everybody a chance to comment on it, and finally issued a new report in 1993. It then went back to court to the judge and had a hearing last February with the new report, which basically had the same classification criteria in it as the Bureau had in 1985, but there was a better rational explanation for it, and it was being reviewed now under the criteria of whether the secretary had acted properly, rather than what the judge had in mind.

The court, just about two weeks ago, issued the decision affirming the secretary had exercised his discretion and that the map was consistent with Nevada law of beneficial use. So that map will now be used in the future and it will result in reduction in benchland of about 6,000 acres. This conversion from benchland to bottomland will get closer back to the historic figures.

TCID Had Allowed Farmers to Transfer Water Rights to Different Lands

Another type of litigation that grew out of this interregnum while TCID was managing the project: they had effectively allowed transfers of ~~property~~ [water rights][4], [they were] informal; people had water over here and they were irrigating lands over here–or in many cases, they were just irrigating lands over here *and* over here.

TCID Apparently Informally Approved Transfers of Water among Tracts

I think TCID had, up until 1970–although I never saw any records–I think they had basically informally approved when people came in and said, "We want to transfer our rights from here to here." Although they never documented it anywhere, because they weren't particularly concerned if the people didn't ask for more water than they were entitled to on the water delivery cards, they gave it to them.

4. Correction made by Mr. Disheroon.

Seney: Wherever you want it.

". . . no matter what crop you were growing or where you were putting it, if it was within your maximum water right, [TCID felt] you were entitled to it. That was it, and there was no checking on what they did with it, very little monitoring. It was an honor system, the farmer would call up and say, 'I want so much water' and TCID would deliver it within one day, anywhere in the project without regard to how efficient it was. . . ."

Disheroon: Yeah, no matter what crop you were growing or where you were putting it, if it was within your maximum water right, you were entitled to it. That was it, and there was no checking on what they did with it, very little monitoring. It was an honor system, the farmer would call up and say, "I want so much water" and TCID would deliver it within one day, anywhere in the project without regard to how efficient it was.

Seney: How much might flow by as you're doing it.

Disheroon: You know these earthen canals, if you had one farmer–this is probably an extreme case–way out at the end of the project, and nobody else wanted any, but if he called up, they would send the water, all the way down–[with] all the waste that was attendant on that.

"Another outgrowth of that was that the farmers then in 1984 and '85 decided they wanted to legalize their, quote, "illegal" [unquote] irrigation. . . ."

Another outgrowth of that was that the farmers then in 1984 and '85 decided they wanted to legalize their, quote, "illegal" [unquote] irrigation. (Seney: These transfers?) Yes, transfers. Went to the Nevada state engineer and applied for transfers. And in most cases, it was not because they wanted to take water here and put it over here–they had already been taking water over here. In many cases what they did, they'd been irrigating here, they went out and bought up pieces of water rights from land that had not been irrigated and moved to consolidate those and transfer them over here. So it wasn't a simple case of simply moving water from here over to here: it was a matter of taking water rights from lands that were inactive, or had perhaps never been irrigated, to legalize this illegal irrigation.

"There were a series of decisions by the Nevada state engineer from 1985 to about 1992, in which he affirmed all of the transfers that people asked for. And the Pyramid Lake Tribe was the principal challenger of the transfers, and they had two primary objections. One, that it wasn't in the public interest, . . . And secondly, the water rights in most cases had either been abandoned or forfeited or perhaps never perfected . . ."

There were a series of decisions by the Nevada state engineer from 1985 to about 1992, in which he affirmed all of the transfers that people asked for. And the Pyramid Lake Tribe was the principal challenger of the transfers, and they had two primary objections. One, that it wasn't in the public

interest, because it was increasing the demand on the Truckee River by, in effect, allowing more water use than was legally authorized. And secondly, the water rights in most cases had either been abandoned or forfeited or perhaps never perfected in the first place, and under the law you can't transfer a water right if it's not a valid water right–so in effect, questioning the validity of the water rights that were reportedly being transferred.

". . . the state engineer approved all of those transfers and basically made rather perfunctory findings on forfeiture and abandonment . . ."

As I said, the state engineer approved all of those transfers and basically made rather perfunctory findings on forfeiture and abandonment.

We ultimately consolidated a number of those cases and went to the District Court with an appeal, and I think–he didn't hear them all, but he heard certain ones of them–basically the District Court found that while the state engineer had not done a great job, that it was probably sufficient so he sustained the transfers, except in one limited instance where they transferred land from benchland to bottom. The judge said, "You have to reduce the entitlement, you can't transfer four-and-a-half, you only get three-and-half if the land you've transferred it to is bottomland. In that respect, the state engineer was wrong." Otherwise, he affirmed it.

Both the tribe and the Federal

government took an appeal to the Ninth Circuit complaining that the state engineer had not made proper findings on forfeiture and abandonment, and there were ultimately two decisions out of the Ninth Circuit, which the Ninth Circuit agreed and said, "The state engineer had mis-applied the law, he hadn't made proper findings." And they sent them back to the trial court to either review them themselves or send them back to the state engineer for a new decision under proper guidance. And that case is still pending, it hasn't been finally decided.

But, in the meantime, the Bureau of Reclamation had, up until a year ago, assumed that the transfers were valid since the state engineer had to approve them and was delivering water to them. After the Ninth Circuit decided that they had been improperly applied, the Bureau changed their view and said, "We're no longer going to supply water, because they are no longer presumptively valid. Until the state engineer or whoever makes a new decision on the transfer, you will get no water."

A number of the farmers went back to the District Court and said, "The government's wrong, the state law says `you presume they're valid unless you obtain a stay' and they didn't obtain a stay and therefore, we're entitled to water."

We said, "That's not right, the Court of Appeals has said that the decision was improperly made, so therefore your

presumption of validity no longer applies." And the judge, in a decision earlier this year, agreed with us. So as of this point in time, none of the people who are involved in the water right transfers will get any more water until there's a new decision. But that's still pending.

Litigation over the 1988 OCAP

The fourth lawsuit, which consumed much of our time until 1990, was the OCAP lawsuit -- I previously referred to the interim OCAP. In 1988, Interior finally came out with new final OCAP, and in that case, as we did in the others, we went to the District Court, filed it, and asked the court to give them immediate effect pending the hearing on objections, which the court did. So those OCAPs have been in place since 1988.

The New OCAPs Called for a Diversion Goal of 320,000 Acre Feet Annually–a Substantial Reduction

They basically call for a maximum diversion to the project. The goal was 320,000 acre feet per year as opposed to 292,000 under the Gesell Decree. But it was based on different calculations. [It] essentially required that if you have a water right, you only get water for lands that are water righted <u>and</u> actually irrigated. And you get no more than three-and-a-half and four-and-a-half -- the same rules that we've discussed previously. So in applying all of those, Interior calculated the amount of water

that would be necessary, and that's basically what the OCAP did. But it worked a substantial reduction in the amount of water, because historically TCID had been diverting somewhere around 400,000 acre feet, so you're talking about 80,000 out of 400,000, it's twenty percent or so reduction in the amount of water to the project–total.

"This was headgate delivery so it's not the total amount of water, because you have also all of the transportation losses of water from the Truckee Canal and from Lahontan [Dam and Reservoir] to the headgates . . ."

This was headgate delivery so it's not the total amount of water, because you have also all of the transportation losses of water from the Truckee Canal and from Lahontan to the headgates, those were the headgate entitlements.

State of Nevada, TCID, and Others Sued Us over the New OCAPs

After that, we were sued by the State of Nevada, TCID, a group of farmers, the Fallon [Paiute Shoshone] Tribe–and it seems to me there was some other entity in there–they *all* challenged the OCAP. We were getting revved up for this massive litigation. One of the things OCAP did was, they had historically kept Lahontan Reservoir full as possible, and in the spring when there was water in the Truckee, they would divert *all* they could out of the Truckee River to keep Lahontan full, and it has a capacity of, I

think with flashboards goes up to like 305,000 acre feet–or am I getting the elevations? At any rate, the Bureau and the OCAP–the OCAP had allowed storage at the end of June at 290,000 acre feet. They reduced that to 215,000, so it was a 75,000 [acre foot] reduction.

The farmers and everyone else came in and complained among other things, saying, "You're not providing enough water to meet our decreed rights, and you don't have the authority to put a limit. We have water rights. The Supreme Court said we own them. You have to supply whatever water it takes to give us three-and-a-half and four-and-a-half." The State of Nevada said, "Your OCAP are going to reduce the diversions, it will reduce the water going into the water table, it'll affect the water supply of the towns"–who had effectively been taking water out of the water table.

Another Issue Was Towns That Took Water from the Water Tables That Were High Due to Seepage and Over-application of Water

One of the results of the over-application of water that resulted from the excess diversions was that you had built up an annual water table, if you will, in the Newlands area so that in the spring when they started irrigating, the water table would come up and it would drop off in the ~~spring~~ [fall] and then come back–it was cyclical. It was primarily due to the water that was percolated into the ground–not only from the irrigation,

but from seepage [from the canals] and all the extra water that was being used. And the towns–Fernley particularly–and Fallon, much of their water supply came out of this water table. So not only was the diversion supplying the irrigation district, they were also supplying the water supply for municipal purposes, even though that wasn't a nominal project purpose.

Some of the Case Had to Do with the National Environmental Policy Act

[One claim] ~~This~~ was under the National Environmental Policy Act, if you haven't adequately analyzed your effects of your actions, you're drying up the municipal water supply, *and* the wetlands at the end had significantly benefitted over the years because much of the water had run off so there were these lush wetlands in the middle of the desert out there, that was occasioned by the benefit of two rivers. They would get all of the runoff that didn't go into the groundwater table, and some of that. You're going to dry up, [and] significantly adversely affect the wetlands, and you haven't analyzed that in your calculations.

The Fallon Paiute Shoshone Tribe Asserted it Had Never Received All the Water it Was Entitled to Receive

The Fallon [Paiute Shoshone] ~~Indian~~ Tribe said, "You haven't carried out your trust responsibility to us, we've never gotten the full amount of water we're entitled to. The

OCAP will adversely affect us."

The Farmers Were Asserting the Right to a Full Lahontan Reservoir as Drought Protection

Also they were claiming, the farmers, basically in their water rights, [that] part of their right was an entitlement to a full reservoir, that not only were they entitled to a full water delivery every year but also enough water in addition to keep Lahontan full to provide them with drought protection in the future. So these were the issues that they were presenting in the OCAP case, and we went through about two years of briefing on all of these issues, and there were some others but those were the main ones that come to mind.

Senator Harry Reid Becomes Interested in the Project Because of Water Supply for Reno and Sparks

Until about 1990, when along came Senator Harry Reid and decided this was getting out of hand. I haven't talked about Reno and Sparks–but in the meantime, they [also] were making demands on the Truckee. They were looking at Reno growing and they wanted to guarantee their water supply and we were entering into a drought period, and they were concerned about having adequate storage. The Pyramid Lake [Paiute] Tribe was pressing their claims, and the Fallon [Paiute Shoshone] Tribe and the Newlands Project. So you had this big controversy, and it looked like the only way it was going to get resolved was ever-increasing litigation.

"Senator Reid came along and basically said, 'Wait a minute. Can't we arrive at some kind of negotiated settlement of these issues?'. . ."

Senator Reid came along and basically said, "Wait a minute. Can't we arrive at some kind of negotiated settlement of these issues?" Because of my role in the litigation, I became directly involved in those negotiations. In fact, part of the difficulty had been between '85 and roughly 1990, except when they were doing the OCAP where they finally gave the responsibility to Undersecretary of Interior, Earl Gelde, there was no one in Interior who could speak for the Department on what was going on in all of these lawsuits.

Many times–and this is going back to your earlier question [on conflicts between Interior Department Bureaus], maybe I'll think of a specific one–I would go to the solicitor's office in Interior and say, "What is your view on this issue of storage, whether the farmers have a water right?" And the Bureau of Reclamation would say, "Yes, they do." And the Bureau of Indian Affairs would say, "No, they don't." And Fish and Wildlife Service was split down the middle, and we didn't get any answers. So basically, in that case what we did was we reviewed the case law and our previous decisions and basically, it wasn't a particularly difficult decision if you're familiar with western water law: Although they're not enforced, there are recognized limitations.

"The idea of storage that you could get your full

entitlement every year *and* a full reservoir, meant that your water right went basically beyond what was necessary for beneficial use and there was no precedent for that argument. . . ."

For example, the doctrine of beneficial use, even though you have a water right of the maximum of four-and-a-half acre feet, you're only entitled to use it if you're putting that water to beneficial use. That is, you need to use that amount of water. If you don't need that amount, you're not entitled to it under your water right. The idea of storage that you could get your full entitlement every year *and* a full reservoir, meant that your water right went basically beyond what was necessary for beneficial use and there was no precedent for that argument.

"What they were arguing with regard to the wetlands was . . . that was a beneficial use of water so technically while the farmers wasted it, it really went to a good use. And we pointed out the Alpine and Orr Ditch Decrees said, 'You're entitled to a maximum of three-and-a-half, four-and-a-half acre feet. You took all of this extra water, you had no right to do that. The fact that the wetlands benefitted was fine, but you can't argue that we should continue to exceed the decree because it benefitted the wetlands.' . . ."

What they were arguing with regard to the wetlands was effectively, well, that was a beneficial use of water so technically while the farmers wasted it, it really went to a good use. And we pointed out the Alpine and Orr Ditch Decrees said, "You're entitled to a

maximum of three-and-a-half, four-and-a-half acre feet. You took all of this extra water, you had no right to do that. The fact that the wetlands benefitted was fine, but you can't argue that we should continue to exceed the decree because it benefitted the wetlands." Consequently, the flip side of that is, we [the U.S.] are not causing damage to the wetlands by enforcing the provisions of the decree. It's the provisions of the decree that dictate the amount of water." So those were some of the issues in the case in where we had different conflicts. But most of the positions we took were pretty well documented in precedent.

"So even though each of the three bureaus would argue for a position to reflect the views of their constituency, we had to try to determine what the law was, and that's the way we based the case. . . ."

So even though each of the three bureaus would argue for a position to reflect the views of their constituency, we had to try to determine what the law was, and that's the way we based the case.

Seney: The Settlement Act, 101-618[5] puts an end to all these things though, doesn't it kind of?

Senator Reid Organizes Settlement Negotiations

California and Nevada in 1966 Agreed to Allocate

5. Public Law 101-618,passed Congress in 1990 and was signed by President George Bush. There were two main sections: Title I—The Fallon Paiute Shoshone Tribal Settlement Act, and Title II—The Truckee-Carson-Pyramid Lake Water Rights Settlement Act.

the Waters of the Truckee, Carson, and Walker Rivers, but the Congress Never Approved the Agreement

Disheroon: For a period of time, yes. But, as I said, Senator Reid thought it was about time to bring this to a stop, so he brought all of the parties together. We had about two years of negotiations, and the intent originally was to try to resolve *all* of these problems in one Settlement Act, including the [problems with] California. I briefly mentioned that historically there was an effort by California and Nevada in 1966: they negotiated a compact to allocate the waters of the Truckee, Carson, and the Walker rivers.

Compacts of that type between states require congressional approval under the constitution. Congress never approved it. There was an effort made in 1987 or '88 when Senator [Paul] Laxalt left [office]. Oh, the compact was negotiated when Laxalt was governor of Nevada and Ronald Reagan was governor of California. Of course at that time [1986], Reagan was president and Laxalt was a senator, so their intention was to get–this [was] twenty years later–get this compact ratified, but they couldn't get it though. It was defeated and at that point they declared the compact dead. So California and Nevada had an active interest in working out a settlement so they could get a congressional allocation of the water. So they were also brought into these negotiations.

END SIDE 1, TAPE 2. August 25, 1994.

BEGIN SIDE 2, TAPE 2. August 25, 1994.

Wayne Mehl, of Senator Harry Reid's Staff, Worked to Facilitate Negotiations Which Resulted in P.L. 101-618–which TCID Never Attended and Never Brought Forward Any Proposals for Resolution

Disheroon: So we were getting into the negotiations. Senator Reid brought together a group of California, Nevada, Sierra Pacific–who you've talked to and was the water distributor for Reno and Sparks–[the] Pyramid Lake Tribe, the Fallon Tribe, TCID, and the Federal government, and there were some others, but those were the primary actors. He said, "See if we can get together and come up with a settlement." And then he had one of his staffers, Wayne Mehl, who you may have talked to, who was the facilitator trying to bring everyone together.

Over a period of a couple of years, an agreement was worked out that ultimately became Public Law 101-618. Along the way, it became clear fairly early that the effort to settle the Newlands Project litigation wasn't going to work, because TCID–and I don't want to mis-characterize their effort–but they never came forward with any proposals for resolution. Their basic position had been, practically I think for all purposes still is, that "we have water rights, we're entitled to them and we want things to continue as they are. If the government wants to change things, they should do it by providing money to line ditches or buy up water rights but it's not our

responsibility." Ultimately they didn't propose anything.

Seney: They wouldn't come to the table and really negotiate?

TCID ". . . came to the table and they'd sit and discuss, but they never put anything on the table and they never accepted anything that anyone else offered. Candidly, they missed a number of significant opportunities during the negotiation where people tried to evaluate it from their point of view, but all of which required some change or accommodation on their part. And for whatever reason, they were just unable to do it. . . ."

Disheroon: They came to the table and they'd sit and discuss, but they never put anything on the table and they never accepted anything that anyone else offered. Candidly, they missed a number of significant opportunities during the negotiation where people tried to evaluate it from their point of view, but all of which required some change or accommodation on their part. And for whatever reason, they were just unable to do it.

Seney: From your perspective, what do you think the reason is?

Why TCID Does Not Negotiate a Settlement

Disheroon: I think TCID's problem has always been–and this is based on my dealings with them as well as the review of their [project]–they're primarily farmers, small farmers whose families have lived there for generations.

They're not, for the most part, highly educated. They're *good* people, they're *wonderful* people to be around, to be friends. But this is their life, they've invested their life in the farming, they farm the way their grandfathers did, they [use] the same methods, almost the same measurements, they don't see anything wrong with the way they use water. They believe that they use the best methods: it was good enough for their grandfathers, it's good enough for them.

"They just were, in a sense, almost caught in a time warp where they would have been solid citizens and unassailable in 1920 or 1930, but this was 1990, and with the environmental demands and Indians and wetlands and endangered species, all had become recognized and entitled to protection, but the farmers had most of the water and the fight was over the water. They weren't willing to bend to accommodate to recognize these others. . . ."

They just were, in a sense, almost caught in a time warp where they would have been solid citizens and unassailable in 1920 or 1930, but this was 1990, and with the environmental demands and Indians and wetlands and endangered species, all had become recognized and entitled to protection, but the farmers had most of the water and the fight was over the water. They weren't willing to bend to accommodate to recognize these others.

The other thing I noticed is–and this was just TCID–that the management of TCID,

they didn't have any really knowledgeable people. Their chairman of the board had always been a farmer, they had never hired any engineers, they hadn't made any evaluation generally–they will dispute what I'm telling you, clearly, because their perception is different but this is *my* perception. They basically hadn't made any effort to decide whether what they were doing was, quote, "wrong," [unquote], or not the best method. It had been good enough for their families and it's good enough for them and they wanted to pass it on to their sons, and they saw no reason to change.

They didn't go out and hire anyone to evaluate whether there were improvements, and in fact, they effectively told the [Department of the] Interior, "Go away, leave us alone." They didn't have any engineers on their staff, they had people who lived there who were the ditch riders which actually opened the valves, but they used methods that went back to 1902, effectively.

Their manager, after 1985, was a lawyer because their principal activity they were engaged in from roughly 1974 to 1990, was litigation. They spent most of their money litigating with the Federal government, *rather* then trying to come up with, "How are we going to deal with this situation?" There was never a view toward an accommodation–it was the view, "Everyone needs to accommodate to us."

I think just economically–put

everything else aside–the economics of the situation just dictate that that situation cannot continue in the face of the conflicting demands from recreation, municipal [users,etc.]. The votes are somewhere else, the money is somewhere else. They're growing alfalfa in the desert, and the money they make is insignificant, and there's not any great demand for alfalfa–but that's their lifestyle and it's the view that, "I'm entitled to my lifestyle however I want to do it." Of course you are, if you can do it, but if you fly in the face of economic demand, you're probably not going to be able to do it very long. I think they were just sort of caught up in this time warp and they've never been able to recognize or accommodate to the changed circumstances, and they haven't to this day.

They've had some people–I think there's a gentlemen who's on the board who was a professor of mathematics at one of the California universities, very bright, very intelligent farmer. They've had people who have proposed changes but the board has never been able to [agree]. I think it's sort of fragmented that whenever anyone would propose change, you could never get a unanimity of agreement to pass anything, and those people would eventually go off the board and someone else [would replace them]. But basically it was just the status quo. I think that's, as I've said, continued to the present day.

Sierra Pacific Power and Westpac Utilities

Seney: Sierra Pacific Power seems to be quite a different kettle of fish. How would you characterize them as players in all of this?

"They're probably the best players and most knowledgeable in the whole equation, including the Federal government. . . .and they know what they're doing, and they have gotten a lot out of this settlement . . ."

Disheroon: They're probably the best players and most knowledgeable in the whole equation, including the Federal government. They don't have five different constituencies, they have one goal, and they have the technical staff, and they have the money, and they have their act together, and they know what they're doing, and they have gotten a *lot* out of this settlement–and I don't mean in any derogatory sense. They knew what they wanted, and they knew how to go about doing it.

". . . the Pyramid Lake Tribe entered into negotiations with Sierra Pacific . . . and worked this out among themselves to allocate storage in Federal reservoirs–which the tribe had no right to do without involving the Federal government . . ."

One of the things they did which I [didn't] particularly [think] was good, was the Pyramid Lake Tribe entered into negotiations with Sierra Pacific, which ultimately became the so-called "Preliminary Settlement Agreement." And the tribe and Sierra Pacific got together and worked this out among themselves to allocate storage in Federal reservoirs–which the tribe had no right to do

without involving the Federal government– and then basically presented the agreement as a fait accompli and said, "Here, we want you to join in this."

The Federal government and the Interior Department looked at it and said, "Why would we want to do that? That doesn't make any sense." We ultimately worked out what we called a "Ratification Agreement" where we put in some stipulations and so forth and accepted it.

Seney: Did you change it very much really?

Disheroon: Not really, no.

Seney: Was it more of . . . .

Disheroon: It was more preserving our options.

Seney: And sovereignty maybe, (Disheroon: Yes.) you say, "Wait a minute, you can't . . . ."

Disheroon: "You can't dictate to us," you know, so we put in "you've got to conform with Federal law" and all that. But the substance didn't change. But in retrospect, Interior reviewed the agreement technically and basically decided it wasn't a bad agreement, so it was more the form in which it was done, rather than the substance. So we ultimately agreed to it, and ultimately Congress, in 101-618–that's about the *only* thing in 101-618 where they *affirmatively* said, "You *will* enforce the terms of this preliminary settlement agreement." And I can only

attribute that to Sierra Pacific, because the tribes' effective lobbying activity [isn't that effective]–and I don't mean that in any derogatory sense. They worked out the agreement, they got Congress to effectively say, "You *will* do it." And they just took it off the table, so that that was a given.

The Pyramid Lake Paiute Tribe

Seney: These are two influential entities, are they not? (Disheroon: Yes.) I mean certainly Sierra Pacific Power is, (Disheroon: Yes.) and I've been told by several different people that I've spoken to, that of the Indian tribes in the state, that the Pyramid Lake Indians are the most influential.

Disheroon: Oh, yes, I think so.

Seney: You would agree with that?

Disheroon: I would agree with that.

Seney: And they're effective players in this too. Their attorney, Mr. Pelcyger, is . . . .

Bob Pelcyger Represented the Pyramid Lake Paiute Tribe

Disheroon: He's been involved in this case, he filed the *Pyramid Lake v. Morton* case in 1970, so he's going on twenty-five years.

Seney: And then they've had good leadership within the tribe itself.

Disheroon: Yes, very, very good leadership, very effective. Joe Ely was their chairman during the negotiation–excellent negotiator.

Seney: And they're able to carry the tribe along with them, they don't have a lot of the "backbiting" that the board at TCID might have if it made the same attempt?

Disheroon: Right, yes. But there had been a significant change because when I first got in this case–and I ought to be careful of what I say here–in 1984, I heard people making comments that the Indian tribe was regarded as sort of second class citizens and that the state and the local [governments] supported the irrigation district. That was the historic alignment of forces, if you would.

". . . the Pyramid Lake Tribe was very adroit . . . And a lot of it was due to TCID's intransigence that they . . . were jeopardizing things that other people needed. Nevada wanted the interstate allocation, Sierra Pacific wanted the storage in the Federal reservoirs. The farmers were becoming an obstacle, rather than an ally . . ."

But the Pyramid Lake Tribe was very adroit and they worked through Sierra Pacific and they met with all of the others and they ultimately formed their own alliance with Sierra Pacific and sort of neutralized the state. And a lot of it was due to TCID's intransigence that they, by their refusal to move, were jeopardizing things that other people needed. Nevada wanted the interstate allocation, Sierra Pacific wanted the storage in

the Federal reservoirs. The farmers were becoming an obstacle, rather than an ally, and you saw this realignment and the tribe's stature rose accordingly while the farmers–it's almost as if they reversed positions so that the farmers–they're not pariahs now, I don't mean to imply that–but they've lost a lot of their previous stature and influence.

Seney: Would you agree though that they have a kind of reputation as being the most intransigent parties in all of this?

Disheroon: Oh, yes, I don't think there's any doubt about that.

Seney: That's hurt them substantially.

Disheroon: Substantially, because they haven't been able to accommodate and take a bigger view or longer-range view of things.

Seney: On the Preliminary Settlement Agreement between Sierra Pacific Power and the Pyramid Indians, am I wrong in understanding that it was actually Sierra Pacific Power that approached the Indians for a settlement on that?

Disheroon: I don't think so, you can ask Pelcyger about it, but I remember a number of times where he was setting up meetings with Mr. [Joe] Gremban, who was I think the president [of Sierra Pacific] at the time, to make proposals. The tribe, giving them credit, was pushing settlement for a number of years and they had proposals and there was a big effort in

settlement in 1984 or '85–Senator Reid didn't think it up, but his timing in '89 was very appropriate. The tribe had a proposal back in '84 or '85 for a settlement, and they were trying to sell that. I think they ultimately approached Sierra Pacific.

Now, it's not that Sierra didn't realize the benefits to them, so they became actively involved in it. But at least the initial approach, I think it came from the tribe, not the other way around because I'm not sure that Sierra initially would have recognized how valuable an ally the tribe could be and the importance that the Federal government was attaching to the Endangered Species Act. But that was a result of case law. It was not until 1978 that the Supreme [Court]–no, maybe it was later than that. *TVA [Tennessee Valley Authority] v. Hill* was a Supreme Court case on the snail darter which the Supreme Court said, "Congress has given the Endangered Species Act the *top* priority on *everything*." So that gave tribe–through the cui-ui, an endangered species–a much bigger clout, if you will, to influence a decision and to bring legal actions. So they were a much more valuable ally after that, [more] than the trust responsibility alone would have made them.

The Role of the Courts in Settling Disputes

Seney: You know the courts have obviously played really a central role since the 1960s in this project in every conceivable question that's come up. I'm wondering if you maybe would comment for us on what you think of the

courts as an arbiter and a decision-maker and a forum for decisions in these kinds of disputes?

Disheroon: I would have to say generally that I think ideally it's a poor place to decide this type of issue. And you know–I don't think we mentioned it–but one of the things that Congress did in 101-618 was basically put a hold on all of the OCAP litigation until the end of 1997 to see if all of this could be worked out: reflecting the belief that things are better worked out by agreement than by a court. And generally, I pointed out the bench/bottom case that we argued to the court that his role was to review what the secretary had done rather than making his own decision. I think as long as I've been in the Justice Department, that has been *our* view that the appropriate role for the court is *not* to make these decisions, because Federal judges, brilliant as they are and experienced as they are, simply don't have the scientific knowledge that's necessarily required to make reasonable decisions in these areas–and they're all very technical and complex and they involve just a whole array of different scientific disciplines. To expect a Federal judge to be able to make a rational judgment, if he's doing it on his own, it doesn't make any sense. Because *no* man has that amount of knowledge.

It's fine, and people I think ought to be entitled to [the assumption] that the government shouldn't be able to make a decision and say, "That's it." [People should

be able] to have someone review it, and the Federal courts I think *do* serve a very valuable function in that regard, where they agree to review the decision made by the technical agencies and give appropriate deference to the [agency, but] not try to get involved in deciding who's right on the science, but whether the agency made a rational, reasonable decision. If they do, then the Supreme Court said, "That's the end." Only if you can say that there was no rational basis or the agency ~~was~~ [acted] arbitrarily ~~sued~~, you'd set it aside, or if you found they violated some statute.

But generally, I think the Federal Courts are not a good place and they're not equipped to do it. Notwithstanding that, I think ultimately, someone has to have the authority to make these decisions, and if you can't reach an agreement, then with the proper rules, the Federal courts generally do a good job, and I think that's what has happened. We've spent monumental amounts of time and effort in this case, just in the ten years I've been involved in it. But you can see that ultimately, up until the litigation on OCAP was put on hold, and even more recently in the bench[land] and bottom[land] water right transfer, you see there's substantial progress being made toward defining the rules, so that the people who are involved, know what their rights are and what they can do and what they can't do. I think that ultimately lends itself toward people getting together, knowing the rules and then arriving at an accommodation.

I think the courts obviously serve a useful purpose and ultimately someone has to make these decisions, but I don't think they ought to make them as judges as to what they think ought to be done, because that's just too much for anyone–man or a group of men.

Seney: It seems to me that the parties in this are fairly quarrelsome and–if I can say this without forming a conclusion which is not my business to do–among the most quarrelsome of the parties, it seems to me, and the most litigation-minded is probably TCID. (Disheroon: Right.) And that goes back to the fact that–and I think you said this in a number of words very eloquently–they're hampered by their culture, in a sense, and then their political structure, in terms of making accommodations *with* the other parties over whom they have to share the water in the river. And so the courts, are they maybe inevitably involved until both sides are worn down and other methods are then used?

Disheroon: I think so. I think in the last resort, if you can't reach an agreement, you either acquiesce in it or you go to the court for a decision. As long as the matters aren't resolved and the people don't acquiesce, then the litigation will continue. But ultimately things do get decided, but not very fast. For example, we've now got a decision on bench[land] and bottom[land] that took us ten years, but unless there's an appeal and it's reversed–and I don't think that will happen–that will now be decided, so that rule will be in place.

Water Rights Transfers Issues Should Be Decided Within a Few Years

Water right transfers: we'll get a decision over the next two or three years on the validity of these transfers and that will be in place. If the thing isn't solved by 1997, we'll be back in court on the OCAP and we'll get decisions on the others and then those rules will be in place. So ultimately, people will know what the rules are, and they'll accommodate to them. But it's not the best way of doing business.

Negotiating the New Truckee River Operating Agreement

Seney: Today, we're sitting here at a table at which you and others were sitting, discussing what's called the TROA, the Truckee River Operating Agreement, the *new* one, and the discussion today for someone like myself, a novice in this field, was a *very* complicated and very confusing one. I don't know how it seemed to you, you certainly seem to have a grasp of these things as I observe you commenting on them. (Disheroon: Chuckles.) What is the time frame for *this* agreement? Now, this is not in the courts, you're negotiating this out. (Disheroon: Yes.) You're meeting in groups and sub-groups and so forth. How long do you think it will take to hammer out this decision on the Truckee River Operating Agreement, the new agreement?

Timetable and Requirements for New Truckee

Disheroon: Another five years. And part of the difficulty is–I made this comment in the group earlier today–that people need to recognize that what we're doing here is something that to my knowledge has never been done before. Congress, in Public Law 101-618, directed that the parties should enter into a Truckee River Operating Agreement. They didn't say what was going to be in it, they gave some guidelines and something, "you *will* apply the Preliminary Settlement Agreement, you *will* recognize valid water rights. And in addition to that, you *can* do a lot of other things." They made a lot of the provisions of the Act conditional upon the execution. But the California and Nevada allocation doesn't go into effect unless that TROA is signed.

Then they went to the *next* step saying, "*And*, five parties have to sign it: Sierra Pacific, Pyramid Lake Tribe, the State of Nevada, State of California and the United States. But, before the United States can sign, there must be an environmental impact statement prepared on the operating agreement, there must be a compliance with the Endangered Species Act so that the TROA doesn't cause jeopardy to the endangered species, and if mitigation is required as a result of TROA, there will be an agreement on the mitigation plan." So all of those activities *have* to take place *before* the secretary can sign the agreement and *then*, *after* the agreement is signed, it must be presented to the Orr Ditch Court and the Truckee River

General Electric Court–which is another court that was involved in previous rulings on the Truckee River–to make sure that it's consistent with the decrees of those courts or that the court approves any changes.

So first you've got to come up with an operating agreement, you've got to get agreement of all of the parties, then somewhere along the way, you have to do an environmental impact statement.

Seney: Almost simultaneously, really.

". . . that's the thing that's unique about this: normally, you'd do an environmental impact statement on a proposed action. Well, the proposed action here is the adoption of an operating agreement which hadn't been written, and yet we're trying to analyze the environmental effects of that agreement . . . So you have to make all of these surmises as to what is going to happen when you have no guide as to what it will be, and that's *very* difficult to do. . . ."

Disheroon: Right, and that's the thing that's unique about this: normally, you'd do an environmental impact statement on a proposed action. Well, the proposed action here is the adoption of an operating agreement which hadn't been written, and yet we're trying to analyze the environmental effects of that agreement when it hasn't been written! So you have to make all of these surmises as to what is going to happen when you have no guide as to what it will be, and that's *very* difficult to do. And

how long that's going to take, that process is probably going to take another two or three years and then after that you have to [comply with] the Endangered Species Act. And then we have to go to court. Hopefully, everyone will ultimately accept it so that we won't have litigation. But if TCID isn't a party, and they continue their litigious ways, we can have another two or three years there, although we would hope the courts would do what they've done in the past: put it into effect subject to later rulings. So, in that regard, I would think five years might be an optimistic timetable.

Prospects for the Settlement II Negotiations

Seney: There's negotiations going on now, just beginning, which TCID *is* a party to, on the Newlands Project–I guess Lahontan Valley Environmental Alliance is the party (Disheroon: Technically.) technically and so forth. Just briefly, are you optimistic that those are going to get anywhere?

Disheroon: No.

Seney: Why not?

"I don't see that TCID has particularly changed its point of view. Until they're willing to accept the fact that their project is going to change substantially, whether they like it or not. It's not going to be done by force, but either the economics or the fact that the Federal government is now buying water for the wetlands, they're going to have their project reduced by at

least half, even if they do nothing. . . ."

Disheroon: I don't see that TCID has particularly changed its point of view. Until they're willing to accept the fact that their project is going to change substantially, whether they like it or not. It's not going to be done by force, but either the economics or the fact that the Federal government is now buying water for the wetlands, they're going to have their project reduced by at least half, ~~whether~~ [even if] they do nothing. Unless they can realize that they need to come up with a coherent strategy of what they really need and what makes sense, *and* accommodate the needs of Fallon for a water supply and the other interests, and get actively involved and make substantive, reasonable, suggestions for compromise, the process will go nowhere. I see no evidence whatsoever to believe that they're doing that, or that they will do that. So it just seems to me that's a *sine qua non* of a settlement and it's just not there.

Seney: Well, listen, I really appreciate you taking the time late in the afternoon to tell us all of these things. It's been *really* informative and I really appreciate your perspective. On behalf of the Bureau, I thank you.

Disheroon: Oh, you're welcome.

END SIDE 2, TAPE 2. AUGUST 25, 1994.
BEGIN SIDE 1, TAPE 1. AUGUST 9, 2006.

Seney: My name is Donald Seney. I'm with Fred

Disheroon of the Department of Justice in Washington, D.C. We're in Reno, Nevada. Today is August 9th, 2006. This is our second session and our first tape.

The first session was many years ago, Fred?

Disheroon: I was trying to remember how long ago that was.

Seney: Well, probably 1994-95, something like that.

Disheroon: So, it's been ten years.

Seney: It has been ten years. We've both been at this a long time. (Laughter) Maybe one of these days we'll be finished. I'm not sure.

Disheroon: I'm hoping.

Seney: Well, why don't we start with what's gone on since about 1995. The TROA [Truckee River Operating Agreement] negotiations really, I suppose, got started in earnest about then didn't they?

TROA Negotiations Were in Full Swing by the Mid-1990s

Disheroon: Well, yes. I think that's fair. They started right after the passage of 101-618, and what was that, 1990? But, there was several years where there were other efforts with regard to Truckee-Carson Irrigation District, TCID [Truckee-Carson Irrigation District] going

on. But, they were in full swing by, '94, '95.

Settlement II Negotiations

Seney: Right. Are you thinking of, are you referring maybe to the Settlement II negotiations, which were over in '94, without any (Disheroon: Yes.) positive resolution?

Disheroon: Right.

Seney: Yeah.

". . .TROA negotiations have been going on . . . ever since that time. . . . one of the things that has to be done for the TROA is to prepare an Environmental Impact Statement under the National Environmental Policy Act . . ."

Disheroon: And so, the TROA negotiations have been going on almost with meetings several times a year, ever since that time. (Seney: Right.) There have been several changes of course in the–one of the things that has to be done for the TROA is to prepare an Environmental Impact Statement under the National Environmental Policy Act, and there were, they started, I don't know when the first draft–and this was being done by the Bureau of Reclamation, primarily their office in Denver. And I think they came out, and I'm a little unclear on the specific dates, but an initial draft around '95 or '96, which after legal review we said really

didn't, you know, quite adequately analyze . . .[6]

Seney: Well, if I may, they were trying to do these things at the same time, weren't they, negotiate the TROA *and* do the EIS/EIR [Environmental Impact Statement/ Environmental Impact Report] (Disheroon: Right.) at the same time to–and I don't mean to be, try to be funny here, but to speed things up a little bit?

Disheroon: Yeah.

Seney: And that was a Truckee-Carson Irrigation District suit, wasn't it, that raised legal questions about that? Am I remembering that right? They objected to that.

"Since the passage of 101-618, apart from the recoupment litigation, we've had no litigation with

6. See also Dr. Seney's oral history interview with Chester Buchanan in the Bureau of Reclamation's Newlands Project Oral History Series. The United States Department of the Interior, Bureau of Reclamation and Fish and Wildlife Service and the State of California, Department of Water Resources, published the *Draft Environmental Impact Statement/ Environmental Impact Report: Truckee River Operating Agreement, California and Nevada*, in February 1998. According to the environmental statement, development of possible alternatives for creation of the TROA EIS/EIR began in 1992 and by December 1995 had taken the form of a document called the *Report to the Negotiators*.

According to Chester Buchanan's oral history interview (he was one of the people who worked on drafting the environmental statement) the *Report to the Negotiators* was the first draft of the environmental statement–which was determined inadequate and turned into the *Report* at which time work began on an entirely new EIS/EIR document.

TCID. . . . So, we haven't had the litigation with TCID that we had just constantly before the Settlement Act. But they have been active in criticizing all the administrative actions that have been taken. . . ."

Disheroon: They did object to it. I don't, there wasn't a lawsuit over it. The interesting thing is that, you know, I think in our prior discussion we talked a lot about all the litigation (Seney: Right.) with TCID. Since the passage of 101-618, apart from the recoupment litigation, we've had no litigation with So, we haven't had the litigation with TCID that we had just constantly before the Settlement Act. But they have been, they have been active in criticizing all the administrative (Seney: Right.) actions that have been taken. TCID. The Settlement Act, 101-618,[7] throws the Operating Criteria and Procedures in place for seven years, that they couldn't be challenged (Seney: Right.) anywhere, (Seney: Right.) including court. (Seney: Right.) And then thereafter, in '97 and '98, the Bureau issued some modified OCAP [Operating Criteria and Procedures], but since that, most of that time TCID has been able to live within those provisions. (Seney: Right.) So, we haven't had the litigation with TCID that we had just *constantly* before the Settlement Act. But they have been, they have been active in criticizing all the administrative (Seney: Right.) actions that have been taken.

7. See footnote on page 67.

Seney: My understanding of the prohibition against the lawsuits in Public Law 101-618 was that was done as a reaction, almost a punishment, for TCID attempting to kill that legislation in what the backers thought was maybe not a straight-forward way. Are you aware of that?

Disheroon: Not, I have no direct knowledge. (Laugh) I've heard.

Seney: That's way too lawyerly, Fred. (Laughter)

Disheroon: I know. I've heard . . .

Seney: Tell me what you know.

Disheroon: I, the, I wasn't *that* directly involved in the–we had, we did work with Senator Reid's office, and Senator [Bill] Bradley, and Tom Jensen (Seney: Right.) in ~~putting the,~~ giving them comments and helping them put the legislation together. And, I do know that they were very unhappy with TCID's efforts. But, what, why they did certain things like freeze the OCAP, I mean I, from our perspective it was good because, you know, it was hard, difficult to negotiate but at the same time still being heavily involved in litigation.

Seney: When you say "our perspective," you mean the Department of Justice (Disheroon: Yes.) in this case? Right.

Disheroon: Right.

Seney: And I can't imagine you would object to a moratorium on lawsuits?

Disheroon: No. Certainly. (Laughter) No. We had no problem with that at all.

Seney: Yeah. Right.

Disheroon: In fact, they could have made it longer, as far as I was concerned. (Laugh)

Seney: Well they, the OCAP business has been, is it settled yet? I know the judge has made some rulings on it and reduced–now why don't you tell me what's going on with the OCAP suit.

Disheroon: Well, the OCAP suit was eventually just dismissed, and there have been no legal challenges to it (Seney: I'm sorry, Fred.) since '98.

Seney: Yeah. I'm sorry. I misspoke. I meant to say the recoupment suit.

The Recoupment Lawsuit

Disheroon: Oh, the recoupment suit?

Seney: Yes. I'm sorry.

"The recoupment suit was sort of a *side* issue under 101-618. There's a provision . . . that requires the secretary to *pursue* recoupment of the water that was diverted in contravention of OCAP from 1973 on. . . .So we, in the early '90s,

we went through a round of negotiations with TCID with an effort to resolve it, which got nowhere. . . ."

Disheroon: Yes. The recoupment suit was sort of a *side* issue under 101-618. There's a provision, I think it's in Section 209 that requires the secretary to *pursue* recoupment of the water that was diverted in contravention of OCAP from 1973 on. And, either, the legislation said we would do that either by settlement or by court action. So we, in the early '90s, we went through a round of negotiations with TCID with an effort to resolve it, which got nowhere. And so, we filed . . .

Seney: Were you involved in those negotiations?

Disheroon: Yes. Right. And Bill Bettenberg (Seney: Right.) was the negotiator for the Interior.

Seney: Did you have many meetings with them over it?

Disheroon: Several. And Bettenberg had some that I didn't attend. But, there were a number of meetings, yes.

Seney: And, was there no interest at *all* on the side of TCID in settling it through negotiations?

Disheroon: Not that they were willing to offer anything that we would consider as reasonable. So, eventually we filed a suit in the District Court, and I think the Senator . . .

How the Justice Department Arrives at Policy

Seney: I'm sorry Fred. Let me stop there to ask you about something really I'm curious about and that is, when we were walking around and deciding to come here you said something about the, alluding to policy in the Justice Department, what the Justice Department would go for in these current disputes. How is that determined? How was it–when you said that in the recoupment negotiations they didn't offer anything that you thought was adequate. How does, how do you; how does the Justice Department determine what it will accept in these, in this, say the recoupment business or any of the rest of it dealing with TCID and the conflicts around here?

Disheroon: Well we had, before we got involved too significantly we asked the Bureau to do an analysis of, to give us an estimate of what they believed the illegal diversions were. That is, the violations from our perspective, of they took water out of the Truckee River, when it wasn't legally needed or wanted, but in excess of that. So, we had them do a calculation and it was pretty straight forward, I think, a simple matter of applying the OCAP that were in effect at the time and then looking at the records of what they actually did, (Seney: Right.) actually diverted and coming up with an amount.

The Initial Figure for Recoupment Was 1,058,000 Acre Feet of Water

Seney: This was the 1,058,000 acre feet number?

Disheroon: Right. And that was our initial figure that we came up with and that was without interest. And, the offers that TCID made were– well, what our bottom line was that we, we thought we had a congressional *directive,* since we were going to actively pursue this, that any repayment had to be *real water* that would be additional water that would go to Pyramid Lake–was our criteria.

Seney: Was this in the report that accompanied the legislation? The congressional . . .

Disheroon: Not that much about it, (Seney: Yeah.) but it, (Seney: Enough that you felt that . . .) the statutory language itself says "The Secretary shall pursue recoupment either through negotiation *or* court action," (Seney: Right.) and so. And, basically they tried all sorts of, in my mind, gimmicks, saying "Well, you could give us credit for this or, you know, your figures are wrong." We didn't believe our figures were wrong. And, ultimately they just didn't *offer anything* that would have repaid any water. (Seney: Right. Right.) So, eventually we said, "Sorry. We'll see you in the court."

Seney: When you were representing the Justice Department in these negotiations, do you have a clear idea–you must have a clear idea of what it is the Justice Department will go

for? And is this simply based on your– because you've been involved in this so long – your understanding of this? Or do you have to go back to someone from time to time in Justice to discuss what's going on and get some sort of instruction in a way?

Disheroon: Right. Right. We, in this case any settlement of litigation would have required either the approval of our Assistant Attorney General for the Environment Division, or the, maybe the Deputy Attorney General one step up in the department. So, we had to keep them informed and we would brief them from time to time, tell them what our approach was (Seney: Right.). We didn't brief the deputy but we did brief our Assistant Attorney General.

Seney: And it would up to him to take it a higher level (Disheroon: Yeah. Yeah.) if he thought it was necessary?

Disheroon: Right. And make it clear then this was our position, what we were pursuing. And, whenever we get a new Assistant Attorney General, you know, we have to do it over again.

Seney: Right. Right.

Disheroon: But, the policy, throughout, has been very consistent and supportive.

Seney: Right. Right.

Disheroon: We didn't file the suit until about '95, so it's only been about ten years.

Seney: The recoupment suit?

Disheroon: Right.

Seney: Yeah.

Disheroon: And we've had, we had to get approval from the Assistant Attorney General to file the suit in the first place.

Seney: Was that hard to come buy?

Disheroon: No. No.

Seney: Yeah.

How Justice Works with Interior to Determine the Direction to Be Taken

Disheroon: Mainly it took Interior a while to get their recommendation together. (Seney: Ah.) That's when Betsy Rieke was the assistant secretary, to get their recommendation over to us, which we needed before. (Seney: Right.) Because we don't, we don't file suits just on our own. (Seney: Right.) We do it at the recommendation, within our division, (Seney: Right.) the recommendation of one of our client agencies.

Seney: And do you pretty much take what the client agency says? Is that, in your experience

have you–the Bureau of Reclamation said, “This is what we think is right.” Do you pretty much accept that? Or . . .

Disheroon: Well, we consider it, and if it’s consistent with our reading of the law and then we would normally defer to them. There are times when, you know, we’ve felt that that wasn’t sufficient. So, ultimately, it’s not ultimately their decision to make.

Seney: Well, I am aware that the Justice Department is an independent player in this and not just a cipher for the Interior (Disheroon: Right. Yeah.) Department.

Disheroon: So we would, you know, if we felt this, their position was not well founded we wouldn’t agree with it.

Seney: Do you work with them as their position is being developed?

Disheroon: Yes. Usually.

Seney: Yeah. So, they have an idea, ongoing, of what you think will work (Disheroon: Right.) and what you think won’t work?

Disheroon: Yeah. Lynn Collins was with the solicitor’s office at that time. In fact, we had gone to the Solicitor at that time, I think it was Tom San Fernandi [spelling?], who later became our Assistant Attorney General. He appointed Lynn as the “special lawyer” *for* Interior to work on 101-618 matters.

(Seney: Ah.) And so, you know, we worked *very closely* with Lynn and through him with the people in the Bureau of Reclamation.

Seney: Lynn was, though, in the Department of the Interior?

Disheroon: Yes.

Seney: Under John Leshy maybe?

Disheroon: Well, he was originally there before Leshy but he was also there under Leshy, (Seney: Right.) right.

Seney: Right. What, has it made a difference in the change of administrations in 2001, in terms of what the assistant secretary, your assistant secretary, or I'm sorry–do you say assistant secretary, what do you say? (Disheroon: Um-hmm.) Yeah.

Disheroon: Assistant Secretary for Water and Power.

Seney: Well, I'm thinking though in the Justice Department, to determine their role.

Disheroon: Oh, no in our case it's Assistant Attorney General.

Seney: Yeah. I understand. Right. For the environment. Has that been a difference with the new administration?

Disheroon: Not within the Justice Department, no.

We've had very consistent support for what we're doing.

Seney: This is something then that the political appointees would refer, defer to the staff lawyers about, pretty much?

Disheroon: Well, they at least, so far, have accepted our recommendations. (Laughter)

Seney: You said something, of course, that made my ears perk up. You said, "At least at the Justice Department this hasn't made a difference." What were you alluding to there?

TROA Issues and Assistant Secretary Mark Limbaugh

Disheroon: There have been changes in Interior Department, of relative recent development where we're not sure that we're on the same page that they are, with regard to, not recoupment, but the TROA.

Seney: TROA issues? This is the new Assistant Secretary for Water and Science?

Disheroon: Yes.

Seney: That replaced Mr. [Bennett] Raley?

Disheroon: Yes.

Seney: Mr. Raley was . . .

Disheroon: He was, he . . .

Seney: Okay, kind of?

Disheroon: He was fine. He had had experience with (Seney: Yeah.) TCID (Seney: Right.) and really thought that, you know, they weren't, I shouldn't put words in his mouth but at least the impression was that he thought TCID was not doing a good job for their constituency.

Seney: Who is the new assistant secretary?

Disheroon: It's a fellow named Mark Limbaugh. He's only been there since, I think, December or so, after Bennett Raley left.

Seney: Had he been in the Department before, or was he an outsider?

Disheroon: I don't think he'd been there that long. (Seney: Yeah.) I think he'd been in the Solicitor's Office.[8]

Seney: I see.

Disheroon: But, I'm not certain of that. I'm not sure if his, that's where he came from.

8. Mark Limbaugh had varied experience, including the Family Farm Alliance, watermaster of the Payette River Basin in Idaho, and the executive director of the Payette River Water Users Association. He then served in the Bureau of Reclamation as the deputy commissioner from January 2002 to September 2005. He resigned as Assistant Secretary for Water and Science effective July 13, 2007. He then became a partner in The Ferguson Group, a Washington, D.C., lobbying firm..

Seney: Okay.

Disheroon: Although he apparently had some connections with farming, you know.

Seney: Right. And that makes sense, doesn't it, (Disheroon: Yeah.) from the point of view of (Disheroon: Oh yeah.) that particular position? Right.

Disheroon: And that's . . .

Seney: The way it works?

Disheroon: They do. (Laughter)

Seney: Right. Well, Mr. Raley did too, didn't he?

Disheroon: Yes.

Seney: He was a (Disheroon: Right.) [Coloradoan,] ~~Californian,~~ (Disheroon: Right.) if I'm not mistaken, and connected to agriculture in the Central Valley?

Disheroon: Um-hmm.

Storey: Yeah. Right. Right.

Disheroon: Right.

Seney: Well, let's talk about the recoupment suit then. After that was filed in '95, after the *failure* of the negotiations, how has that played out?

Disheroon: We went through another effort to try to reach a settlement. It again failed. We spent an *awful* lot of time in discovery. You know, we're sort of in the position where, you know, the people who had actually been involved in the decisions from '73 to–we asked for recoupment for diversions from '73 to '87. Eighty-seven was when the court approved OCAP, (Seney: Right.) it went into effect.

Seney: The revised OCAP?

Disheroon: Yeah, you know, and thereafter, you know, there weren't any *significant* violations, you know, gross over-diversion. (Seney: Right.) So, we had that lovely fourteen-, fifteen year period. And so, what we had to do was establish factually the, what happened, why it happened, you know, that diversions were illegal. So, we spent an awful lot of time rounding up the people who were still alive, that had been involved, taking their depositions, trying to establish a good factual record for what actually happened. We have, well obviously, *stacks* of government records, (Seney: Right.) but you know by themselves it would have been very difficult. And then we put together . . .

Seney: What do you mean, "by themselves they would have been difficult?"

Disheroon: Well, I mean if you just handed them to someone and said, "Here. Decide what happened."

Seney: I see.

Disheroon: So, and but then we put together a . . .

Seney: You're gesturing about two or three feet of documents.

Disheroon: Yeah. There was a stack, a stack of documents that we went to all of the different offices that were involved and gathered all the records we could find. And basically tried to reconstruct the history on paper of what happened during that time period. So, we had both that and the testimony.

Seney: Now, if I may, I would . . .

Disheroon: And then–go ahead.

Seney: Yeah, if I may. One of the people I've interviewed out on the, from TCID has said that the letter that, I think, Secretary Morton was supposed to have sent or did send, saying "You can't violate this, and if you do violate this you'll have to pay it back," that letter didn't exist. Is that true?

Disheroon: No. No. The letter's in evidence in the case.

Seney: Okay.

Disheroon: No, the letter was sent. We have the letter, (Seney: Right.) and we put it in evidence. So, if they say that I don't know what . . .

Seney: All right. Someone did and I wanted to make sure (Disheroon: Yeah.) that you could . . .

Disheroon: No, I could, you know–if necessary we could go to record in the case and pull out the exhibit and show it to you.

Seney: I'll take your word for it. (Laugh)

Disheroon: But, it was a very important exhibit. It exists.

Seney: Yeah. Well, it is. It's a key (Disheroon: Yeah.) letter isn't it? (Disheroon: Right.) Right.

Disheroon: So, it took us, you know, and they of course wanted to take depositions of our witnesses so we had the cross-discovery going on. But, that took us about, '95, about six or seven years. There were different motions that were filed, jurisdictional motions. TCID challenged, you know, filed motions to dismiss most of the claims, and challenged the authority, and said we were violating the Orr Ditch Decree and all of that. And so that was all going on while we were doing sort of, at the same time the discovery was going on. But we, we succeeded in defeating nearly everything.

Seney: From your point of view do you get the feeling that they're just delaying or that, or there, somebody's claim is, the motions they've filed have, seem to have merit and

you say, "Oh gad. Good god, what's the judge going to do with this one? This one might be trouble for us." Or, does it just seem like they're just delaying?

Disheroon: I've always felt that most, for the most part all they were doing was delaying. Now, I'm sure their attorneys think, you know, in good faith they (Seney: Yeah.) file legitimate claims, but they were found to be without merit. And, that's before we had the trial. You know, they were saying, you know, we should be barred by the Statute of Limitations, because, that was one of the arguments, because this all happened, you know, many years ago. We said, "Congress directed us to do this." You know, so, Congress couldn't have directed us to do something which is barred by the statute of limitation, or that they didn't intend the Statute of Limitations to apply. And there wasn't any specific statute that would have applied to anybody. They said the government was barred by [the doctrine of] laches, the doctrine that, you know, if you delay too long. And, explained, "Well, you know, we couldn't have done anything up until '97. We were busily litigating with you over the, you know, *U.S. versus TCID* and *U.S. versus Nevada*, and all of that litigation where you were told, you know, you were operating the project–they told you they were going to take the project away from you and you sued and wouldn't let them do it. You wouldn't let the Bureau take over. You were told that everything

you did was at your own risk." That litigation didn't conclude until about 1985 or '86, and then we had the OCAP litigation, you know and then 101-618 came along. So that under the circumstances there wasn't a time when we reasonably could have even determined what was due, and secondly, you know, brought us in to do it. (Seney: Yeah.) But they didn't succeed on that. They had other arguments. But, ultimately none of them were . . .

Seney: Do you recall what the other ones were? Any of them? Some of them?

Disheroon: Well, Statute of Limitations and laches were two of them. I don't remember, now, the others. They were sort of permutations of the same kind of arguments.

Seney: Right. Right. Which judge has been hearing those?

Disheroon: Judge [Howard D.] McKibben.

Seney: Judge McKibben?

Disheroon: Yeah.

Seney: He's been handling these things for quite a while, hasn't he? The . . .

Disheroon: Right. He's had the recoupment case from the beginning. The OCAP litigation he had, he took it over from Judge [Bruce Rutherford] Thompson when Judge

Thompson died. So, he had it in the early '90s, but it wasn't that active. But then he took, then he had the recoupment litigation and he's the only judge we've had on that.

Seney: Right.

Disheroon: So, and then we went to trial, and, since we didn't settle it, we finally went to trial in, I think it was '90, 2001, or two [2002].

Seney: Is this just before the judge?

Disheroon: Um-hmm. I think it was 2002. Yes. It's not a jury trial. (Seney: Right.) So, it was just before the judge, and it took us about a month to put on our evidence, and they put on their evidence, and as I said we had *stacks and stacks* of documents. The case, in many respects, was based on documents, obviously. But, there were still people like Ted DeBraga and Lyman McConnell for TCID, who had been around. (Seney: Right.) We found some of the old board of directors members from TCID who we questioned, and took depositions of. So, and ultimately the judge gave us a judgement. It wasn't–we won the case.

"We didn't get the million acre feet we asked for. We had subsequently found that there were some errors in the calculation and that the figure should have been something around 750,000 [acre feet]. . . ."

We didn't get the million [acre feet] we

asked for. We had subsequently found that there were some errors in the calculation and that the figure should have been something around 750,000 [acre feet]. So, and we put that in evidence. So, we weren't–that's without interest. We weren't at the end of the trial asking for a million. We were asking for about 750,000 [acre feet].

"The judge gave us right at 200,000 acre feet. He found that they had clearly, blatantly, intentionally, violated the OCAP . . ."

The judge gave us right at 200,000 [acre feet]. He found that they had clearly, blatantly, intentionally, violated the OCAP but there were particularly two areas which would have, which reduced our judgement significantly, which if he hadn't made either one of them we would have probably gotten somewhere around 500,000 acre feet.

The Judge Relied on Two Issues to Reduce the Amount of Water Awarded in the Recoupment Lawsuit

The biggest one was, there was testimony regarding the accuracy of the gauges in the Truckee Canal that measured the diversions, and we have extensive testimony from the U.S. Geological Survey, whose gauges they were, (Seney: Right.) and who maintained the records, about how they dealt with difficulties in them, in that they, the figures that we were relying on were, they're *adjusted* figures that they had taken into

account those permutations, you know, lockages or whatever. (Seney: Right.) Because they go out, and look at the gauges and make determinations so as to come up with the most accurate figure. And that's what we offered in evidence and that's what we relied on. They brought in an expert, Mr. Binder [spelling?], who basically said, you know, the gauges were off by a factor of like five percent or something, and that his proposal was they, you assumed, our position was, "Well, error can go both ways," but of course he said, "No. You know, it always overstates." And the judge, I think just my opinion, he was looking at this–this was suit in equity. (Seney: Right.) So, he was sort of looking at it from the sense of fairness as to–he knew they were liable. They, and he knew that it would be difficult for them to repay this so he was kind of looking for sort of a jury verdict, if you will. (Seney: Uh huh.) That's just my opinion. (Seney: Sure. Sure.) Nothing in the record to support this. But, he basically said there were errors and therefore he was going to knock off five percent on all the gauge readings. So that alone, I think, was somewhere around a 150,000 acre feet, just because *everything was loaded*. (Seney: Right. Right.) It wasn't.

Seney: No average in there? Yeah.

Disheroon: And, he didn't pay attention to the fact that the USGS [U.S. Geological Survey] had already adjusted its readings to take *into*

account these alleged difficulties. And the other was the fact that there were no published OCAP in effect from 1980 through 1985. Now, our position was we were ordered to maintain the '73 OCAP in place by Judge Gessell in his order in *Pyramid Lake v. Morton*, until they were amended either by his approval or agreement with the Pyramid Lake [Paiute] Tribe.

Seney: Go ahead, Fred.

Disheroon: Neither of which happened. The Bureau published notice annually in the *Federal Register* until 1979, and after 1980 they just sort of stopped doing it, for whatever reason. And they said, "Well, you can't find a violation during those years."

Seney: Because they hadn't repeated this in the *Federal Register*?

Disheroon: Because they hadn't reissued it.

Seney: Yeah.

Disheroon: And so, we disagreed on that. We said, "Well, they *were* in place, but,"–oh and the other thing was he said, "In the 1980s there was the Alpine Decree, which Judge [Bruce R.] Thompson issued in the District Court, which changed the water duty. It had been 2.92 acre feet, and now it was three and a half and four and a half. And they said, "You didn't take that into account." And we

pointed out that, you know, that decision was appealed and we didn't get a final decision on that until *almost* '95. And as soon as we got a decision we entered a new interim OCAP. And that, in any event, there were spills in those (Seney: Right.) years, which would not have been permitted regardless (Seney: Right.) of what the water duty was.

Seney: When you say water duty, you mean if I've got, if I've got an acre-foot coming, under the old one I could only have 2.92 (Disheroon: Right.) because you have to concern yourself about return flows? But under the new ruling I get the full three and a half to four and a . . .

END SIDE 1, TAPE 1. AUGUST 9, 2006.
BEGIN SIDE 2, TAPE 1. AUGUST 9, 2006.

Disheroon: That probably was another, almost another 100,000 or so if you added those two back in we'd be about 500,000 [acre feet].

Seney: But he wouldn't, he would listen to spills and that kind of thing which . . .

". . . he did issue a judgement and he directed TCID [Truckee-Carson Irrigation District] to repay . . . over twenty years, and he ordered them to pay two percent interest each year on the unpaid balance. . . ."

Disheroon: No, we filed a Motion for Reconsideration, but he didn't address it. So, but he did issue

a judgement and he directed TCID [Truckee-Carson Irrigation District] to repay the 298,000 I think it was, 293,000 [acre feet], somewhere in that range, (Seney: Right.) over twenty years, and he ordered them to pay two percent interest each year on the unpaid balance. And this, they've taken an appeal and we have taken an appeal. So, we're asking that we get more and they're asking basically we get nothing or less. (Seney: Yeah.) Um . . .

Seney: And that's in front of the Ninth Circuit?[9]

Disheroon: That's now in the Ninth Circuit.

Seney: And they're, you know have you made all your arguments and submitted all your briefs?

Disheroon: No. In fact the, it was put into mediation again, before the, the Ninth Circuit has a very active mediation program and they like to try and get cases settled if they can. (Seney: Sure.) You know, everybody, nobody wanted to say "Well, we *won't* discuss them. So, for about most of this year they've been, and I haven't been directly involved in it–the appellate section attorney has been negotiating with TCID–told [him] we were wasting his time. And it's, you know, it will turn out that way. (Laugh) But, you know, they're about to the point where TCID came forward with their

9. The United States Court of Appeals for the Ninth Circuit.

final offer which basically was, you know, they were going to give us water that was credits for a thing they claimed that we did, you know. It's not, nothing that would have been acceptable.

Seney: Their record of success before the Ninth Circuit is not very good, as I understand it?

Disheroon: As far as I know they've never won *anything*.

Seney: Right. That's not very good?

Disheroon: That's not very good. (Laughter) They may look at it differently, but no, I don't think it is.

Seney: Yeah. I don't know that–you'd think that they might be more willing to . . .

Disheroon: Yeah. I think it's–you put your finger on it earlier.

". . .they just have a mindset that they have a certain right to do this and by God nobody's going to tell them different. And they're just unwilling to adjust to accommodate the changed circumstances. So, they just continue to fight and delay, and in the meantime, you know, changes are really *ratcheting* down on them. They are *much* worse off *now* in the sense that offers that were made to them over time, including in the recoupment case, they would have been much better off to have accepted them. And each time they don't accept it, the next time there's less and

less being offered. So, I do think the delay is just putting off the inevitable. . . ."

It's the same, and I think we talked about this the last interview, was that they just have a mindset that they have a certain right to do this and by God nobody's going to tell them different. And they're just unwilling to adjust to accommodate the changed circumstances. So, they just continue to fight and delay, and in the meantime, you know, changes are really *ratcheting* down on them. They are *much* worse off *now* in the sense that offers that were made to them over time, including in the recoupment case, they would have been much better off to have accepted them. (Seney: Right.) And each time they don't accept it, the next time there's less and less being offered. So, I do think the delay is just putting off the inevitable.

Seney: Has it made any difference at all that Lyman McConnell is no longer the project manager and Dave Overvold is?

". . . the last couple of water years, there haven't been any diversions to Lahontan and the difficulty is if you're not diverting to Lahontan you can't repay recoupment because the only way you can effectively repay it is to *reduce* diversions. . . ."

Disheroon: It's hard to say. He's only taken over since this spring. Or actually, since June I guess, officially. We don't have that much involvement with TCID right now. They're

complying with the OCAP. They've actually earned some credits by exceeding the efficiencies. So, they have about 30,000 acre feet of water in Lahontan that they've earned (Seney: Right.) credits, which they were going to use to help repay their recoupment indebtedness. But the water, the last couple of water years, there haven't been any diversions to Lahontan and the difficulty is if you're not diverting to Lahontan you can't repay recoupment because the only way you can effectively repay it is to *reduce* diversions.

Seney: Right. But, there's so much water from the Carson . . .

Disheroon: So much water, yeah, that they've, they haven't gotten any credits for it. So, the interest is sort of compounding their situation. And this year's going to be the same thing, that there will be no diversions, have been no diversions, and there probably won't . . .

Seney: Are you depending on your weather forecasting skills here? (Laughter)

Disheroon: No. I just, just look at all the snow pack and (Seney: Ah.) they had to make precautionary *releases* out of Lahontan to keep, you know, from going over the top. Tahoe is almost full, (Seney: Right.) in fact up to the rim. (Seney: Right. Right.) I'm sorry, back up to the legal, (Seney: Right.) you know, storage limit. (Seney: Right.) So, there's plenty of

water and there's a lot of water coming down the Carson. So, they don't *need* any. In fact, if you diverted it there's nowhere to put it. So, that would be another waste.

Seney: Well, as a Tahoe resident, you know, I'm interested in any of these weather forecasts (Laugh) that promises another heavy winter. Last winter was plenty heavy enough.

Disheroon: Yeah. Well, I'm not predicting more snow.

Seney: Okay. (Laugh) Your arthritis is telling you (Laugh) something that I should know about?

Disheroon: No. It's just that for this year they won't be able to repay anything.

Water Issues for Fallon, Fernley, Etc.

Seney: Right. What do you make of the demographic changes that are going on out in Fallon and the impact that may have on all of this in the future?

Disheroon: I think they've been quite significant. I think, you know, and I don't have chapter and verse, but ~~a lot of the,~~ many of the farmers there are getting up in years and the younger people are not coming along to replace them. They're going, doing other things. And so, the agricultural economy, I think the people involved in it is narrowing. I think in some respects the naval base has, you know, expanded its mission. They've

got a lot of other activities going on and like, maybe Fernley, I don't know, they may be even people looking at it as a, you know, a suburb of Reno, you know, (Seney: Right.) much cheaper. (Seney: Right.) And, the big thing that I think is more important than that, particularly with the town of Fernley and Reno, they're looking for additional water (Seney: Right.) for their, to fund, to supply their *growth*. And, like talking about bringing water from Honey Lake Valley or looking at the Humboldt, or groundwater wells, but the price of an acre-foot of water in the, from the Truckee River, I forget what it's been, but it's been in the hundreds of thousands of dollars that people have had to, developers have had to pay to buy it. (Seney: Right.) But, on the Carson it hasn't reached *that* level but they're beginning, but there are quite a bit of urban development around Dayton, and Carson City, and in the Upper Carson (Seney: Right.) but they're looking, you know, for development. So, there'll be more demand there for water. TCID is sitting on a gold mine, (Seney: Right. Right.) of all that storage in Lahontan. If they would ever decide there might be a better use for it (Knock at door) then . . .

WOMAN: [Inaudible]

Disheroon: Oh. Yeah. Yeah, come on in. We'll just sit over here out of your way. It won't . . ..

Seney: No. No problem.

Disheroon: I have, and this is just my thinking, I had thought that, particularly with regard to the town of Fernley, for example, the time will probably come where they will be looking to Lahontan as a source of water so that they could pump water, (Seney: Pump it back up?) pump it back up from the Carson through the canal rather than (Seney: Yeah.) use it to (Seney: Yeah.) allow Fallon to have it.

Seney: I understand. Right. Right.

Disheroon: And that, if they could do that the *value* of those, that water would grow exponentially.

Issues a Farmer Would Have in Trying to Sell a Water Right Entitlement on the Newlands Project

Seney: If I'm a farmer on the Newlands Project and I've got some water rights that I own, which is peculiar on this project (Disheroon: Um-hmm.) they *actually* own the water rights, (Disheroon: Um-hmm.) can I sell them to someone upstream in the, in the Carson Valley?

Disheroon: Yeah.

Seney: No, there's no legal barrier on that?

Disheroon: Just that it, you know, has to be consistent with beneficial use, (Seney: Right.) and it can't involve waste. But no, other than that . . .

Seney: As long as they're using for M & I [Municipal and Industrial], (Disheroon: Right.) or agriculture, (Disheroon: Yeah.) or whatever?

Disheroon: The difficulty is the farmers in Newlands don't own Lahontan, so they only own the water that is delivered to them. So, they wouldn't have any way of *transferring* it upstream. And if, if they proposed to sell it to someone, so they say, "Well, you can take it out up there." You'd have maybe a legal argument that, you know, that's, you don't have a precise amount of water to sell because it depends on what's in Lahontan, (Seney: Ah.) that under the decree the United States has the right to *all* the water that gets to Lahontan, whatever it is. (Seney: Yeah. Yeah.) And that's the amount of water that then is obligated to serve the farms in the Newlands Project. But, while their water duty may be three and a half their supply is subject to variation (Seney: Right. Right.) depending on the water supply. So, you'll want to transfer it upstream, you know, how do you determine what amount it is. So, there would be that difficulty.

Seney: So, you'd almost have to build a pipeline and pump it out of Lahontan and back up?

Disheroon: And, establish, (Seney: Yes.) you know, yeah, what the particular individual would have gotten at Lahontan.

Seney: Right. Right. Yeah.

Disheroon: So, but there's no *legal* prohibition. I'm just saying there are practical problems.

Seney: Right. And then the Alpine segment of the river, which is something I don't really quite understand. But, that might mean that if you were selling it, if you tried to take out, assuming you could come to some terms about how much water that we're going to have, then these people, these other segments could complain, could they not, that (Disheroon: Yeah.) that, so there would be all kinds of (Disheroon: Oh yeah.) problems and difficulties?

Disheroon: Yeah. And it's not just Lahontan. It's these other areas. (Seney: Right.) And when the, the river goes on regulation as the watermaster says, you know, "There's a scheme of who gets what, when, and why." (Seney: Right. Right.) So, it's not just, "You've got a certain amount of water." You may have an expectation–but it depends on the water supply. The same thing up here as well.

Seney: There's a gentleman up on the Upper Carson who I'd like to interview, and I've left him a message. I'm not sure he'll talk to me. Chris Bentley [spelling?], do you know that name? He's buying up water rights.

Disheroon: I think I've heard of the guy.

Seney: He's very wealthy and he's (Disheroon: Yeah.) interested in, and he's got some sort of agricultural device he sells. It's almost like Hughes Tool, with their drill bits for oil. It's a very significant kind of device. I can't remember exactly what it is, and he's *extremely* wealthy. (Disheroon: Um-hmm.) I mean, billions apparently, maybe a couple at least. And, he's interested in that and I'm anxious to talk to him, just if he'll talk to me, about how he sees it, the development on the area up there. Do you have any insight or knowledge of the Washoe Tribe's water rights and how those figure into this?

The Washoe Tribe's Water Rights

Disheroon: I don't think they really do, for the most part. Because they're, aren't they more involved with the Walker?

Seney: Well they, no they . . .

Disheroon: I thought they were involved with Walker Lake?

Seney: Well, the Washoe do have, they do have big tracts of land up in the Carson Valley. (Disheroon: Yeah.) They have some water rights on them, but yeah.

Disheroon: I don't know anything about it.

Seney: Okay. Well then, if you don't then it's obviously an issue (Laugh) that has not come up yet.

Disheroon: No. Not so far.

Seney: So, the recoupment is just on hold at this point until the, if the mediation stalls (Disheroon: Yeah.) and the court decides to take it up?

Disheroon: Which will probably happen pretty soon, and then we'll file briefs and then the court will decide the case in probably another year, before we get a decision.

Seney: But, what happens if, I suppose if there's no diversions from the Truckee Canal, how are they going to pay back the water do you suppose?

Water Recoupment Payments Might Be Made by TCID Turning over its Rights in Donner Lake

Disheroon: Well we, we have suggested the basic way they could do it is to turn over Donner Lake.

Seney: Uh huh. Well, that's about what, 5,000 acre feet, isn't it?

Disheroon: It's, on an annual basis it's about 5,000 of which TCID owns maybe a little more than five, I'm not sure, but they own half. (Seney: Right.) So, they don't own all of Donner Lake, but they own (Seney: Right.) . . .

Seney: I might, maybe I'll . . .

Sierra Pacific and Truckee Meadows Water

Authority (TMWA)

Disheroon: And there's even an argument with Sierra Pacific or TMWA [Truckee Meadows Water Authority] as to exactly what their interest is. But, they treated it as if they each own half, (Seney: Right.) so they get half of the releases under the indenture.

Seney: Right. After September 15th (Disheroon: Yeah.) or something?

Disheroon: But, you know, storage, the storage value of Donner to someone in the Truckee Meadows, like TMWA, would be a lot more than just the amount of water that they could get at a given year because they could use it as drought, additional drought, and pretty much guarantee the additional drought supply. So, monetarily you could probably get more for it than just measuring, putting a dollar figure on the releases.

Seney: I see.

". . . what we could do is take it and sell it to TMWA or someone else, but TMWA's the logical . . . entity, and then take that money and buy up rights in the Carson Division and retire them and that way reduce the demand. . . ."

Disheroon: So, what we could do is take it and sell it to TMWA or someone else, but TMWA's the logical person, logical entity, and then take that money and buy up rights in the Carson Division and retire them and that way

reduce the demand. That will result in lesser diversions. And so . . .

Seney: And more for the lake, obviously, (Disheroon: Yeah.) right?

Disheroon: Right.

Seney: What's . . .

Disheroon: And–there are other things they could do too. And that's–but Donner, at least, you know does provide water to Pyramid Lake every year, of some value. (Seney: Right.) Other than that there really, I don't know of anything they could do in years (Seney: Right.) where there are no diversions.

Seney: Right. Right. Because there really isn't. I don't think the tribe is. (Disheroon: Yeah.) So, the government's not interested in money for this (Disheroon: No.) they want water?

Disheroon: They want water.

Seney: Right.

Disheroon: Right.

Seney: Which is much more valuable (Disheroon: Yeah.) than money is? (Laugh)

TCID Has to Repay about 190,000 Acre Feet, and the Interest on That Water Debt Is Significant

Disheroon: Yes. Well, and it's, you know, given the value of Truckee River water rights it's got to be very, very significant about (Seney: Right. Right.) 200,000 acre feet. Plus, in the years they're not paying, you know, they're going to be paying, what, two percent of this 200,000 is what–earlier I misspoke. It's like a hundred and ninety. It's right at 200,000. (Seney: Yeah.) So, that's 4,000 acre feet (Seney: Right. Right.) a year.

Seney: Are they paying that now?

Disheroon: Averaged out. Yes.

Seney: When they appealed it they have they have to pay it still?

Disheroon: Unless they can get it knocked out on the appeal. Yes.

Seney: Ah.

Disheroon: And the court's order to repay has not been stayed while the appeal's going on so they're still under an order to repay roughly, what, over twenty years, so 10,000 acre feet a year. (Seney: Yeah.) And if they're not doing it, you know, their balance is going to be going up.

Seney: Does it compound?

Disheroon: Um-hmm. Two percent a year.

Seney: Yeah. Yeah.

Disheroon: So, next year it's . . .

Seney: Two percent of two hundred and four?

Disheroon: You add another 4,000 to it, (Seney: Yeah. Right. Right.) and then next year it's 204,000. And so, (Seney: Yeah.) yeah.

Seney: Is it unusual that the court didn't stay that on appeal?

Disheroon: I don't think so.

Seney: No?

Disheroon: The court, I think, felt there wasn't any reason why they shouldn't start repaying it. It's going to take them a long time.

TMWA and Sierra Pacific

Seney: Yeah. Right. Right. You mentioned TMWA, which is the successor, at least for water service, to Sierra Pacific Power. What, has that made any difference at all that it's now this quasi, or maybe governmental, entity isn't it?

Disheroon: Yeah, it is a (Seney: Yeah.) state entity. Right.

Seney: Right.

Disheroon: Not really. No. It's, there are some legal issues that we have to deal with. It's a substitute. Under 101-618 the statute directs

that there be five, well three parties plus two to the Preliminary Settlement Agreement (Seney: Right.) who *have* to be signatories to TROA. One of those is the Power Company. (Seney: Right.) They have purported to have assigned their interest to TMWA. We have said, "You will need our approval, since you're attempting to sign agreements with the United States. (Seney: Ah.) And, you can't do that without our approval." In other words, you can't impose an obligation on the United States that it hasn't agreed to. (Seney: Ah.) So, we've been going through a process of making sure that there's nothing adverse that would allow TMWA to be substituted for Sierra.

Seney: What sort of things do you have in mind that might be adverse?

Disheroon: Well, if they have the full, the same ownership rights, that they have the same abilities to carry out the obligations under TROA. That they have the financial wherewithal to do the things that they're required to do under the agreement. Basically that, that they demonstrate that they can perform with the same degree of reliability and certainty that Sierra would have.

Seney: I've been told that their existence is somewhat imperiled at this point, that the legislature is considering a Northern Nevada Water Authority, sort of like the Southern Nevada Water Authority. From what I'm

told, apparently based upon the complaints that developers and others that somehow TMWA has had a hand in letting these water prices go up. (Laugh) I mean, I don't know if that's a fair . . .

Disheroon: I don't know.

Seney: Are you, you're aware obviously?

Disheroon: I've read, I've read that there is such legislation being proposed and yeah, it would complicate things.

Seney: It would, wouldn't it? Yeah.

Disheroon: If basically they want to substitute somebody else for TMWA we still have to, you know, have (Seney: Right.) five people to sign TROA.

Seney: Right. Have they talked, that is the state legislature, have they talked to you guys at all, in Justice, to see what needs (Disheroon: No.) to be done?

Disheroon: No. No.

Seney: Well, is this the kind of thing you might approach them about, to say, "You know, you should be aware," or would you depend on TMWA to do that?

Disheroon: Well we depend on TMWA and Nevada, the State basically to, to state that position. (Seney: Right.) We'd talk to them probably

rather than the legislators.

Seney: Ah. That makes sense. To Roland Westergard or [inaudible]?

Disheroon: Well, the – oh, I forget what the name of the current director of (Seney: Water Resources?) Water Resources. But . . .

Seney: Right. Right. To let them know what your concerns are?

Disheroon: Right. And at this point, you know, it's just a proposal. So, I've asked about it and I'm trying to get more information to see if, you know, if it's something that's likely to happen. (Seney: Right. Right.) If so then, you know, then we'd be raising our concerns.

Seney: Well, I don't know if, if my reporter is good on this. I think so. But, it seems to be almost a done deal, but there's so much annoyance with TMWA over certain things. I guess, some people have said, you know, "They've brought the culture of Sierra Pacific Power with them to TMWA," because apparently there's very little staff changes. They sort of all moved over.

Disheroon: Oh, I think that's true. It think they just sort of (Seney: Right.) moved it over lock, stock, and barrel.

Seney: Right. Right.

Disheroon: So, that could be a problem.

Seney: You're smiling in this lawyerly way, (Laugh) and shrugging your shoulders.

Disheroon: Well, we've got so many other problems, (Laugh) what's one more?

Seney: I guess. Right?

Disheroon: Yeah.

Seney: Let's go back to TROA then and talk about some of the difficulties. And first of all, have there been any *easy* parts about TROA?

Disheroon: Easy? No, nothing's been easy. Although, I will say there has, [background noise] there has been substantial–I'm sorry–substantial progress . . .

Seney: It's like my son. I have to take things away (Disheroon: Yeah.) from him too.

Two Issues Still Stand in the Way of Getting TROA Completed

Disheroon: I do the same thing. (Laugh) There has been really great progress that's made. I mean, it's taken a long time, but I think TROA, the way it stands now, if we could get past these last two issues it's really going to be a significant achievement. And, although it hasn't been easy, (Seney: Right.) you know, it's certainly been worth doing.

Seney: What sort of a detailed answer would you give to someone who said, "What the hell took so long?"

Why Negotiating TROA Has Taken So Long

Disheroon: Simply because we have so many diverse interests to try to deal with in a very complex system and to come up with an operational scheme that addresses, and all the changes in demand, particularly the, you know, municipal and industrial demand, to put in procedures. And then to do all of the required federal analysis under NEPA [National Environmental Policy Act] and all. It just, it's a major, it's a major effort and it's not something that could be done quickly. And, you have to do everything by *agreement*. You have to get *all* parties to agree, you know. (Seney: Right.) It's not majority vote. You've got to have five parties, you know, the State of California, United States, State of Nevada, Sierra Pacific, and Pyramid Lake [Paiute] Tribe agree. That's not an easy thing to do. I'm amazed that we've done as well as we have. (Laugh)

Seney: Well, you meet what, almost monthly now? Monthly maybe?

Disheroon: Yeah, pretty much.

Seney: And have then for a while?

Disheroon: Yes.

Changes and Continuities in the Negotiators

Seney: Yeah. Right. In order to carry all this out? And you've all been at it quite a while? I mean, there are one or two new faces, I guess, on the–Mr. Suttlemeyer [spelling?] has joined the tribe's team?

Disheroon: Right.

Seney: And, but other than–and then I guess, what, the State of Nevada has changed a little bit. (Disheroon: Yeah.) But Roland's been there all along?

Disheroon: But Roland's–yeah. But the, the basic players have not changed.

Seney: Yeah.

Disheroon: You know, TMWA, you have some of the officials that are different. But, the lawyers are still the same ones.

Seney: Gordon De Paoli and Sue Oldham?

Disheroon: And Sue Oldham. Right.

Seney: Right. Right.

Disheroon: And, Roland [Westergaard] is still there, and California has had–you know, we've had pretty much continuity. There's a few (Seney: Right.) individuals who have dropped out, but it's been pretty much the same.

Seney: That must be helpful.

Disheroon: Right.

Seney: Is it?

Bill Bettenberg

Disheroon: We've lost Bill Bettenberg, (Seney: Right.) but, you know, he's still around and we can talk to him.

Seney: Was that a pretty big loss, do you think?

Disheroon: It would have been if we weren't as far along as we are, but you know ninety-five percent of it's done. (Seney: Right.) And so, you know, there's just a couple of issues that–although they could be really knotty].

Seney: I know that he had hoped that this would be done when he retired (Disheroon: Right.) which was last year, (Disheroon: Last year.) last summer, right?

Disheroon: Yes.

Seney: Where is he now, by the way?

Disheroon: He's attending law school in Wisconsin, the University of Wisconsin.

Seney: Ah, right. I know he . . .

Disheroon: He's now spent one year. He retired from Interior.

Seney: Went to law school?

Disheroon: Went to law school. But, he's back in Interior on contract work this summer. He was the head, director for a while of their Policy Office, (Seney: Right.) so they've got him working on some issues like that.

Seney: Yeah. Bill's not the sort of guy who's going to retire?

Disheroon: No. No, he immediately jumped into law school. (Laughter)

Seney: In some areas I suppose he doesn't have much to learn, does he?

Disheroon: No, he probably, he, it was interesting that his first year they have Moot Court in law school. They made him the judge. (Laughter) Instead of one of the arguers. He got, a first-year law student, they made him the judge.

Seney: That's . . . (Laugh)

Disheroon: One of the judges, anyway.

Seney: Yeah. Oh, I'm sure he's . . .

Disheroon: Reflecting on his experience, probably.

Seney: I'm sure he's doing gangbusters in law school. I can't imagine anything else. What about the California issues on the upper Truckee River when the people around

Truckee and other areas began to surface, wanting to become part of the process? How did that work?

California Interests and Issues on the Upper Truckee River

Disheroon: I think it's all been pretty well worked out. They worked primarily with Carol Hammond and the California delegation, but they come to all the meetings. (Seney: Right.) But, and there were, several years ago you had, California kind of pulled back and said, "We need to take another look at this," for, I think, basically because of their concerns.

Seney: The Upper Truckee interests?

Disheroon: Yeah.

Seney: Yeah.

Disheroon: And then we, you know, we came up with some changes in the agreement to, I think, that's taken care of those concerns.

Seney: Right.

Disheroon: Because nowadays we don't, we don't hear anyone complaining or anything. (Seney: Right.) And their representatives are still coming to the meetings.

Seney: Well, I know the State of California was interested in instream flows for fish

purposes (Disheroon: Um-hmm.) and that was, you were able to trade (Disheroon: Yes. Right.) water around to (Disheroon: Right.) solve that?

Disheroon: Yeah. We've got some different credit water provisions and storage. (Seney: Right.) It's not for instream flows.

Seney: And then the whole question of depletion, how much of the water rights given to the upper Truckee are actually going to be, be able to be used, and how much have to be kind of reserved (Disheroon: Right.) in a way for the question of depletion? Was that a hard one to, to deal with, and did the Interior have, I mean not Interior but Justice have much to do with that?

Disheroon: We didn't have that much to do with it. It wasn't really a legal issue. It was just that California had concerns, had a concern that needed to be worked out. But . . .

Seney: Sierra Pacific did? They were (Disheroon: Yeah.) concerned (Disheroon: Right.) with the tribe, (Disheroon: Right.) about how much water would eventually (Disheroon: Right.) flow down?

Disheroon: But, they pretty much got it (Seney: Yeah.) worked out.

Seney: Also the question of how close you could put a well to the Truckee River?

Disheroon: Um-hmm. Yeah, that's a whole area. I stayed away from that one. (Laugh)

Seney: Well, that you leave for the hydrologists (Disheroon: Yeah.) and what not?

Disheroon: But they worked, that was worked out several years ago. (Seney: Right. Right.) You know, there's very, chapter ten, I think, its articles in, has a whole raft of arcane (Seney: Regulations?) provisions about where you can put wells, (Seney: Yeah.) and all of that, in California. (Seney: Yeah.) But, it's there.

Seney: It's interesting to me that I, and of course the question is intercepting the water that should be going into the river before it gets there. And, I would think it would have to go a fair amount distant?

Disheroon: Well, I would too.

Seney: But, apparently they worked something out?

Disheroon: Yeah. Well, they got the USGS involved in it, and you know, (Seney: Yeah.) made some judgements.

Seney: And I guess too, in depletion, that this was more a matter of art than science (Disheroon: Um-hmm.) to figure out what . . .

Disheroon: I would think, some of it. (Seney: Yeah.) Yeah.

Seney: And what was going on there? I know some of the things were, you know, that were not open for discussion, like the Interstate Allocation and all those things, were settled in the, were settled in the Public Law 101-618, a carryover from the negotiations on the Interstate Compact, (Disheroon: Right.) and that's all been decided a long time ago. Any, I guess, you couldn't really open that up again so there would be no (Disheroon: No. No.) thought about doing that?

Disheroon: No. The effort is to get TROA in place so that those allocations can go into effect.

Seney: I know the State of Nevada has had some worries about TROA not going into effect.

Disheroon: Um-hmm. I would think so. (Laugh)

Seney: On the basis of the 90/10 split on the Truckee River. That's very, that's a very handsome split for Nevada.

Disheroon: It is.

Seney: And, would that, I suppose that would be open if TROA somehow falls through?

Disheroon: Oh right. If TROA doesn't go into effect, you know, (Seney: Everything will be?) that statute really doesn't mean anything. (Seney: Right. Right.) Because the condition, you know, subsequence never met–so it would never go into effect. It could be up for grabs.

Seney: And nothing in the Preliminary Settlement Agreement was renegotiated for the TROA was it? That was all left pretty much the way it was, or were there some changes there?

Disheroon: Nothing *major*. There have been a few efforts by Sierra to do a little changing. Not significant changes but things here and there about what they agreed to do.

Seney: Right.

Disheroon: I guess there's still one . . .

END SIDE 2, TAPE 1. AUGUST 9, 2006.
BEGIN SIDE 1, TAPE 2. AUGUST 9, 2006.

Seney: . . . from the Justice [Department], in Reno, Nevada. Today is August 9th, 2006. This is our second session and this is our second tape.

What have you done to try to head off what I think everyone expects will be legal challenges by TCID?

". . . the basic . . . two things. One is . . . we *don't* put anything in that would adversely affect TCID's legal rights. And, the other is to work with the Bureau on their environmental analysis . . . so that when it comes down to it we can establish, hopefully, that there will not be any significant adverse effects. . . ."

Disheroon: Well, the basic thing we've tried to do is

make sure the environmental–well, two things. One is to be careful in reaching agreement that we *don't* put anything in that would adversely affect TCID's legal rights. And, the other is to work with the Bureau on their environmental analysis to see that they have done a good job of doing an analysis (Seney: Right.) of those effects, and so that when it comes down to it we can establish, hopefully, that there will not be any significant adverse effects.

". . . there were two proposed draft EISs that are in the record, one of which is now called the Report to Negotiators, that we reviewed and said, 'This won't cut it.' . . ."

I mentioned earlier–there were two proposed draft EISs that are in the record, one of which is now called the Report to Negotiators,[10] that we reviewed and said, "This won't cut it." You know, your analysis, in one case, they just assumed that if TROA didn't go into effect that Sierra would, at that time Sierra would, on its own, come up with a comparable solution and therefore the effects of TROA were, were not significant. (Seney: Right.) And I said, "Huh uh. You know, you just can't *assume* that it can be dealt with. You've got to postulate and state what you think will happen. (Seney: Right.) You've got to have a rational basis for it." So, they had to go back and do another draft.

10. See footnote on page 90.

“. . . they have now finally proposed alternatives that . . . as far as I can tell the only adverse effect . . . on TCID is it will *not* preclude them from taking all the water they’re legally entitled to *if* it’s available . . . What TROA would do would allow upstream users with a higher priority to more effectively use their water rights, put them in storage, for example, so that at some times there may be *less* water in the river. . . .practically, if there’s less water in the river then there’s less for them [TCID] to take. . . .”

But, I think they have now finally (Seney: Right.) proposed alternatives that are sort of, do capture the likelihood, the–as far as I can tell the only adverse effect, if you want to call it that, on TCID is it will *not* preclude them from taking all the water they’re legally entitled to *if* it’s available, which has always been, you know, legal. (Seney: Right.) You can’t take it unless it’s available. What TROA would do would allow upstream users with a higher priority to more effectively use their water rights, put them in storage, for example, so that (Seney: Uh huh.) at some times there may be *less* water in the river. Under the TROA they are allowed to create credit storage by reducing the Floriston Rates, which is not now legally possible. (Seney: Right.) So, that means TMWA can store some water that they don’t need this year, as a drought supply (Seney: Ah.) in a federal reservoir. There’ll be less water going down the river. It doesn’t affect TCID legally because Sierra had the prior right to the use of (Seney:

Right. Right.) that water. But practically, if there's less water in the river then there's less for them to take.

Seney: And in the past this couldn't have been done?

TCID, in the Past, Benefitted from the Inability of Senior Water Rights Holders to Store Their Water

Disheroon: They, no they couldn't do it. So, TCID has *benefitted* from their inability (Seney: To store their own water?) to use all of their water rights. (Seney: Yeah.) And so, they've gotten used to having more water. And of course the Floriston Rates regime is pretty well locked in so that you can't reduced, by storage, which TROA would allow them to do. So that's the one change. (Seney: Right.) But, other than that, you know, there's nothing in TROA about the Newlands Project.

Seney: There was some question about getting some upstream storage for the Newlands Project. What . . .

Disheroon: Oh, there's, that's one of the issues we're still working on, was to create–under TROA there are several varieties of credit storage where different . . .

Seney: Yes, it's not nearly confusing enough (Disheroon: Right.) right?

Disheroon: Different water users, suppliers effectively,

(Seney: Right.) can have storage in federal reservoirs of water which they can use, you know, for their purposes later on. (Seney: Right.) Well, we have said that the United States should have the right to do the same thing for the Newlands Project. So, to create Newlands credit storage by reducing Floriston Rates. And, we do that in years when it would appear that they don't need the full flow in the river. (Seney: Uh huh.) So we put this water in storage and if they need it then it's released and they get it. If they don't need it, then it goes to Pyramid Lake. So, it creates a benefit for Pyramid Lake, basically.

Seney: Is this a kind of a way of creating some water that they can use to pay their recoupment? Because they could use that for that couldn't they? Or no?

Disheroon: No. It would . . .

Seney: It wouldn't work for that?

Disheroon: It wouldn't work for that. If they don't need it they don't get it.

Seney: Ah.

". . . you can't repay water under recoupment if you don't need it. . . ."

Disheroon: And you can't repay water under recoupment if you don't need it. (Laugh)

Seney: Is this one of the things they're trying to do? This sort of–you said they were talking about credit water that didn't really apply. Is that what TCID would like to do with this?

Disheroon: No. No they, they don't think they'd like it themselves. They would rather just have the water brought down and taken over to Lahontan.

Seney: And carried over if they don't (Disheroon: Yeah.) need it?

Disheroon: Right.

Seney: Right. Right. Yeah.

"There is, now, in OCAP a credit storage provision in Stampede Reservoir, which is basically where the, they tell TCID not to take a certain amount of water over to Lahontan, but then they hold a block of water, which is really fish water, in Stampede against the eventuality that it turned out that they [TCID] do need it. . . . It benefits TCID in the sense that it ensures that they get their legal entitlement. But, it also carries out the requirement in 101-618 that the secretary operate within the directives in *Pyramid Lake v. Morton* that to the extent that it's not needed that the water goes to Pyramid Lake. "

Disheroon: But from a standpoint of maximizing the federal interest in the river, it's very important. (Seney: Right.) And so, we haven't quite nailed down the agreement on

how it has to be administered. There is, now, in OCAP a credit storage provision in Stampede Reservoir, which is basically where the, they tell TCID not to take a certain amount of water over to Lahontan, but then they hold a block of water, which is really fish water, (Seney: Right.) in Stampede against the eventuality that it turned out that they do need it. (Seney: Right.) So, they just have a guarantee that they will get it. But that's, that has nothing to do with Floriston Rates. That's using what water that already belongs to the government and basically is intended for another purpose. (Seney: Right.) They could, and that way you'd, if you exercise it then, you know, the water's allowed to go past Derby into Pyramid, but you may have to make up for it later.

Seney: You know Fred, if I were either a cynic . . .

Disheroon: TCID doesn't like that.

Seney: No, I'm sure they don't. I want to go back to the earlier one about the Newlands credit water. (Disheroon: Um-hmm.) Because if I were either a cynic, or say a farmer on the project, I might think that this was really more to benefit the tribe than TCID.

Disheroon: Well, it's not the tribe, per se. It benefits TCID in the sense that it ensures that they get their legal entitlement. But, it also carries out the requirement in 101-618 that the secretary operate within the directives in

Pyramid Lake v. Morton that to the extent that it's not needed that the water goes to Pyramid Lake. It's federally-controlled water. So, this is the way we're trying to do both.

Seney: Ah. So that means . . .

Disheroon: We need to draw the line between, "Give TCID their legal entitlement but not a drop more."

Seney: Right. Right. You know, I know one of the grounds that TCID is going to challenge the TROA on is–do we have a little more time?

Disheroon: Um-hmm.

Seney: Okay. They're going to challenge the TROA on is that they're signatories to the old Truckee River Agreement (Disheroon: Um-hmm.) but not to this one.

Disheroon: Right.

Seney: How have, how has that been handled?

How the Old Truckee River Agreement Affects TROA and the Signatories

Disheroon: Well, one of the things we have to do to, for TROA to go into effect is to get a change in two decrees, including the Orr Ditch Decree. And, what we have done is essentially–will do–ask the court to substitute TROA for the old Truckee River Agreement. And, with

regard to TCID our position is that TCID was there because at the time it was the operator, under contract, of Lake Tahoe. And so, they were an operator on the system. (Seney: Right.) They weren't there because they own water rights. (Seney: Ah.) They were there as an *operator*.

Seney: So they were a signatory?

Disheroon: And, of course, they operate Derby. But that's (Seney: Right.) you know, not a storage facility.

Seney: So, they were a signatory based upon their operation of the Tahoe City Dam?

Disheroon: That's our position. Yes.

Seney: Ah.

Disheroon: And that they no longer, under the new contract with the Bureau, they no longer operate (Seney: Right.) the dam at Tahoe.

Seney: Right. So that obviates . . .

Disheroon: So, they had no operational control with regard to the Truckee River reservoirs. (Seney: Ah.) They're just, you know, a recipient. Therefore, and in the case, the U.S., *TCID vs. Secretary*, the Ninth Circuit said that TCID got no water rights under the Truckee River Agreement. It was *merely* an operational agreement. (Seney: Ah.) So, we're saying we can change, in fact we *have*

to change because Congress has directed us to, the operations on the river. And, in order to do that you need to do away with portions of the Truckee River Agreement.

Seney: I suppose . . .

Disheroon: And the fact that TCID was a signatory doesn't mean we need their approval.

Seney: Oh. Well, they're not going to be happy to hear that are they?

Disheroon: Well, they've heard it, a long time ago. (Laugh) But no, you're right.

Seney: Yeah. Right. Right. I suppose, even at this point you might, if something happens to TROA, go in and move that the judge substitute the United States for that as signatories on the old Truckee River Agreement based upon who's operating the dam now?

Disheroon: If it got to be a problem, sure.

Seney: Yeah. Right. Right.

Disheroon: And the, and just a final point. (Seney: Sure.) In the Orr Ditch Decree itself the Decree says that the Truckee River Agreement is *binding* among the parties who signed it. Our view is, it is not a court order in the sense that the (Seney: Ah.) *court* ordered it. The court *adopted* it as an agreement among the parties, and binding

on the parties, but it's not as if . . .

Seney: It's a court order under . . .

Disheroon: It's not as if we are asking the court to change *its* order. (Seney: Ah.) We're saying, all the other parties have agreed to a new agreement and TCID's interests have been taken care of.

Seney: Because under 101-618 you're directed specifically not to interfere with court orders in Newlands, right?

Disheroon: Well, that's always generally true. I'm not aware of any specific provision. It does say that we have to get approval.

Seney: Of the Orr Ditch Court?

Disheroon: Of the Orr Ditch Court and the one in California for any necessary *changes* that are necessary to put TROA into effect. (Seney: Right.) Yeah.

Seney: Right. Think there's going to be any problem with the court here? Will this be Judge McKibben again?

Disheroon: No. I'm not sure who it'll be. We've got two or three different judges. I think Judge [Lloyd] George currently has the Orr Ditch.

Seney: Is he the Orr Ditch judge now?

Disheroon: I think so.

Seney: Yeah.

Disheroon: I was trying to remember this morning who it was. (Laugh) I think it's Judge George.

Seney: Do you foresee a problem with the things that you need for the judge to do in this regard?

". . . obviously TCID's going to come in, and we'll probably have a significant evidentiary hearing to establish why what we're doing is, does not . . . affect their legal rights. . . ."

Disheroon: I don't, but you know, obviously TCID's going to come in, (Seney: Right.) and we'll probably have a significant evidentiary hearing to (Seney: Right.) establish why what we're doing is, does not, you know, affect their legal rights.

Seney: Even though TCID has not taken part, isn't a signatory of TROA, and hasn't even attended meetings for *years*, I don't think have they?

Disheroon: No.

Seney: They did for a while, I know.

Disheroon: Right.

The State of Nevada Looked after TCID's Interests During Negotiations

Seney: But, the State of Nevada looks, to some

extent, after their interests does it not?

Disheroon: Yes.

Seney: And how, how has that worked? How has–I guess Roland [Westergaard] would be the key person here. How has he and what has he done to look after their interests? What has he asked for, insisted on?

Disheroon: Well, I can't think of everything, but, for example, on the Truckee, on the Newlands credit storage, you know, they have asked, among other things, that before we do that that we could solve with the state *and* the entity that, is at that time, operating the Newlands Project. So, so they've asked for procedural measures. I think if they saw anything that they thought would adversely affect TCID they would raise it. But, you know, I, that's the only particular instance that comes to mind. But, you know, they've been cognizant of (Seney: Right.) the potential affects, and they've raised it.

Seney: Right. As I take it all of you have in the sense of heading off any (Disheroon: Yeah. Right.) kind of lawsuit (Disheroon: Yeah.) that might have a chance of succeeding.

Disheroon: Right. Yeah. We've got a lot invested in this. (Laughter)

Seney: What . . .

Disheroon: So, we want to do it right. (Laugh)

Seney: Absolutely. Right. What is the hangup? What is the problem with the Newlands credit water? You said this is one of the issues that's hanging things up. Is this the most difficult one?

Remaining Issues with Fernley and Credit Storage in Reservoirs

Disheroon: No. No. The most difficult one is the town of Fernley. Its recognition that there's not a full integration of the existing credit storage provision in OCAP with TROA and trying to find a way to allow both of them. Bob Pelcyger has pointed out that the statute requires TROA to be the exclusive federal regulation for operation of these reservoirs, and that a credit storage operation is an operation of a reservoir. It's really the only one that affects Newlands. (Seney: Right.) And that the existing credit storage in OCAP really isn't currently covered under TROA. So, trying to find a way to sort of integrate those two and make sure what the rules are, the priorities and all of that. I think it can be worked out. It's just, it's sort of something that slipped by for awhile there and (Seney: Yeah.) wasn't really focused on, (Seney: Right.) and now that you're down at the end, you know, it needs to be resolved.

Seney: What's the, what's the problem with Fernley?

"... TROA has what was considered a placeholder that would allow [Fernley] ... to get

credit storage for their municipal water supply and would have assigned them a particular priority in storage. But, that was *presumed* to be contingent upon their reaching an agreement with the tribe as to their basic water supply. . . . They've been buying up Truckee Division water and they've sought to transfer some of it. But, they want to continue to take it out of the Truckee Canal . . . They recognize that there's twenty or thirty thousand acre feet of seepage every year that they use, that they have wells for. . . ."

Disheroon: TROA has what was considered a placeholder that would allow them to get credit storage for their municipal water supply and would have assigned them a particular priority in storage. But, that was *presumed* to be contingent upon their reaching an agreement with the tribe as to their basic water supply. Most of the issues with Fernley *aren't* TROA issues. There's a big issue of "What kind of water supply is Fernley going to have? What facilities they need? Where are they going to get the water?" They've been buying up Truckee Division water and they've sought to transfer some of it. But, they want to continue to take it out of the Truckee Canal with, you know, the intent at least. (Seney: Right.) They recognize that there's twenty or thirty thousand acre feet of seepage every year (Seney: Right.) that they use, that they have wells for.

Seney: Groundwater recharge?

Disheroon: But, they have no legal right to this seepage, but they don't want to see it go away. And, there's other issues like that. They're growing like crazy. They don't have an agreement with the federal government that allows them to take water for *domestic* purposes. They're buying irrigation water rights. They're being allowed to use them for irrigation, but to the extent that they want to use them for domestic water supply they don't have an agreement with the federal government for that.

Seney: And that's what they would need to switch the use of those water rights?

Disheroon: That's my view, yes.

Seney: Right.

". . . the tribe has said . . . they won't agree to their plan unless they agree to get off the Truckee Canal. . . . They said, 'Put in a pipeline.' Fernley said, 'Well, if we do that we'll lose the seepage. So, we want to be made whole.' . . ."

Disheroon: I don't see how you could take water out of a federal project without the consent of the federal government (Seney: Right.) even if you have bought irrigation water rights. But that's not doing to get–and the tribe has said, you know, they won't agree to their plan unless they agree to get off the Truckee Canal. They don't think that a dirt-lined ditch is the appropriate means of conveyance for a municipal water supply.

They said, "Put in a pipeline." (Seney: Right.) Fernley said, "Well, if we do that we'll lose the seepage. So, we want to be made whole."

Seney: There was . . .

Disheroon: But . . .

Seney: Yeah?

"There is this one issue in TROA that would allow them, and the tribe says, 'No they can't be in, if they don't reach an agreement with us.' There's another provision in TROA that would allow them to come in later, but they wouldn't necessarily have the same priority. . . ."

Disheroon: There is this one issue in TROA that would allow them, and the tribe says, "No they can't be in, if they don't reach an agreement with us." There's another provision in TROA that would allow them to come in later, but they wouldn't necessarily have the same priority. So, that all has to be worked out.

Seney: My understanding is that some time back that they were actively negotiating this, Fernley was, with the tribe to have wells adjacent to the Truckee River to supply their municipal and industrial. Those came a cropper, I guess?

Disheroon: They've never come close to reaching an agreement.

Seney: Right. What did . . .

Disheroon: Yeah, we've primarily expected the tribe to negotiate an agreement with them, but it hasn't happened.

Seney: Yeah.

Rebecca Harold

Disheroon: What difference has it made that Rebecca Harold is no longer the negotiator for Fernley and that you have a, that Fernley is now a new, is a different municipal entity with a mayor and a different attorney? Has that complicated matters?

Fernley Needs Contracts to Put Water into Federal Reservoirs and to Take Water from the Newlands Project

Disheroon: I'm not sure it has because Rebecca would still have been dependent on, you know, the city people to tell her what (Seney: Right.) they needed. (Seney: Right.) So, I'm not sure it's made a difference. The difficulty is they're far apart on an agreement, where they haven't even addressed critical elements like a contract with the federal government. In fact, they would have to have two contracts. Well, I suppose you could put them in one. They also need a storage contract to put water in federal reservoirs. And then they need an agreement to take the water from the Newlands Project. And, they don't have,

and they're not even *talking* about either one of those yet.

Seney: Yeah. Well has, have they had to curtail some of their building activity because of uncertainty over water rights?

Disheroon: I don't know.

Seney: Supply?

Disheroon: I don't have the impression that they have.

Seney: Yeah.

Disheroon: I think they're still, you know, using those wells.

Seney: They still have enough seepage to–that's kind of a, kind of a tough way to go isn't it. I mean, if they end up on the wrong side of some of these contractor suits? I know there's other water that's going to be coming in. I can't remember the–Aqua something or other?

Disheroon: Oh, yeah. There's another proposal. I don't know.

Seney: That water may come in from another . . .

Disheroon: Yeah. From the Humboldt (Seney: Right.) or somewhere.

Seney: Exactly. (Disheroon: Yeah.) Right. Right. Groundwater from Lake Winnemucca area.,

(Disheroon: Yeah.) that kind of thing?

Disheroon: I'm not really up to speed on that.

Seney: I understand there was some suggestion of doing, of postponing the Fernley agreement and doing it later? Is that going to happen, ~~until the TROA could,~~ this was so that TROA could be signed and then work this out later?

". . . we just need to do something, sort of put a placeholder in TROA (Seney: Right.) and not let TROA become hostage to resolution of these *other* (Seney: Right.) bigger issues that really aren't part of TROA. . . ."

Disheroon: Well, it seemed to me that would be the logical thing to do, that, you know, we just need to do something, sort of put a placeholder in TROA (Seney: Right.) and not let TROA become hostage to resolution of these *other* (Seney: Right.) bigger issues that really aren't part of TROA. (Seney: Right. Right.) And don't even involve all of the parties.

Seney: Where is–is that going to happen? Or . . .

Disheroon: Well, it's still up in the air.

Seney: Still up in the air? I understand, I understood there were some talks going on to do that. Has that stopped or is the . . .

Disheroon: Well, there haven't been any all-party talks.

They've been sort of partial.

Seney: Is this something I should ask Bob Pelcyger about?

Disheroon: Yeah. Or Sue Oldham.

Seney: Okay. (Laugh) All right.

Disheroon: Yeah. But, in the sense of really coming to grips with it, it hasn't happened. I mean, Fernley's attitude seems to be, "Well, we want the credit storage. We want to be a part of TROA."

Seney: "So we should have it"?

Disheroon: "So, we should have it." And the tribe's position appears to be, "If you don't reach an agreement with us we're not going to let you." And if the tribe doesn't agree it won't happen.

Seney: Right. Right.

Disheroon: Because as I said, you've got to have five people, (Seney: Right.) five parties agree.

Seney: Right. Might this be one of the impacts of this new negotiating team for Fernley that they haven't been there through all of these things and don't understand the give and take?

Disheroon: I think so.

Seney: Yeah. Right.

Disheroon: They really ~~need to,~~ need some help in putting their position together, shall I say.

Seney: Right. Let me ask you about something else that I know you're anxious to talk about and (Laugh) clear up, clear up for me and that's this "Fork in the Road" business?

The "Fork in the Road"

Disheroon: Oh, I'm not sure I'm the right one to ask about that.

Seney: Well, I'm asking everyone.

Disheroon: Go ahead. (Laugh) Try me. (Laugh)

Seney: Well, I understand the tribe comes in and says, "This, we don't understand the things this way or that way, and everybody has to back off." And, you take a little break and then come back and renegotiate. What, what was going on there from your point of view?

Disheroon: Well, I think it was not necessarily the tribe. Part of it was California, and then there was Sierra [Pacific]. And, to be honest with you I tried to stay out of it as much as possible because it wasn't, wasn't really a legal issue. But it was, "If we got to the point where it became obvious that certain things we agreed to weren't going to happen then what do we do?" And, all I can tell you is

they were lengthy discussions. Bettenberg could probably, or Sue Oldham could explain it to you better. But, they finally reached some kind of understanding, but I stayed away from it, because in some respects it was pretty hypothetical, but it was obviously important to get people comfortable with it.

Seney: Right. Well, this has turned out to be a very detailed agreement hasn't it?

Disheroon: Oh yeah.

Seney: And you think it needs to be that detailed?

". . . everybody has to have you know, their input to make sure they get what they think they've agreed to. So, that's why we got what we got. TROA's not easy to read. . . ."

Disheroon: In order to get five parties to sign it, yes. (Laugh) And what I think if, you know, one person could do it we could sit down and you could rewrite it probably a lot more simply. (Seney: Right. Right.) But then maybe you couldn't. (Seney: Right.) Maybe everybody has to have [taps table] you know, their input to make sure they get what they think they've agreed to. (Seney: Right.) So, that's why we got what we got. TROA's not easy to read.

Seney: No, it's not. I've made numerous attempts and . . .

Disheroon: And there's all these cross references?

Seney: I know. I know.

Disheroon: Yeah.

Seney: How is it going to be to administer it?

". . . we've all agreed to set up this operation in the federal watermaster's office. So that they are working to actively understand everything and be prepared to implement it if it ever goes into effect-when it goes into effect. . . . And we've been providing funding for several years, to his office, you know, set up the computer system and . . . everything else."

Disheroon: I'm not sure it'll be that bad because many of the, the technical parts aren't really that important. Probably would never come about. And, what we have done, we've all agreed to set up this operation in the federal watermaster's office. (Seney: Right.) So that they are working to actively understand everything and be prepared to implement it if it ever goes into effect-when it goes into effect. (Laugh)

Seney: Yeah. Let's be a little more optimistic. (Laugh)

Disheroon: So, I think, you know, *that* I think will, is the mechanism to, to understand it. So, to deal with the situation, if they come up.

Seney: And the federal watermaster is the logical

person to do this, isn't he?

Disheroon: Yeah. And under the TROA he is to be the (Seney: Right. Right.), yeah.

Seney: And isn't it in the (Disheroon: Yeah.) statute as well?

Disheroon: He's called "the administrator." No.

Seney: No?

Disheroon: It's not in the statute. It's just, we felt that there wasn't any other–you couldn't have, you know, the overlap was just so high that you couldn't have two different (Seney: Right.) officials. We're going to have the watermaster wearing two hats, (Seney: Right.) but still the same person, (Seney: Right.) the same staff, you know, and they'll be making the decisions for the one hat or the other.

Seney: And I suppose you talked to Garry Stone about this?

Disheroon: Oh yeah.

Seney: Orr Ditch Court?

Disheroon: Oh yes.

Seney: And they'll be fine with it? And . . .

Disheroon: He's talked to the Orr Ditch Court. (Seney: Yeah.) We haven't.

Seney: Right. Right. That's his job, I guess?

Disheroon: Yes.

Seney: To talk to the judge about (Disheroon: Yeah.) that?

Disheroon: And we've been providing funding for several years, to his office, you know, set up the computer system and, you know, everything else.

Seney: Right. Will that funding continue once it's in effect?

Disheroon: Oh yeah, as an agreement in TROA (Seney: Right.) about who pays what.

Seney: Ah. Okay. All right. Anything else you want to add? You said, let me see, you said when we began that this was going to be a very important agreement, when it was all said and done and successfully completed. Why do you think that?

Believes TROA Will Be a Model for Other Areas of the West

Disheroon: Well, I think, you know, given the change in demand in the, in the whole water rights issue in the West where the shift is away from agriculture into domestic supply–I'm oversimplifying it–but this is one of the first really big efforts to find a way to really *maximize* the benefits of the available water supply and introduce mechanisms that

haven't historically been used. And, I just think it will, you know, be a model for, not the language but the (Laugh) concepts (Seney: Right.) for, you know other areas.

Seney: It's going to be applicable to other areas, you think?

Disheroon: Yeah. Because the problems are, that are here are not unique.

Seney: Right.

END SIDE 1, TAPE 2. AUGUST 9, 2006.
BEGIN SIDE 2, TAPE 2. AUGUST 9, 2006.

Seney: Cut you off when you said the problems were not unique?

Disheroon: Yeah. Yeah. The problems aren't unique. I think there are a lot of other areas, but this could be a model, or at least a direction for, (Seney: Right.) possible solutions. Whether you could get the maximum use out of the water. You know, all the tradeoffs. We have fish water one time and municipal water supply another.

"You kind of get away from the rigid concepts of first in time, first in right and a more cooperative approach to water. . . ."

You kind of get away from the rigid concepts of first in time, first in right and a more cooperative approach to water. (Seney: Right.) And, in setting up a

coordination so, you know, you can deal with situations.

Seney: This too, do you think, more broadly kind of recommend these multiparty negotiations for difficult issues that the, you know, I'm thinking, and I asked you once a long time ago whether this was the toughest problem you've dealt with and you said, "No. No. It was salmon on the Columbia River." (Laugh) Do you still feel that way?

"The salmon problem [on the Columbia River] is still insoluble. This one has a solution. . . ."

Disheroon: Oh yeah. The salmon problem is still insoluble. (Laugh) This one has a solution.

Seney: This one has a solution? I guess then I'm thinking of success here wouldn't maybe make people think that that might be possible with the salmon as well?

Disheroon: No.

Seney: No?

Disheroon: There are just too many more people. Too many divergent *locked-in* interests (Seney: Yeah.) where it's hard to find a convergence that everyone could agree on. I just don't, I'm pessimistic that it will ever happen. It's just, somebody's going to just say, "This is the way it is, now shut up and do it." (Laugh) And that probably means it's a federal judge or Congress.

Seney: Right. Are you still working on the salmon?

Disheroon: Parts of it.

Seney: Parts of it? So this, actually this must be kind of a *treat* then to come and work on TROA compared to the salmon, huh?

Disheroon: Yeah. It's, at least you can see an end in sight, (Laugh) (Seney: Right.) and that you've done something to (Seney: Right.) improve the situation. (Seney: Right.) On salmon it's like you're just moving the, you know, kicking the can down the road. (Laugh) But, you don't know what the solution is (Seney: Right.) or when you're going to get there.

Seney: Right. All right. Anything else you want to add?

Disheroon: No. I don't think so.

Seney: Okay. Well, I appreciate it again. Thank you for (Disheroon: Sure.) talking to us.

END SIDE 2, TAPE 2. AUGUST 9, 2006.
END OF INTERVIEWS