

JEROME C. MUYS

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KAREN TACHIKI

This is going to be the oral history of Jerry Muys. We're here in Las Vegas at the Colorado Water Users Association meeting. It's December 12, 2001. Jerry, I think most people would think about your involvement in Colorado River matters and think instantly to your involvement in the Arizona v. California litigation. Can you tell us how you first became involved in the case?

JEROME C. MUYS

Well, I guess I'd first say how I happened to be out at Stanford Law School, which is where I met Mike Ely who got me involved in all this originally. But I'm a Pennsylvanian by basic residency for so many years, my wife and I both are. We happened to come out to Stanford because a good friend of mine at Princeton ran into Bill Norris, who was a Princeton grad and who had worked for Mike Ely on the Colorado River litigation in the early '50s. And then Bill later came out to California, became a 9th Circuit Judge, and is now retired, I think. But any how my wife and I decided to come out West to Stanford, and I believe it was the summer between my

second and third year at Stanford that Mike Ely came to interview students for a summer clerk position with the California Attorney General's office, not with Mike's firm. Mike had been hired by then Attorney General Pat Brown to be Special Assistant Attorney General to handle the Colorado River case, which Arizona had filed in 1952. Mike interviewed a number of us. I was very impressed with Mike, and I was very fascinated with the litigation and with the job of clerking on it. The trial was going to be starting and this was the summer of '56. I think the trial was going to be starting up in San Francisco that summer. I thought this would be an exciting thing to do. And also the pay was pretty good for a State Deputy I think it was called Attorney General, even though it was just a clerk. So, I told Mike I was interested and he hired me. That summer we started the trial up in San Francisco. I did a lot of the mundane things that summer law clerks do, research and so forth, and I got to meet a lot of the people who stayed throughout the whole litigation. But that's how it all started.

KT

Did you work then in your final year of law school? Or did you work in the summer only?.

JCM

Well, after I graduated, Mike then offered me a permanent job with his law firm back in Washington, to be preceded by me working in the beginning in the summer of '57, when the trial was again going on up in San Francisco. Mike wanted me to go on the Attorney General's payroll, which I did until I passed the California bar in January of '58. Then Mike hired me for his firm. We just stayed, my wife and I stayed out in California. We moved down to Pasadena for a year, and didn't go back to Washington until October of 1958. Then I was a member of Mike's firm, working under the same contract with Pat Brown that Mike had with the state.

KT

Can you tell us a little bit about some of the individuals that were involved? If you start with the California folks.

JCM

Well, of course, the top individual was Pat Brown, who was a very gregarious Irishman. He used to come during the trial. Well, first of all there was a special litigation section set up in the Attorney General's office to handle just the Colorado River litigation. It was headed by Gil Nelson, an Assistant Attorney General, I believe that would have been his title, down in L.A., and Pat Brown put him in charge of this Colorado River group. But Mike Ely, even though he was a contract Special

Assistant Attorney General, was really running the show. I mean, he was in charge. Gil was a very amiable, pleasant guy. Actually I recall he was a cousin of Ray Bolger he told me, he looked very much like Ray Bolger. But Gil was kind of a nominal head of the office, but Mike was really in charge, and that's the way Pat Brown wanted it. Mike hired a number of other outside attorneys to be Special Assistants in that unit. The principal one was Charlie Corker, who had been a Harvard Law School graduate and had taught at Stanford for awhile. Mike bumped into him somehow in the course of putting this special team together, and he was very impressed with Charlie. Charlie left the Stanford faculty and went on this case and saw it through the end. He stayed with the Attorney General's office after Arizona against California was finished in '64 for awhile before he went up to the University of Washington to teach at the law school there. Other people were hired too. I remember Howard Friedman. I'm not sure where Howard came from, but he didn't stay too long with that special unit. He went into practice with Loeb and Loeb, where I think Malissa McKeith is a partner now. And Burt Gindler I think responded to an ad in the paper, came in from Minnesota and joined that special unit the same summer I did, '56. Burt may have preceded me a little bit. But Burt stayed for the duration also, and then he subsequently went into private practice with Seth and Shirley Hufstedler's firm. I've forgotten what the name was at the time. I think he's still with them in some subsequent firm. Then some lawyers were brought in on a permanent status in the

special unit. And other people kind of worked part time. I think Bill Norris again was on a special contract that Mike had with him to help on the case. Shirley Hufstедler became a very integral part of that team, although she wasn't part of the permanent litigation group.

KT

Was she working in the A.G.'s office generally?

JCM

No, she was in private practice.

KT

Oh, okay.

JCM

But she had a contract with Pat Brown, and it was part time. We had the trial up in San Francisco, but there was a special office for the Colorado River litigation down in Los Angeles at 9th and Broadway, which I think was actually the headquarters of the Colorado River Board at that time. We were sharing space, or had adjacent space to the Colorado River Board's offices there. There were a couple other young lawyers about my vintage that were hired. One was Andy Chaudry, who was a native of India and had just graduated from law school and was interested in water issues. He was hired for several years, then he moved on and went back to India. Harry Sondheim was just hired and worked pretty much for the duration of the litigation. John Alexander was hired as a Department of Justice employee in that special unit and went through the duration of the litigation. Then he became, as I recall, a Superior

Court Judge, maybe Municipal Court Judge in Los Angeles. And there was one other lawyer whose name escapes me, who wasn't there too long. But that was kind of it. You had Mike Ely brought in as Special Counsel, the head of the team, Gil Nelson, the nominal head of the team, and a full time Department of Justice Assistant, and then the special people Mike hired, Charlie Corker, Shirley, the rest of us. We all had titles as we were State Department of Justice employees during that short period until I left and went with Mike's firm. Then I was just acting under the contract Mike had with Pat Brown.

KT

And how did this particular team then interact with the California agencies who all had their General Counsels or Special Counsels, I think they were also involved in the case.

JCM

Right. Well it was, as I look back, rather hard. I think logistically it was hard to coordinate everything. Mike and Charlie Corker I think pretty much had that responsibility. Imperial was represented by Harry Horton, and by his I believe son-in-law, Reggie Knox. Palo Verde was represented by Frank Jenney, Coachella by Earl Redwine, Los Angeles Department of Water and Power by very funny Gilmore Tilman. And who else would we have had?

KT

Metropolitan.

JCM

Metropolitan was Jim Cooper. Those were

the principal players. They all had their individual personalities. Some were more dynamic and effective than others. I think most of them took Mike Ely's lead. Mike would come out with strategic proposals and so forth, and either by correspondence or on the phone or in most cases on important matters, with actual meetings of all the agency counsel, and work out positions. I think all of them went along pretty readily. The one who was more independent, and I'd say a little feisty maybe, was Harry Horton, because Harry was Imperial's counsel and was well along in years and had quite a reputation I think in the state as a water lawyer. So he wouldn't always see eye to eye on things that Mike wanted to do. It may have been that there were tensions even then between Imperial and Metropolitan that I wasn't aware of.

So maybe Harry would see issues lurking in some positions the state was taking that might come back to bite Imperial. And so he was kind of more cautious, and I'd say not as easily or not as likely to come along immediately on most of the group's positions than some of the other lawyers.

KT

Since you were sharing space with the Colorado River Board, did the Board have much of an influence?

JCM

Oh they were our technical people. Ray Matthews was, I guess he was called Executive Director then, but he was equivalent to Jerry Zimmermann at the time. Then the Board had a lot more engineers than they do now. They may have beefed

up their staff specifically for the litigation. Gil Lee, for example, was one of the engineers. I think Gil later went on to law school and worked for L.A. Department of Water and Power for a number of years, and maybe still does, or maybe he's old enough to be retired by now. I'd say we all got along very well. It was a lot of comradery, they were very helpful. A lot of the engineers were very able. They didn't have to do very difficult things. When we got into developing the water supply phase of the case, Tom Stetson came down on assignment, or whatever you want to call it, from the Department of Water Resources up in Sacramento and was assigned to the Arizona against California litigation. He became our top expert on water supply and actually later testified on that issue. By the way that was a great, great part of our case we developed, and the Special Master ultimately just ignored it completely and said water supply was completely irrelevant to the case. And a great deal of time, effort and money went down the tubes on that issue.

KT

Did you have other technical experts that were brought in from the outside?

JCM

Yes, I think we brought in Raymond Hill, who was an old friend of Mike's and who was a very prominent hydrologist. He was with a firm as I recall, Leeds, Hill, and Jewett. Now I see there's a firm called CH2MHill.

KT

CH2M Hill.

JCM

CH2M Hill, or whatever, and I assume the Hill is Raymond Hill, although I don't know. But he also testified on water supply. We never got to know him very much. He was kind of a pompous fellow. I think Mike told me one time that someone said that Raymond Hill was the only person he ever knew who could strut sitting down, which I thought was an apt characterization of Raymond, though he was quite a brilliant engineer.

KT

Did Pat Brown himself get involved very much in the case?

JCM

Not really, I remember him coming through the office up in San Francisco during the trial on several occasions. And he was very humorous. He came in, talked to me and shook hands and, you know, chit chatted. The impression I had, you know, was of a real politician, a man of the people. And, so unlike his son that I met later, when he was practicing in Bill Norris' firm in Los Angeles for awhile. Jerry Brown was there and was always very serious, not much lightheartedness in Jerry, unlike his dad.

KT

Were you all assigned to work on different issues?

JCM

Well, we had an overall strategy. We knew the issues that had been identified that we were working on. I think as a young lawyer I got to do a lot of research on different

issues. And at one point I was assigned two Indian reservation boundary cases, the Fort Mojave and Colorado River boundary disputes. Because there was a fair amount of water involved, Mike and Charlie Corker gave me that assignment, which was good for a very young lawyer. I put the whole cases together and then tried them and everything, so it was a big thrill for me and good experience. I probably never would have gotten anything like that kind of experience that soon after graduating from law school as I did working in the special Colorado River Unit. I think they would parcel pieces of research out. But Charlie Corker and all the people I mentioned pretty much zeroed in on particular issues. For example, John Alexander and Harry Sondheim did most of the research on the Indian water rights issue, and the reserved rights, and so forth.

I did a lot of work on the legislative history of the Boulder Canyon Project Act. Mike, of course, would do the outlines of briefs and make the strategic decisions, which the other counsel would go along on as to how we were going to treat these issues. But certainly issues on the Compact meaning, we all thought at that point that the Compact somehow was relevant to the litigation, but Special Master Rifkind disagreed with that ultimately. But Mike and Charlie would decide how we were going to attack these issues. And then they might make assignments to Burt Gindler, or Howard Friedman. They were a little more senior than I was. And I'd get different pieces to work on, but then Shirley was hired, as I say, and Bill Norris to work on special targeted issues. They might hire specific

lawyers on a contract basis to work on issues that they might need rather speedily, or they thought those lawyers might have some special expertise on. But I think, all in all, all the personnel were used quite efficiently. It's my recollection that in many cases Metropolitan would sometimes file an independent brief, and sometimes Imperial. But by and large, most of our efforts were joint briefs that everyone would join on. And I don't recall that, maybe beyond the contributions Harry Horton made and to a lesser extent, Jim Cooper, we ever got much in the way of work product from the other agencies. Now, of course, when we put on our affirmative case eventually, we all thought it was an equitable apportionment case. So we all thought we had to prove our water rights. Then, of course, Frank Jenney put on the Palo Verde case and Harry Horton put on the Imperial case and Jim Cooper Metropolitan's and so forth. So when the individual agency cases were put on with respect to their water rights, whether they were state water rights or, like Metropolitan, contract water rights, then the agency counsel took the lead. But I'd say everything pretty much beyond that was under the direction of Mike and Charlie and Gil Nelson technically, and the work assignments were spread around the lawyers and the special units. To that extent, I don't think the agency lawyers made a particularly large contribution to the broader issues.

KT

Tell us about your Arizona counterparts.

JCM

Oh, let's see, I'm trying to think. Arizona started out with a particular lawyer, I think his name was Frank. It may have been the Frank who later went on to be a Yale Law Professor, or had been a Yale Law School Professor. But he was representing Arizona in the early stages of the proceeding, representing the State of Arizona. And they had the same agency problems as we did because you had a number of Arizona irrigation districts who were involved, and some of whom had water rights in the mainstream, like Yuma and Welton Mohawk and some of those agencies. But there was one lawyer, very able, I can't remember his first name, his was last name was Frank. And then some time in the early stages of the proceeding, he came up with the theory that this was not an equitable apportionment case along the traditional lines of those the Supreme Court had decided in the past, but that it was really a unique case in which the federal contracts should control everyone, the three states, at least their water rights. And it's my recollection that that was such a radical proposition, that he didn't want to rely extensively on a traditional equitable apportionment case, where each district would present its evidence of its water rights and needs and things of that sort. I think that so alarmed a number of the counsel for the districts, and maybe other counsel for the state, that I believe he was fired, actually. And they brought Mark Wilmer in from the firm of Snell and Wilmer.

And Mark came in, he was a prominent trial lawyer. I don't know if he was a water lawyer, but he pretty much reverted to the traditional presentation that would be

made in equitable apportionment case. But as it turned out later on, it's my recollection as we got to the final briefing and everything before the Special Master, he reverted back to the contractual allocation theory that his predecessor had been fired for espousing. And, as you know, that turned out to be the winning rationale before the Special Master. Everything we did in the way of what we thought was all the supporting evidence we needed to show an iron clad priority for the California users on the traditional equitable apportionment principles was just ignored by the Special Master and the Supreme Court. The Special Master and the Court ultimately held that Congress had authorized the Secretary to make a contractual allocation among the three states, and, in fact, he had done so by all of our water delivery contracts.

KT

Tell us about the Special Master.

JCM

Oh, Special Master Simon H. Rifkind, of Paul, Weiss, Rifkind and Garrison in New York City. Well, he wasn't the first Special Master. The suit was filed in '52, and early on the California defendants, moved to join the upper basin states. And about that time, the Supreme Court appointed a Special Master named Haight. It may have been George Haight. And he decided, as I recall, the so called joinder motion and, rejected the idea that the upper basin states were indispensable parties for this law suit. A number of them had not intervened so we hoped, I think, that the suit would go down the tubes because of the indispens-

ability of those upper basin states. But he rejected that argument, as did the Supreme Court. Then he died shortly after the decision, and I think Rifkind probably was appointed about 1954 or '55, and came on. And as I say, they had some pretrial hearings. This was before I was involved. But beginning in the summer of 1956 he scheduled the trial for San Francisco, and that's where we tried the whole matter. He was a prominent New York City lawyer, but with no familiarity with water issues or anything. He had been a Federal District Judge, and retired sometime I think in the early '50s because he said he had, as I was told at least, a lot of children in college and so forth. District Court Judges didn't make much money then. They wanted to get in private practice, which he did. But he was very well respected in the bar. And someone at the Supreme Court obviously thought highly of him and the Court appointed him Special Master, as I say, about '55. He was kind of a somewhat arrogant man. He was never in doubt of himself. And he and Mike Ely, two of a kind, they would often have little exchanges in the court room. But Rifkind was very brilliant, obviously very brilliant. He cut right through to the heart of the issues and was on top of everything. But as I say, he was never in doubt as he moved along, and so forth. He conducted the hearings very expeditiously, and I think very fairly and effectively. The trial was held in the, I think it was the then Post Office building up in San Francisco, just off the corner of Market Street, about maybe 9th and Market. And we had a big room there that they made available. It may have been the Federal building, but I believe it was the Post

office. And they made this big room available for the trial. Rifkind would sit in his swivel chair on the platform with his back to all the lawyers as they would be doing their direct and cross examination. And you always wondered whether he was asleep or whatever. But in critical times he'd spin around in his chair and inject himself. I always thought that was quite amusing

KT

It's a little unnerving.

JCM

Yes, you wondered whether he was hearing any of this, and so forth. But he was a small man and, you know, maybe that was part of what shaped his personality. Because he was very aggressive and very intelligent, and everyone certainly respected him. And he was highly respected in the legal community in New York.

KT

And he had a law clerk, right, or not a law clerk, but he had someone to assist him.

JCM

Yes, he had law clerks. The first one I remember was Charlie Meyers, who later was part of the Stanford Law School faculty, and later Dean, and became a very good friend of mine. But I met Charlie during the course of the proceedings before the Special Master. Charlie had been a prominent oil and gas professor down at the University of Texas Law School. And then he moved up to Columbia, and I don't recall what Charlie was teaching. I doubt if he was teaching oil and gas law at

Columbia, but he was teaching something. Charlie never told me how he got hired by Judge Rifkind to be his clerk. But I'm guessing that Rifkind wanted to get some sharp young professors to help him, and he may have just made an inquiry at Columbia, or maybe Rifkind went to Columbia for all I know. But he hired Charlie, and Charlie was the mainstay of his staff. He was his principal clerk. Toward the end of the trial he brought in another lawyer from New York, I think a member of his firm, Paul, Weiss, Rifkind & Garrison, a fellow named Fishbein.

But other than that I don't think that Judge Rifkind had any other clerks. But Charlie was very effective. He'd come out with the Judge. And, of course, he would do a lot of the work in the interim periods between the hearings for Judge Rifkind. He was a brilliant guy, and then he finally moved out to Stanford from Columbia, I'd say in the '60s sometime, and then stayed on and became Dean. He later left Stanford and went with the Los Angeles firm of Gibson, Dunn, & Crutcher in their Denver office. Charlie was appointed Special Master in the so called Pecos River original action in which Texas had sued New Mexico. Charlie did a very good job. Then he died at a relatively early age, I'd say about 1990, pretty much from lung cancer and heart problems associated with the smoking. He was a voracious smoker. I mean, he really smoked a lot. So a word of caution to smokers. But that was Charlie's principal part, and, as I say, Fishbein came on to help at the end. But I'm guessing Judge Rifkind probably had some of his associates in his law firm do research for him, more mun-

dane things. But Charlie Meyers was his right arm pretty much.

KT

And the U.S., who represented the U.S.

JCM

Well, we were just talking at lunch here in the Pavilion because, let's see, there were a couple Arizona lawyers there and Mike Clinton, and we were talking about Bill Veeder, the notorious Bill Veeder, who had been in the U.S. Justice Department. He was the original lawyer representing the government when Arizona filed the law suit in '52. And he had also been at that time the government lawyer on the so called Fallbrook case where he made the outrageous assertion that the Federal government had some kind of paramount authority over all the water in the West, and they could do whatever they wanted with it without regard to state law or anything else. That was in the early '50s. When the Eisenhower Administration took over in 1953, Veeder was fired as the government's lawyer in Arizona against California and shipped over to the Bureau of Indian Affairs. By and large, he was kind of sent to Siberia because his view of Federal supremacy and water rights was not one that found any favor at the Justice Department, although it's strange that the ultimate victory Justice got out of Arizona against California, was based on an all Federal rationale.

But the two lawyers that took over were Dave Warner and Walter Kiechel. I think they were both from Nebraska. They were protégés of the Solicitor General at the

time, his name was J. Lee Rankin. And when he took over as Solicitor General at Justice, he brought Dave Warner and Walter Kiechel in from whatever, I think they had been in private practice in Nebraska. They really ran the litigation with help from individual Interior Department lawyers. The client, of course, was the Secretary of the Interior and the agencies there, the BIA and Bureau of Reclamation and so forth. And those two Justice lawyers would often have assistance from those Interior Department lawyers. But they were both very staid, kind of conservative lawyers. Dave Warner talked very slowly and if you're sitting on a summer afternoon up in San Francisco and he was examining some witness, why you might well dose off. Judge Rifkind would often have to say "Let's move it along Mr. Warner". Kiechel was more dynamic and a little more feisty than Warner who was very placid, and as I say staid. Kiechel was more aggressive and active. Mike Ely used to get under both of their skins when they might be presenting direct testimony by a witness or cross examining. Mike would always be coming in with little nit picking objections or needling them, because he knew he could disrupt them, and Warner would get flustered a little, but kind of maintain his cool, whereas Kiechel would get all feisty. Walter is still alive. I see him periodically, and he calls me once in a while. He called me after our oral argument in Arizona v. California in April of 2000. And you know, you would not have thought that they would have been able to put together the amazing victory they did in the law suit, but they did. And they were good lawyers, they had good pedigrees from law schools.

Later on, Dave Warner I think retired and died at an early age as they say. Walter is still around. He stayed on for some time, and then he became an environmental lawyer for International Paper Company. I see him periodically at the American Bar Association Water Law Conference down in San Diego. But those two guys pulled off a major victory for the government.

KT

Now, at this time the Indian reservations didn't have separate representation as they've had in subsequent iterations of the case, right?

JCM

Well, that's right. In fact I think first of all the Navajo tribe tried to intervene, and they were denied intervention. That was Norman Littell, who was a very prominent Washington lawyer representing a lot of Indian tribes. They never got into the case. I don't know that anyone else ever tried to assert a right to represent the tribes independently. That was kind of a transitional period. The law has always been that when the government is in a case involving Indians the Attorney General has complete authority, whatever he wants to do is binding on the government and on the tribes. Somewhere along the way, and as a matter of policy, I think the United States decided to let the tribes, if they wanted, have their own independent counsel and try and help them fund that counsel to some limited degree. And so that's what has evolved today. As you know, in Arizona II each of the tribes had their own independent counsel, and now in the final stages of the dispute down on the Fort Yuma Indian

Reservation they have their independent counsel. The government is also there on behalf of the tribes but serve in a back up role. The government lawyers, Justice lawyers, and the tribal lawyers really have to reach agreement, and I think, by and large, unless there's some outrageous position that a tribal attorney would want to be taking on an issue that would be prejudicial to other Indian claims, or to the government's interest in the subject matter, why they pretty much defer to the counsel the tribes have hired. That's what evolved over the years.

KT

Tell us a little bit about how Rifkind's opinion came to be. I think there, there was a Draft at one point, and the parties were allowed to comment.

JCM

That's right.

KT

And then the final, now were you all surprised by the Draft Report? Or did you kind of have clues along the way?

JCM

I don't think any of us had a clue that the Draft Report was going to be the way it was. I remember when it came out, I think it was dated December 5, 1960, as I recall. No, that was the Final Report. But the Judge said he wanted to give us a Draft Report, he told us then that we would get a chance to comment on it and he would

prepare a Final Report. I can't remember whether it was the Draft Report or the Special Master's Final Report, but I think it was the Final Report that Mike Ely sent me up to York, Pennsylvania, where it was being printed, so that as soon as it came off the press, I got a box of them and drove them back to Washington. In any event, the Draft Report was a complete shock I think to everybody, because we were so convinced, Californians were convinced, and Nevada was convinced, I think, that Arizona was taking a long shot. We were still convinced that the case could be decided on traditional principles of equitable apportionment. We had put in a good case about our senior water rights, and the magnitude of them. And we had put in what the Court indicated in earlier cases about available water supply, that it would be matched against requirements of the states and that would be a factor. So we had all this evidence we put in about the water supply. Well, we did put it in, we had a voluminous record. It's just that in the Draft Report, the Special Master said it was all irrelevant and everything we had proved about our water rights was irrelevant because Congress had in fact authorized the Secretary to make a "contractual allocation" of waters of the first seven and half million feet of the waters in the main stream in the lower basin. In fact, he had done so through the Arizona and Nevada master contracts and through the collective individual contracts with the California agencies, and that was the allocation. He bought one hundred percent of all the government claims for Indian tribes, except the disputed boundary claims on the Fort Mojave and Colorado River reservations.

That was the first time the magnitude of Indian claims was set at "practically irrigable acreage". We all knew of the Winters doctrine and that there was such a thing as an implied water right for Indian reservations. But the magnitude had been determined under a number of different formulas, so California argued for giving each tribe the maximum amount they had ever used on a reservation plus some modest kicker, maybe another ten or fifteen percent.

Arizona argued that the decree ought to be left open, just give the tribes what they're using now and if they ever need more water, they can come in later. But the government asserted that it would be best for the tribes if you took a look at all the practically irrigable acreage on the reservation and gave them enough water to satisfy those requirements so that each reservations need would be determined for all time. They wouldn't have to come back to the court, and everyone would have certainty as to what the magnitude of the rights were. We weren't much surprised by that because we knew that the government had argued that. But the idea of the contractual allocation, which the government picked up on too, so they were kind of siding with Arizona's initiative on that, that just stunned all of us. And we really tried hard to get that turned around. We were given a chance to comment on the Draft Report and we wrote official comments to the Special Master. Then we had two days of hearings before him in New York at the Federal Courthouse in downtown Manhattan. And he may have changed a few things in the Draft Report, but not

much. Only things to kind of correct minor errors he might have had. But the fundamental principles of his report weren't changed at all.

KT

Now, what was the reaction of the California clients so to speak?

JCM

Oh, well, I don't know. I remember Mike Ely gave a speech at what was then called Town Hall in downtown Los Angeles. I don't know if that group is still around or not.

KT

I think it is actually.

JCM

I helped, I mean I didn't conceptualize the speech, but I helped work on it and everything. And I always remember Mike in a way tried to characterize it as a victory of some sort for California, which was I think quite a stretch. But I think everyone was shocked. You couldn't say the case had not been strategically well planned or implemented. I think we had a wonderful record, and our briefs I think were great. Just think about the way the Supreme Court's final decision came down, which was five to three. When you got Justices like Justice Douglas and Justice Harlan coming down on our side, two philosophically different Justices by about 180 degrees, I think if you read their dissents, they were right on target. And I think that's the way everyone thought that case should have been decided. It was pretty startling to us. I heard later, by the way, an interesting story that

Mike told me. You know, we had the oral argument before the Supreme Court, that was the longest one on record at that time I think except for maybe the Civil Rights cases, but it was like sixteen or seventeen hours. Then they recessed for the summer I guess and then over the summer two Justices retired. I think it was Frankfurter and maybe Burton, I can't remember. And they were replaced by Arthur Goldberg and Byron White. So when they reconvened in the fall, they rescheduled oral argument because they had two new Justices that would replace the two retiring Justices. We had something like nine additional hours then on reargument. And Mike told me that Frankfurter told him that after the first argument when the Court went back in and did their straw vote, as they usually do about how they see the case, that California had prevailed five to three. But with Frankfurter and Burton retiring, White and Goldberg came on and they went in the opposite direction. So the ultimate decision was against us on a five to three basis. So it's such a quirk of fate that the timing was such that the decision could not have been rendered before two Justices who were on our side retired.

KT

Had there been any settlement discussions amongst the parties during the duration of the case?

JCM

I don't think there were ever any settlement discussions. But there may have been. If there were, I don't remember them getting much prominence around the office. Mike was very convinced that we had a strong

case and were destined to win and I think everyone else on the case felt the same way. If there were any suggestions for settlement, I'm sure when Mike talked to Pat Brown about it he would probably have recommended against it. In my later years working with Mike he was never one interested particularly in settling cases. You know, Mike was a brilliant guy and had a pretty strong ego, and I think he felt that he was correct on most of the representation he undertook for a client. And certainly if you look at the kind of case we put on, under his direction, and measured it against the Supreme Court precedents at the time, it looked like we did all the right things and had an iron clad victory. I think we felt, I remember we used to talk about it, Mike and Charlie and all of us after, kind of a post mortem, that we wondered if somehow California might not have been prejudiced by marching into the court everyday with, you know, Mike and the entourage of state lawyers, and then the five agencies with an entourage of their own lawyers. I mean, California lawyers and engineers dominated the space in the hearing room. There was Arizona with Mark Wilmer and a couple of their lawyers and poor Dave Warner and Walter Kiechel, just by themselves. So it looked like David and Goliath. We were coming in with all the power and the money, and everything, and we often wondered whether somehow that influenced the Special Master in trying to figure out some way that he could help poor struggling Arizona in this dispute and which led him to think of this unique interpretation of the Boulder Canyon Project Act that he finally settled on.

KT

Did you guys have any idea that your oral argument was going take, I mean, that you were going to be given so much time, I mean, preparing for that oral argument must have just been an enormous task?

JCM

Well, I think we weighed that pretty carefully, looking at all the briefs and all the issues. Of course, the Federal contractual allocation scheme had only been sprung on us, you know, in the Draft Report. So we had never researched that or were prepared to argue why it was completely off the wall, and why you had to take a hard look at water supply. These were all kind of givens before, so I think we made a good assessment of what we needed.

And each of the agencies wanted to have something to say. I don't think each agency counsel argued, I'd have to go look at that. But Mike carried the ball pretty much. Imperial may have, Harry Horton may have had something to say, and some, maybe Jim Cooper, if they had a unique issue or something. But I think we made a good showing about why we needed so much time. And these were major, major issues, setting a broad new precedent on interstate water allocation and Indian water rights. And, of course, there was California, Arizona, Nevada which each had it's case, so you have three states in there. So I think we felt we needed that much time, I don't think we were surprised when the Court gave it to us. We were surprised, you know with the eventual outcome, needless to say. From the way

some of the questions from Justice Douglas and Harlan came down, and the good argument Mike made, I think we were kind of optimistic that we might get it turned around, but we didn't.

KT

Now one of the outcomes of the case was, of course, then that there had to be a determination, or listing of present perfected rights. Were you involved in that?

JCM

Well, let's see, the decree, after we had the argument on the Draft Report before Judge Rifkind, you know, he didn't make any changes. After the Draft Report he gave us a chance to tell him what he ought to do with his recommended decree. I don't recall whether he did that when we had the argument on the Draft Report or whether he had a special session after his final report was out. I think we did it on the Draft Report. He kind of leaned on us to make sure that the decree, whether we liked its substance or not, was adequate to take care of the issues the way he had decided them. So the Court handed down its decision in '63, and the decree came out in '64. I didn't get involved after that because I left Mike's office at the end of '65. And even though present perfected rights were supposed to be decided within several years of the decree, as you know that dragged on and never really got decided until 1979. There were a lot of negotiations between the states and the government and the Indian tribes on what the respective present perfected rights were at the time, and I think Doug Noble really handled the bulk of that for the state, with contributions

from each of the agencies. I guess Bob Will would have been involved with it during that period too in the early '70s, when he was General Counsel at Met. But I was off then, I had moved on to the Public Land Law Review Commission, where I was heading up the legal staff. And so I just know from reading and talking with people about what was involved there.

KT

So from late 1965 to then you had a hiatus from Colorado River matters.

JCM

Right. I went with the Public Land Law Review Commission in January of '66. The Land Commission was chartered by Congress to review all Federal land and natural resources policy and come up with recommended changes in policies for Congress and the President. And they were really scheduled to go out of existence in '68 sometime. They had a four year life. Well, they got a late start, so they eventually got an extension of time and the Commission didn't wind up until June of 1970. But Wayne Aspinall of Colorado was the chairman and he asked me to stay on to the end until we had written the report and everything, so I did. I had not planned to stay that long, but I didn't feel like I could bail out in the middle of the Commission's effort, which I strongly believed in. It was a challenging, interesting job, and I think the Commission did a good job. So I stayed with the Land Commission until the middle of '70, and then I went to George Washington Law School as a Visiting Professor for about a year into '71, then I went with another law firm in town,

Debevoise and Liberman, which was primarily an electric utility firm, and I was not working on any Colorado River matters during that whole period, from '66 to about '72 or '73, when Bob Will talked to me about working on the Fort Yuma Indian Reservation boundary dispute. I think it may have been as late as '75, but perhaps in '74 sometime. So that was 25 years ago, and here we are yesterday having a meeting of all the counsel in Arizona v. California trying to see if we can settle that very same dispute, or whether we're going to have to litigate it. So it's hard to believe that on and off since about '75, I've been working on that same boundary dispute, which is the last issue to be resolved in Arizona v. California.

KT

I think when most people think about Mike Ely, I mean, he's got to be considered one of the most colorful characters, and, of course, having been involved in the negotiations of the early contracts with the agencies and things like that. Did he ever talk about those times and what it was like and how he banged heads, or what he did to get people to agree?

JCM

No, Mike never talked much about that. Of course, when I went with him, he was so heavily involved in Arizona v. California we really didn't have much time to talk about what he did on the contracts. As most people know, Mike had gone to Stanford as an undergraduate and Stanford Law School. Mike was sort of a big man on campus in the 1920's and he became very close to Stanford President Ray Lyman Wilbur and

Herbert Hoover, who was a Stanford alum also. So after Hoover was elected, he persuaded Ray Lyman Wilbur to become Secretary of the Interior. Wilbur needed someone he trusted and who could be his strong right hand man as a lawyer. Mike was practicing, I think he told me admiralty law or something up in New York City. I think Mike got out of Stanford about '24, '25, '26, somewhere in there, and he practiced in New York for awhile. And then, of course, Wilbur became Secretary of the Interior in 1929, and brought Mike down as his right hand man. And Mike, as you know, from all the documents that Ken Hutchison of Met's legal staff put together on the negotiation of the Seven Party Agreement, Mike had the principal responsibility for negotiating the water and power contracts under the Boulder Canyon Project Act. Mike never talked too much about this. But I know he didn't feel that having done any of that presented any conflict. It seems to me he represented Imperial in the dispute over the 160 acre limitation issue, even though he or Ray Lyman Wilbur, at Mike's recommendation, had written a letter of some sort which opined on the question of whether or not the 160 acre limitation applied to Imperial. And I think Mike was on the other side when it finally got up to the Supreme Court. But Mike was so involved with all these Colorado River matters, it was hard to imagine in many ways. I don't know what the standard of ethics would have been, it's hard to imagine that Mike could have gotten too involved in litigation, certainly with the government over the meaning of water and power contracts that he had personally negotiated. That always struck me as a little strange

that that happened. But anyhow, he had a wonderful reputation. He had a brilliant mind. I was very impressed with him, naturally. When he offered me a job to come back to Washington, my wife and I thought a great deal about it for a long time, because we liked California where we were after Stanford. But we'd had our first child, the first grandchild of our two widowed mothers, and we were on kind of a guilt trip and felt we ought to go back East and be close to them so they could see the grandson and everything, so we did that. Mike said, "Well come on back to my firm just for a year or two, and then I'm going to open an office in Los Angeles to carry on the Colorado River litigation and you can come back to California and head up that office." So I thought that was a nice compromise. Well, Mike never did open his California offices. It turned out the Attorney General made a permanent little suite of offices available for Mike down in L.A. in the State Building, and Mike used the State offices all the time. He never really needed his own office. And my wife and I grew fond of Washington, so our original plans to come back to California just never came to fruition.

KT

Now about 1975, then you started representing Metropolitan.

JCM

Right.

KT

On the Indian boundary disputes, and the administrative process, I guess, with the Secretary on Fort Yuma, and so forth. And

then you also were retained by Met to start working on some Hoover energy issues, the renewal of the Hoover power contracts.

JCM

Right.

KT

And my recollection is, I think that Met and DWP, who I think was represented by Mike Ely at the time were not always quite on the same page on some of the issues on the renewal of Hoover energy. So that must have been kind of interesting to be on sort of the other side of the table from your, your former mentor?

JCM

That's right. Well, Mike had not gotten involved at all in the Quechan Tribe, Fort Yuma matter. Let me just mention that a moment because it was so interesting. I assume that it will all come out in discovery and if we have to litigate the Quechan claim. But what had happened is that in the early '50's, in Arizona v. California, the government had made a limited claim for the Quechan Tribe on the Fort Yuma Indian Reservation. There had been a boundary dispute years before and the Secretary had determined in 1936 that some 25,000 acres of land were not part of the reservation. Based on that decision during Arizona v. California the government only made a claim for the other undisputed lands on the reservation. So in '63 and '64, we thought that was the end of the case. Beginning in the early '70s, the tribe persuaded the Kleppe Administration at Interior, and the Solicitor over there at the time, to take another look at that boundary dispute and

reverse the earlier 1936 so called Margold Opinion. That moved along down the track very speedily, and the state parties in California and Arizona were given the chance to comment on that proposed reversal. They objected to it, but they didn't feel like they had an adequate opportunity to make a good record before Secretary Kleppe. So Bob Will hired me to prepare a pretty comprehensive set of arguments to present to the new Solicitor and we got an extension of time to do that. So I did that, and then Congressman Rhodes of Arizona, who was I guess then the Speaker of the House, an influential Republican, demanded that Secretary Kleppe give the affected water users the chance to explain why the earlier Margold opinion should not be overturned, and indeed affirmed by the Kleppe Administration. We had a one day hearing. We all sat around a room back in Interior and made arguments before Secretary Kleppe and Solicitor Austin and the next day the tribe came in and made their arguments.

Solicitor Austin decided that he would not carry through with the proposed reversal of the earlier Margold opinion, but that he thought it was correct. The tribe then prevailed on Senator Jackson, Chairman of the Senate Energy and Natural Resource Committee, to hold some oversight hearings on what had happened. There were a number of Indian sympathizers, both among the Senate membership of the Committee, and certainly the staff, and they complained very heavily to Kleppe and Greg Austin about what he had decided. So Greg thought he would write a formal Solicitor's opinion to lay out his rea-

soning, which he did, and he filed it in January of 1977. When the new Democratic Administration came in with Secretary Andrus and his new Solicitor, Leo Krulitz, the tribe renewed its efforts to get Margold reversed and Austin reversed, and they prevailed on the Solicitor to do that, who did reverse the earlier Solicitors' opinions and held that these disputed lands were part of the reservation.

KT

Who kind of spearheaded the argument for the tribes?

JCM

Well, I think, you know, what was the lawyers name that used to represent the tribe originally, Ray,?

KT

Simpson.

JCM

Ray, Ray Simpson, he was their lawyer. for Indian Affairs under Kleppe. So they didn't have to do much arguing. They had sympathetic folks in the Administration. Even after Kleppe went out sympathetic lawyers were still there, not the top Solicitor, but his associates. And so, again, the tribe didn't have much trouble in persuading them to overturn the earlier rulings. As you know that's where we are now, we're back to trying that whole issue, maybe having to try it on the merits, although we hope we'll be able to settle with the tribe somehow. I think we had at least not a discouraging meeting yesterday. I think the tribe's present counsel may be someone we can deal with, time will tell. But then, okay, the

Hoover Power contracts. Well, Mike had written all the regulations and contracts for the allocation of the power from Hoover, the firm power, and the secondary energy and everything. And the rates were set under those Regs in a way that would recover for the government all the capital and operating costs of Hoover Dam over a 50 year period. Then at the end of the 50 year period, when the contracts were up, the Secretary was supposed to square the books. If power users had paid too much, then they would get a refund. If they hadn't paid enough they'd have to ante up some more money. Well, it turned out when they settled up the books in the late '80s, 50 years from whenever the contracts were executed, maybe around 1990, there were twenty five million dollars to be refunded. So the question was presented to the Secretary, now it becomes the Secretary of Energy, as opposed to the Secretary of the Interior because power marketing had been moved over to the Energy Department, who decided to distribute the surplus revenues among just the firm contractors, because the firm contractors had really underwritten the project. They committed themselves, Met included, as the biggest firm purchaser, to pay for enough power to recover the costs of the project, whether they used the power or not.

And indeed, Met paid for a fair amount of power it never used in the early years. So the formula the Secretary came up with was one that Met and Arizona Power Authority and the Nevada Colorado River Commission liked. The other firm contractors were L.A. Department of Water and Power and Southern Cal Edison, or what-

ever it's called now, who didn't like the formula because they thought they should have gotten more money back and that the over payment should have been returned dollar for dollar to those who paid them. Mike was representing L.A. Water and Power. And again, he had been heavily involved in writing the regs that we were litigating the meaning of, and again I was a puzzled by that. But, anyhow Mike died during the litigation at the age of I think 92. He died with his boots on right in his office working on this Hoover refund case. But, anyhow, we prevailed, though not completely before the Court of Federal Claims. But we won most of what we wanted. Then, since we didn't like part of the Court of Federal Claims decision and L.A. and Edison didn't like any of it because they didn't get much of anything at all, so we took it up to the Federal Circuit and they reversed the part of the Court of Federal Claims decision that Met and Arizona and Nevada didn't like. Met ended up keeping all of its refund, which may have been nine or more million dollars out of the twenty five, I can't recall. But anyhow, that was interesting, and I think we made a little bit of new law in the Federal Circuit on the way regulations, the Secretary's interpretation of regulations is to be treated in a suit for breach of contract, which is essentially what Edison and L.A. brought. They claimed that the Secretary had breached their power contracts. We said no, the power contracts incorporated the regs, the Secretary was given broad discretion in the regs, he exercised it reasonably, and that ought to be the end of it, and the Federal Circuit agreed. So that was a good win on the part of the firm contractors.

KT

Did you also do some work for Met on the renewal of the Hoover Power contracts?

JCM

Yes. That's in the early '80s, when the contracts were coming up for renewal I think. Well, at the time, I was doing work for Met as I remember in Arizona II not quite as visibly as, later on. But when the government and the tribes filed in December of 1978 to reopen the decree in Arizona I to award water rights for so called omitted lands that they hadn't claimed water for, and for disputed boundary lands, Carl Boronkay had me do a lot of work on the briefing of that case. And then, as you recall a companion law suit was filed in San Diego, and I helped you and Warren Abbott, I guess, on some of that briefing. So I was working throughout the early '80s in Arizona II, but I wasn't listed on the early briefs because Carl had been, as you know, at the California AG's office, and I had that short period of six months as a Deputy Attorney General when I started right out of law school. Because of our previous positions, someone in the California AG's office said they didn't think it would be appropriate for Carl and me to participate on behalf of Met, because Met might get in a conflict with the state on some issue. And since we had worked for the state for some period, it would be, they thought maybe a conflict. Well, Carl and I sort of just went into the background for awhile, and I didn't do anything. Then the Administration changed and there was a new Attorney General in California, I can't remember who it was, but they said, "forget about it, there's no problem." So then I

think toward the end of Arizona II, my name was on some of the briefs and Carl was taking an active role. Of course, he had become General Counsel at Met by then. But in the same period of the early '80s, the Hoover power contracts were coming up for renewal and I worked with Fred Vendig on doing a lot of briefing on why our contracts ought to be renewed, and why the restriction requiring Met to use its power just to pump water into and in the aqueduct out to be stricken. So I did a lot of briefing in the administrative proceedings. But then they wound up and some law suits were filed and Nevada and Arizona asked me if I would be interested in representing them in the litigation. Well, Carl hadn't asked me to help in the litigation at all, so I talked to him about it. He said, he didn't want me to represent either Nevada or Arizona. I said, "Well, are you going to use me for Met?" and he said, "I don't know, maybe or maybe not." So he decided the fair thing to do was to put me on a retainer so that, since he didn't want me to work for the other states and wasn't sure how much I could be involved on behalf of Met, at least I would be getting some kind of compensation for having forgone the working for the other states. That was in the early '80s some time.

That was the basis of my retainer, which lasted until just a few months ago. And now I'm treated like all the other lawyers, I'm just on an hourly basis. But I think Carl felt, and Warren later, it was good to kind of keep me on a retainer so I'd be around to help on anything they wanted.

KT

Now, did you get involved in drafting the legislation on the Hoover renewal contracts? Eventually, there was Federal legislation.

JCM

No, I really didn't. That was pretty much all Bob Will and I think Eddie Weinberg for Nevada and Bob McCarty for Arizona. Somehow or other I was out of the loop by then. You know, we had filed all our administrative comments and so forth. And I think the law suit, several law suits had been filed. And I was kind of on the side line at the time on those. But I didn't do any of that legislative drafting.

KT

Now, at some point in time, you partnered up with Bob Will.

JCM

Right.

KT

And you formed your own law firm. And Bob continues to do a lot lobbying representing different agencies, including the Colorado River Board, and Metropolitan, and things like that. One memorable piece of legislation I think of is the All American Canal Lining legislation. And I think you participated in that to some extent.

JCM

I did work on that.

KT

What do you remember about that?

JCM

Well, as to how Bob and I got together. I knew Bob, having met him when he was just on the legal staff at Met, you know, at some point over the years. And then when he came back to Washington as Met's lobbyist, I got to know him better. And then after he left, he came back to California and then back to Sacramento as Met's lobbyist in Sacramento for awhile. And Jerry Butcher was back in Washington. I think maybe even Ron Gastelum was for some short period. Ron had been on Bob's legal staff for awhile, and went on off somewhere else ultimately. But then Bob came back to Washington, not as a Met employee, but he had retired from Met and he was just in private lobbying practice. And, of course, we saw a lot of each other. He worked on lobbying matters, like drafting the Hoover Contract renewal legislation, and I was working on Arizona v. California, and boundary disputes, and some of these other legal issues. About 1987 in the middle of the San Diego litigation over the boundary disputes when I was running the Washington office of Holland & Hart, which is a Denver law firm, counsel for one of the tribes wrote me and said that he thought I should be disqualified from continuing to represent Met in the San Diego litigation or if it went to the Supreme Court because one of my partners in our Denver office was former Solicitor Greg Austin, who had written the 1977 Solicitor's Opinion, which was favorable to our view of the proper boundary of the Fort Yuma Indian Reservation. Well, I had talked to Greg Austin about that when he came back to Holland & Hart and he never

recalled working on any of the boundary disputes. But he checked his files and, low and behold, Scott McElroy, the counsel for the Colorado River tribes was correct. Greg had signed some papers during the present perfected rights negotiations supporting the tribe's claim. So I either had to leave Holland & Hart or give up Met as a client. So I left Holland & Hart because the State of Colorado at that time did not permit building a wall between lawyers in the firm and partners who had been in government service, so you would be insulated from conflicts. They didn't have that kind of liberal rule, but they do now. But they didn't then, so I decided I had to leave Holland & Hart, and I was just tired of big law firms. That was the only big law firm I'd ever been with. I had been with Mike and we never had more than half a dozen lawyers. Bob and I were working together on so many things that we thought it might make sense to form a partnership, so we did in '87. That lasted until '94 when Bob told Jean he was ready to return to San Diego and retire from active lobbying. They moved to Escondido but obviously he hasn't retired from active lobbying. He's back in Washington a couple of weeks a month and we still see each other a lot. But that's how we got together.

KT

Now one of the things that you worked jointly on though was the . . .

JCM

Oh, All American Canal.

KT

Legislation on the All American Canal.

JCM

That's right. I'm trying to think, was Warren Abbott General Counsel then? Because Carl was General Manager by then and Myron Holburt was working on it.

KT

Right, so I think that means Carl must have been the General Manager . . .

JCM

Yes, he was General Manager.

KT

Because he had hired Myron to come over to Met.

JCM

That's right. Where I got involved was they were trying to figure out how they could divide the conserved water that was going to be made available by lining the All American Canal, because you had the Seven Party Agreement, and obviously the ag users felt that if water was conserved, it ought flow down through the priority system, even though Met might have paid for it. So I guess my assignment was to write the language used in the House Committee Report justifying giving any of the California agencies a first crack at paying for and getting the conserved water, but if they didn't, permitting Met to get it. And I think that we had a good basis for that. I think we probably could have gone further, and Congress could have actually superceded the Seven Party Agreement and said, "Well, we don't care what the Agreement says, we're going to give the water to the party that pays for it." Anyhow, Imperial got the first option to do the job

itself, which was a concession that Met made to Imperial. Met also made a few other concessions I think to Tom Levy about what Coachella's rights might be in the conserved water. But, as it turned out that language giving Imperial first option turned out to be a stumbling block for awhile and, delayed negotiating some reasonable agreement for lining the canal and allocating the water. But I thought we had a good legal basis for what Congress provided in the All American Canal legislation.

KT

Now you also have had the honor of being appointed by the Supreme Court as a Special Master, in a water case. Did that, working as a Special Master then give you a different perspective of the Supreme Court and how it works?

JCM

Well, yes I never knew, for example, how Special Masters operated. One thing I always like to tell, I'm sure I told you this a couple of times, is about how I got the appointment. I was sitting in my office in Washington one snowy day, and I was the only lawyer in there and my secretary was the only secretary there. She buzzed me and said that Justice White was on the phone. Now I had been working on a cert petition on another case, and I talked to a couple of my friends about how I had to get around a decision that Justice White had written if I was ever to have any chance of getting in the Court on the cert petition. So I thought well, which one of my friends is calling me now, and is going to give me a bunch of malarkey about "this is Justice

White, and don't waste your time applying for cert." Anyhow, I answered the phone and said "yes", and he said, "This is Byron White." I said, "oh", you know, kind of skeptical. And he said, "As you may know, we get these pesky interstate water cases up here. I understand from some people that you know something about interstate water issues." He went on a little bit and said, "I'd like to talk to you about whether you'd be interested in being a Special Master." And then, since I couldn't recognize the voice as any of my friends, I said, "Is this really Justice White?" He said, "Well, yes it is." So I said, "Oh, well, excuse me." He said that I had been recommended by Charlie Meyers, Judge Rifkind's former clerk, in Arizona v. California and that if I didn't have any conflicts, why he'd like me to send my resume up and consider whether I'd like to do it. So I checked things out, and I didn't have any conflicts. I thought I might have one conflict. I had contributed when I was with Holland & Hart from a partners' slush fund for political candidates, and one of them had been then Governor of New Mexico. Since the case that Justice White was talking to me about was Texas and Oklahoma against New Mexico, I thought it might not look right if I get appointed as Special Master and someone says, well look, this Jerry Muys gave a hundred dollars to the Governor of New Mexico and so forth. So I told Justice White about that and he said, "You mean, you gave a hundred dollars to go to a cocktail party for the Governor?" I said, "Yes, it came out of the firm's fund and so forth but I've never had any contact with him." He said, "Well, if it doesn't bother you, it doesn't bother me. Just forget about it." So that's the way it

started. Then as we moved along through the case, if I had questions I'd call the Deputy Clerk, and sometimes I'd talk with Justice White directly. But I guess the main feeling I had about the whole episode is how much more fun and satisfying it is to be in a quasi judicial role, actually deciding something, rather than just being an advocate on one side or the other. Anyhow I liked that judicial role much better because when you're representing a client, you know, no matter what you think may be the optimum, most equitable solution to a problem, you're committed to making your best efforts for your client's position. Sometimes you may not feel completely comfortable with that or whatever. But, when you're in this judicial role, though my decision was just a recommendation to the court, you have the opportunity to move things around and kind of effect a compromise that you'd like to think keeps everybody relatively happy. So that's what I liked about it most. I'd like to do it again sometime.

KT

At that time, was Justice White for some reason was he in charge so to speak of finding Special Masters?

JCM

Yes, I think so, I think he had that assignment because he had picked Charlie Meyers, and he had picked Owen Olpin to handle the North Platte reopened decree in Nebraska v. Wyoming. Which, by the way, they just settled a few weeks ago and the Supreme Court approved the settlement in that case. And then Charlie had recommended me, so he called me and said,

White had picked the three of us, and, over a couple year period for the three water cases that had come up to him.

KT

Now, as a Special Master after your report goes out to the court and, the court comes down with a decision, do you have any more contact with the court? I mean, do, do they call you and thank you for your service or?

JCM

No. Well, usually the Final Decree says, something like the decree is now entered and gives its thanks to the Special Master. But somehow I got short changed. My name wasn't even mentioned in the court's opinion in Texas and Oklahoma v. New Mexico. So I looked at other decisions and sometimes they don't always mention your name. Maybe it depends on who's writing the Opinion. Maybe they don't think it's appropriate to mention that Joe Dokes was appointed Special Master. Some of the cases, as did mine, just say, "A Special Master was appointed." So if you're intrigued about who the Special Master was, you just go look at the order appointing the Special Master. But no I've talked to the Deputy Clerk of the Court quite a bit, we're kind of good friends. And sometimes I ask him about other cases that are pending up there and so forth. But no, the only acknowledgment I ever had that I was even working on the case, other than talking with Justice White if I had a problem, was when I was at a reception up at the Court for something or other, and I saw Justice Scalia, who I known for a number of years when I was with the Public Land Law

Review Commission. He was rookie law professor down at University of Virginia Law School in the late '60s and I was supervising a contract study down there and I got to know him. And then later he was Chairman of the American Bar Association's Administrative Law Section, the same year I was Chairman of the Natural Resources Law Section, so we worked together a fair amount and got to know each other. We weren't bosom buddies, but good acquaintances. I also saw him once at the Court at a reception and he said, "Well, I see we finally got you working for us." I said I appreciated the work that was about it.

KT

Well, as you look back on what, thirty, forty years of involvement in one way or another on the Colorado River matters, what's your memorable moment?

JCM

Well, it was all very challenging and fascinating. First of all, it was great to work with an intellect and such a good advocate as Mike Ely. Mike, as many people know, did not have much success keeping lawyers with his law firms. He had kind of a 19th, not even 20th, 19th Century view of how law firms ought to operate. Mike was senior partner and he never had a view of the other partners kind of sharing in the firm. So that was something that I was not happy with. But working with him was invaluable. To see him in action and see that mind at work, what he accomplished, I think that's really something. He was truly a good mentor for me. So I think out of all this, having worked with him made me a far

better lawyer than I think I would have been otherwise. I thought for a while about going into some of the big firms in L.A. I had offers down there and up in San Francisco when I was getting ready to graduate from Stanford. But I think I would have ended up, you know, doing some menial, rather non interesting work. And I just love working in the natural resources field. I guess what I use my Colorado River experience for in most cases is when I'm making presentations or when I'm teaching students. I've taught for a long time now at UVA, I hope to resume teaching water law down there next year, University of Virginia. I always cite our experiences on the Colorado as evidence that litigation doesn't produce very much. I mean, we've been at it 50 years now on the Colorado and it hasn't produced one more drop of water. And I think if all the time and effort and money and dedication and everything else that went into all this litigation had focused on trying to figure out some equitable settlement with Arizona at some point, why it would have been much more productive. And so, that's why when I was Special Master, I found the states of Texas, Oklahoma, and New Mexico were so antagonistic that when we started out there was never any hope with getting them to agree on anything. Later on when my report was approved by the Court, they remanded one issue to me that I hadn't decided, I was able to work with them and get them to settle that issue. They all were very appreciative, and all counsel thanked me. I think that was kind of a legacy from my Colorado River experience - that continually litigating issues is not the way to solve questions about how to share a common resource like water.

KT

You know, in a few minutes Jerry, we're going to go down stairs and hear a panel that's going to talk about their vision.

JCM

Oh, that's right.

KT

The Colorado River in the future what's your vision, I mean, if you look out ten, fifteen years from now, and there are so many issues, as we know that are at a cross roads, as we speak. Things could be very different in ten or fifteen years?

JCM

Well, I think we will, of necessity, or just through belated awareness, come to have a different view of how to manage resources. Over the years I used to be convinced that allocations, quantitative allocations, were important and you protected them and certainty and everything was critical. But, I like the idea of having a more flexible system of some sort. I spend a lot of my time when I get asked to present papers, talking about new institutional arrangements where all the parties will get together. If they're interstate issues, well not just the states will get together, but the Indian tribes will be represented on some kind of a management entity. And rather than trying to live with outmoded elements, such as the Compact or the law of the river and so forth, you have something like adaptive management. You'll have certain equitable principles that all the parties agree on, about what to do in times of shortage, and how to make fair allocations, about higher value uses, and things of that sort. So I

think it will be inevitably a much more cooperative...

... kind of in a way sacrificial, management that doesn't rely so much on individual states rights and what their entitlement should be. The region will be viewed as a region, and what's best for the region will determine how the water's managed. If certain parties give up rights or equities, they'll be compensated in some fashion or dealt with fairly. And I think that's what we have to come to in the long run, probably not in my life time

KT

Well, I'd really like to talk to you again in five years or so. I think some of the issues will be put to bed because there's so many things that you worked on, particularly in your representation of Met that I think would be great to talk about. I mean, you know, the banking opinions discussions over the rights to transfer and, working on San Luis Rey matters, and things like that. All of those things which are still kind of in the mix and so not really appropriate for public discussion. But certainly, I mean, I just marvel at all of the people that you were able to work with. I mean, they're really all the names that you read about.

JCM

Well, it's all been an enriching experience for me. It's been a privilege and as people say, a privilege and a pleasure to have worked with a lot of them, including yourself. We had a number of good years in more recent times working on these river matters. And I think natural resources work is the most interesting, exciting kind

of practice you can have. And I'm so glad that somehow or other Mike Ely led me into it and I decided to stick with that. I wouldn't trade it for anything.

KT

Thank you very much for your time.

JCM

My pleasure, thanks for talking to me.

INTERVIEWEES: JCM 1

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