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Practitioner's Perspective

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PRACTITIONER'S PERSPECTIVE

The *Water Law Review* is please to present the following interview with one of the great water lawyers, public servants, and teachers of our time—John A. Carver, Jr., to whom we proudly pay tribute in this issue. Chip Cutler, one of John Carver's former students, had the privilege to interview Professor Carver, whereby we learn of his incredible life and career as a water lawyer, public servant, and teacher. On behalf of the Editors, Mr. Cutler, and our readers, I sincerely thank Professor Carver for his time and candid insights. I hope all who read this interview thoroughly enjoy it.

Kris A. Zumalt, Editor-in-Chief

Interviewer: Good morning Professor Carver, I'd like to begin with your childhood history. You were born and raised in Idaho, and I was wondering how western water law has changed since you were a boy?

Professor Carver: I was a boy growing up in Idaho in the 1920s. I spent summers on my grandfather's irrigated farm. "Turning the water" into the fields and rows was one of the chores. I was very well aware of how important water was. I was unaware of water law as such, but I did know that my grandfather had water *rights* and that they were as important to him as his land rights. The neighbors who shared the same ditch also had water rights and occasionally there was conflict.

How has it changed? Obviously much has changed. The law has changed, and water use has changed, but how those farmers feel about their water rights hasn't changed. Many of the water rights have been sold.

Interviewer: Is Idaho's experience similar to Colorado's, in terms of development replacing many of the historical farms?

Professor Carver: Idaho has more water than Colorado has. As I used to tell you in class, what kind of water law you have depends on how much water you have. I think there are more pressures to shift uses in Colorado from farms to municipal and industrial uses.

Interviewer: Professor Carver, how did you become interested in natural resources work, and water in particular? Was it a conscious choice, or were you just sort of nudged in that direction?

Professor Carver: My interest in natural resources, and in

particular in water, was accidental in many ways. I was not aware growing up of the separate field of water law. In those simpler times youngsters aspired to be lawyers, not corporation, criminal, or water lawyers. I did grow up in an agricultural area and I did know those were the problems that lawyers, like my father, were involved with.

Interviewer: Speaking of your father, he was blind, but he overcame this adversity to work as a United States Attorney for the State of Idaho for twenty years, and later a trial judge. Was it primarily his influence, or were there others who influenced your career path?

Professor Carver: I remember wanting to become a lawyer from my earliest days. I suppose my father was an important part of that. As the time went on, as I finished college, I started an administrative career in the government. After finishing law school I returned to the law.

Interviewer: I've always wondered how one would cope with blindness practicing law and preparing for trial?

Professor Carver: Growing up with him his children weren't much aware that he was handicapped in any way. He had studied under a lawyer, and after passing the bar shortly after I was born, opened an office doing collections and that sort of thing, and quite soon was elected county prosecutor. He had a partner some of the time who I suppose made some difference, but he didn't regard his as any kind of a handicapped situation at all. He prepared cases, and when I was about ten years old, I can remember going to the law library with him, where he'd tell me exactly how to use the West key system and find cases. He was active in Democratic politics and when Roosevelt was elected became a United States Attorney. Of course as a U.S. Attorney you had secretaries and assistants, things like that, but he did his fair share of the work. He used to present cases to the Grand Jury and try cases and so on.

Interviewer: So you were indoctrinated in the practice of law at a young age.

Professor Carver: I don't know about the practice of law, but I was aware of what lawyers did and how things went in the community and so on. I moved on to, you might call it, more structured work than involved in private practice.

Interviewer: When did you discover your interest in politics and working in the federal government?

Professor Carver: Those are two different questions. I was interested in politics because my father was. In 1936, he ran for the

Democratic nomination for the United States Senate, unsuccessfully, but I drove him all over the state of Idaho in that campaign. I was imbued with politics. I went to Washington, D. C. after that campaign where I got a job working for a Senate Committee. I was then 18. I got into non-political government in 1940 through a civil service examination, and was in civilian personnel administration for the War Department until 1947.

I quit my government job to open a solo practice in Boise in 1947. I was for a time an Assistant Attorney General, and I got back into politics by helping Frank Church, a fellow Boise lawyer, in his successful campaign for the Senate in 1956, and I became his Administrative Assistant. In 1960 I worked in the Kennedy campaign.

Interviewer: How did you become involved with the Kennedy campaign, as his Michigan campaign coordinator?

Professor Carver: I was acquainted with Ted Sorenson, Kennedy's Administrative Assistant. After Kennedy was nominated I got a call from Bob Kennedy. The interview was odd. He said, "What do you know about Michigan?" I said, "Absolutely nothing." He said, "Well, you're our man." The general idea was that there were really two Democratic parties in Michigan, and they wanted someone who was not tied up with either side.

Interviewer: Were you effective, bringing the two sides together?

Professor Carver: Well I was rewarded by the Kennedy administration with a sub-cabinet appointment as Assistant Secretary of the Interior, and we did carry the state.

Interviewer: What were your first impressions of young John Kennedy?

Professor Carver: Well I met him in Boise when he was just first elected to the Senate. He was a very impressive guy. He was in his first term, I asked what it was like being Senator, and he said, "it's the most corrupting job in the world." He was a very personable and able. I didn't know him personally very well; I did know a lot of the people who were very close to him quite well. I was a great admirer.

Interviewer: His brother Robert?

Professor Carver: Well, he was one tough cookie. I liked him a lot, but he was pretty no nonsense in terms of what we were trying to do at the time, running a successful election. I wasn't involved at later times, after he was a Senator and running for President himself. I was on the Federal Power Commission, so I wasn't involved in any later campaigns.

Interviewer: What was your role in Johnson's '64 campaign?

Professor Carver: As a part of his administration in the Interior Department I could defend or support what Interior was doing. I accompanied Johnson on one of his western campaign swings. I went to a number of different states and again just kind of talking up the administration or the particular Congressman that we happened to be interested in, that sort of thing. I was trying to make it clear to the various user and other groups in the West that the administration was a fair and good administrator of the public lands.

Interviewer: In your Idaho practice you concentrated on timber and mining law issues; when did you shift to water, and why?

Professor Carver: I don't think I ever really shifted to water. I don't remember having a water case. Working with Frank Church involved many water issues. This was especially true of the 1956 campaign for election to the Senate because there was pending at the time competing projects for the development of the Hells Canyon stretch of the Snake River. The federal proposal was to build a high dam, and the competing proposal was for several low dams to be built by the Idaho Power Company. An issue in the campaign, charges that Church would give away Idaho water rights. Water rights were an issue in Church's later efforts for a wilderness bill and for designation of a part of the Salmon River country as wilderness. Frank would never be part of any movement to take away vested water rights. These were political issues that required me to become knowledgeable about water rights and water law.

Interviewer: How did you first meet Frank Trelease?

Professor Carver: I don't remember precisely, but I think he and I were on a program of the University of Wyoming at Trail Lake up by Dubois, Wyoming. I worked with him a number of times thereafter when I was on the advisory commission to the Public Land Law Review Commission. He was a principal author of the Commission's water rights studies.

Interviewer: What role has the environmental movement of the last century played in the evolution of water use and water law?

Professor Carver: A very, very broad question. At the turn of the twentieth century, a hundred years ago, the liberal progressive movement was split. John Muir and others favored preservation, but other "progressives" favored public power development. Conservation and dam building were synonymous ideas to some. Later in the century, dams became the antithesis of conservation. A movement favoring recreation made water recreation a desirable public objective,

aligned with the conservation movement. More recently the two one-time allies have become mortal enemies. Great conservation leaders, like Stewart Udall, are now decried for building dams like Glen Canyon. This to me seems very odd, but we are accustomed in this country to judge past actions by today's standards.

The National Environmental Policy Act and the Clean Water Act, and all the other environmental laws in the last third of the last century, have had a tremendous impact on water law. The federalism pattern of governing in this country has changed. Things once regarded as strictly state matters have now become national matters, and paradoxically the states are able to frustrate programs of the national government.

Interviewer: What brought about the change from prioritizing big storage and hydroelectric power generation projects to conservation and theories of more efficient use?

Professor Carver: The change is a function of population. The conservation movement in the late 60s and early 70s got the people thinking about it. It came to a real head when Carter became President, and issued a "hit list" of water projects. He tried to stop the whole pattern of western water development. He wasn't entirely successful and a good many more water projects were later completed. But there hasn't been anything of major significance in the last twenty-five years. The Endangered Species Act represents the high water mark of this national concern. Most of this developed during the Nixon administration. He has such a terrible reputation, but that's when it all came to a head.

Interviewer: Do you think today we can reconcile hydroelectric power generation with aquatic habitat preservation?

Professor Carver: There is really no way to reconcile the two. If you're going to build big dams, you're going to have an impact on aquatic habitat. You can mitigate the impact, but there are going to be some losses. The problem that I see is that you can't turn the clock back. You can't tear out the dams in the Northwest to revive the salmon fisheries.

You can't have two objects occupying the same space at the same time. That was the whole problem with the so-called multiple use mantra of the last century. You felt that with semantics you could solve the land-use problem. There must be trade-offs. That doesn't mean we can't do it better, but we fool ourselves if we think everything is going to come out.

Interviewer: In your opinion, what is the appropriate future role for the federal government in western water administration?

Professor Carver: Its role in western water administration is the same as its role in western development generally. The federal government was source of capital of last resort, for building the railroads and building water projects such as Hoover dam and Glen Canyon dam, projects too big for private enterprise. That role is largely gone; maybe it's completely gone. The last big one was the Central Arizona Project, which was the price paid for getting some sort of peace on the Colorado River. But now the federal government's role is almost entirely that of regulator through the Clean Water and Clean Air, Toxic Waste and other programs. It fixes national priorities as against the individual and regional pressures. The Supreme Court and the Congress have both made it very clear that we're going to stick with state administered property systems involving water, and that states can have conservation programs in terms of the interstate export of water, as in the Nebraska Court's *Sporhase* decision. Chief Justice Rehnquist and others have emphasized in recent years a counter-movement, which says that Congress really intended the states to have more and more control, in terms of let's say putting conditions on the operations of federal dams, like in the *New Melones* case in California.

Interviewer: Last year, the College of Law, for its Carver Lecture, hosted Interior Secretary Babbitt, and he discussed management of public land and parks on a regional watershed basis, effectively realigning state and agency management boundaries that have been established for decades. Do you see that as a successful management policy?

Professor Carver: In the 1950's there was a book called *Ten Rivers in America's Future*, or something like that, which rather specifically developed this regional watershed approach, so its not a new idea. John Wesley Powell emphasized it as a way of dealing with the management of the water. No, I don't see any chance for that policy gaining any more headway. Today's dominant political forces are much too narrowly focused for anything that broad to develop. The main problems now are domination of policies by urban interests, so that any kind of macro change in management is just out of the question. If former Secretary Babbitt wants to talk about it, fine; he didn't make any progress on it, and I don't think anyone in office now is even thinking about making any progress on it.

Interviewer: Do you see further compartmentalization of management as opposed to more cooperative agency management of the public lands?

Professor Carver: The era when I was Assistant Secretary of the Interior enjoyed a better relationship with the users than any administration since, in my opinion. In my view cooperation really

depends on the kinds of people that you put in charge of these programs and on the general philosophy under which the managers work. What seems to dominate most policy questions now is an “us versus them” orientation rather than a cooperative one. Maybe that will change, but I don’t see it changing. As I saw it, the people who have the most interest in wise management of the range were the users, because if the range is depleted then they’re out of business. It was a hard thing to sell because the general idea is that the users are a bunch of robbers and rapists that are trying to despoil our natural resources. There’s a terrible habit in this country of looking back and finding scapegoats in the past for what we see as evils today. It just doesn’t wash. The people running the government, most times, are doing the best they can. I don’t see anything getting any better, because the pressures are greater. With this instantaneous communication and these open meetings and so on, you don’t have any chance to work things out. We’ve come to the point where we personalize legitimate public issues, not only personalize them. We blame Gale Norton for programs she probably hasn’t even had a chance to look at yet. Legitimate public issues are obscured.

Interviewer: Can we reconcile federal and state water interests?

Professor Carver: We obviously can reconcile them if you take the position that the dominant sovereign, which is the federal sovereign, can do whatever it chooses to do, that is, whatever the Congress says. A true reconciliation will come when we treat this Constitutional Supremacy principle as a financial problem rather than as a legal problem. That means that if the federal government properly chooses to take the rights of existing water users, it should pay for them. Social costs of new policies should not be dumped on a particular class of user by some legal interpretation of what they thought was a water right, now its just a privilege and can be taken away at will. I see reconciliation coming in the form of a broader view of what people are entitled to be paid for if they are disrupted in their established and legally recognized uses.

Interviewer: Professor Carver, does the theory of “fair allocation” have a place in western water administration?

Professor Carver: The only place where I think you get any meaning for the term “fair allocation” is that it is a term like the one the Supreme Court invented in interstate water allocation—“equitable apportionment”. “Equitable” means whatever the Supreme Court decides and fair allocation is subject to the same semantic problem. What’s fair allocation? Who decides? The process must inspire confidence and have finality.

If by fair allocation you want to say that municipal uses are better, are superior to agricultural uses, I say that’s fine, but if you’re going to

displace an agricultural use, you've got to pay the social cost of it. That's the way our prior appropriation system works.

Interviewer: Where do *Winters* doctrine tribal water rights fit in the new geography of conservation driven water management? And in that regard, the Interior Secretary's trust responsibility?

Professor Carver: I'll take the last part of your question first. When I was involved in the business, the Interior Department's trust responsibility enabled the Interior Department to in effect decide what was best for the Indians. The change that has come is that the Indians now have their own lawyers, and they can and do get to court. Trust responsibility is now more consonant with conventional trust law. I know when I was in the Interior Department, I was looking after the rights of the Indians, and a different Assistant Secretary for the Bureau of Reclamation was looking after the interests of the Bureau of Reclamation and its water users. We had the same Solicitor's Office on both sides of the controversy. That was a questionable arrangement. Any kind of nonsense about "Chinese walls" was just that. I think that doesn't happen now. The tribes are well represented, so that the trust responsibilities are judicially supervised.

Problems still persist, however, because there isn't any Indian reservation in this country that doesn't have intermingled private interests right on the reservation. In Washington, Idaho and other states you have this conflict between the Indians' claim to control water within the reservation boundaries and the citizens of the state, and the water administrative agency of the state insisting that their responsibility for the allocation of water is not restricted, except to the extent that the Indians have or are determined to have their water rights. In other words, that the non-Indians can have their water rights administered by the state agency. So, I don't see that problem resolved or even getting any closer to resolution because the Supreme Court has said that under the McCarran Act if you have a general water adjudication, you can do it in the state courts. The problems that the state courts have with that are almost insurmountable because an Indian water right is not limited to the beneficial current use, as is a normal appropriated water right. State courts thus face the problem that when you get through with an adjudication, whatever it may say, at some time in the future the Indians may come along and successfully say that our rights are better because they're older, and the fact that we haven't used them is immaterial. I don't think you'll ever successfully get the Indians to fully quantify their rights in that respect, or if you quantify them, you'll quantify them at a number which will have the same effect as what I've just said. That's being solved in some states; in Montana they're trying to figure it out by agreement, and in Utah they're trying to figure it out with leases and that sort of thing. Ultimately the problem is irresolvable. A riparian right and an appropriation right just don't fit with each other. Indian rights are more like riparian rights than they are like appropriated rights, even

though we call them appropriated rights with a date and amount and so on. It just doesn't work that way.

Interviewer: What about federal wilderness reservation impacts on vested water rights, an example being the Snake River Basin Adjudication in Idaho?

Professor Carver: Those Idaho cases were a clear example of problems we have spoken of. I was working for the Senate when the Wilderness Bill was passed, and to my certain personal knowledge, there would be no wilderness system if it had not been agreed and put in the legislation that vested water rights would not be taken, under any kind of implied reservation doctrine. Nevertheless the legislative history and the legislation was, in the Idaho case, parsed again and reasonable judges, not having been there, came to a split decision as to what the Congress in 1964 intended. I don't think we're yet at any point where any vested rights are going to be taken, but the federal government never gives up. If they can get those water rights without paying for them, then they think they've done a good job for the federal government, and the fact that they may have done a bad job for the government generally seems to be another issue.

Interviewer: Do you see an ever-increasing congressional role in western water administration?

Professor Carver: Not directly, not in the same sense that we had it in the past. I foresee no more Upper Colorado River Storage Project acts, and no more general reclamation or power-oriented development. On the other hand the federal role with non-water programs, such as the Endangered Species Act, give the federal government an increasing role.

Interviewer: Should Upper Colorado River Basin water users be worried about continued Lower Basin population growth?

Professor Carver: If they have any confidence in the 1963 *Arizona v. California* decision they shouldn't be worried. At least not the same kind of worry which led to the Colorado River Compact negotiations in the 1920s. The shares of the respective states have been judicially fixed, and claims upon water by virtue of prior appropriation, that is first putting it to beneficial use, are unlikely. On the other hand, that isn't to say you won't get some kind of equivalent problem that will be played out within a state. For instance, the normal appropriation process might be used in Colorado on the basis that use elsewhere is beneficial under our law. So far that's been a no-no in Colorado, but the effort persists.

Interviewer: How do we protect Colorado's unique natural and

cultural environments while accommodating future growth?

Professor Carver: Just deal with it as a political process. You win some and you lose some. To go back to what I said earlier, the only way that you'll ever successfully get a reconciliation is a recognition that if you're going to impose unusual costs on a particular segment of the population you've got to compensate them. If it's worthwhile for us not to have sprawl development, then we've got to figure out some way to, at least to some extent, prevent the owners the land which is capable of being so developed from being singled out for adverse treatment. That doesn't mean that I favor the exploiter who has gone out and on a speculative basis bought the land. But for sure, some guy who has been a farmer for seventy years on the plains should not be singled out for separate treatment simply because we have a new growth policy.

Interviewer: Can prior appropriation and judicial administration of water rights survive the pressures of municipal domestic use and environmental preservation?

Professor Carver: I think the *City of Thornton v. Bijou Irrigation Co.* case shows that they can. I think that's a classic example of all the forces being brought to bear—the long planning horizon, the concerns about the environment and the imposition of conditions, all of those kinds of things. The final upshot of that case is that you had some adverse effects on some kinds of existing users, but nevertheless in terms of the integrity of the system, the prior appropriation system was maintained.

On the other hand if you believe that the Colorado Supreme Court's most recent decision involving Aurora's attempt to get water out of that Union Park project—I believe that decision was something of a blow to the prior appropriation system, at least as I have understood it. That case says, in effect, that we're not going to import any more water even though it isn't now being used. The Court looked at language of a federal statute to conclude that Congress intended that a priority for the federal government. Congress said just the opposite. I'm very critical of that decision, in terms of the way I think the prior appropriation system ought to work. The way I think it ought to work is that if there is no water there to be appropriated, that will come up at the time when you start interfering with senior water rights. But to say in advance that there is no water available is to take upon oneself the power to modify the prior appropriation system. The beauty of the prior appropriation system was that the seniors were always protected; they didn't need any extra protection. But then you come along with environmental interests, who have not appropriated the water but who assert these values, and that's legitimate. Nevertheless your question is, is the prior appropriation system being fundamentally changed, and the answer is yes it is. It is in many major

ways. It is now being changed over what we understood it to be fifty years ago. Then if I wanted to appropriate water out of a stream, I'd divert and apply it to a beneficial use, and if I interfered with somebody else's use, they called the river and I was subordinated to their use. If I wanted to risk my money on only using the water every twenty-five years, I could do it. Now big brother is looking after you, and saying "that isn't a very good investment." Well, what the hell, Aurora thought it was a good investment.

Interviewer: In your mind, how can we better administer groundwater and surface water in Colorado?

Professor Carver: That is such a complicated issue because of the various kinds of groundwater that have been legislatively defined. We have a mixture of legal definitions and hydrology definitions, which don't lead to easy administration. In 1983 when the Colorado legislature tried to deal with this on an ad hoc basis, they did a good thing, but they got farther and farther away from any kind of conjunctive administration of the total water situation in Colorado.

Interviewer: Do you think it's advisable then to maintain separate administrations for groundwater and surface water?

Professor Carver: As of now I'd say it's advisable to keep that up, because doing anything else would be so disruptive that I don't think we could do it. There isn't any state in the West that doesn't have this problem in one way or another. Arizona and Idaho are at the opposite ends of the spectrum in terms of how much water they've got, but they have equivalent problems in terms of the way they try to deal with the problem of developing water. Such as in handling a groundwater mining situation at the same time that you're dealing with a renewable surface flow or recharge amount in the connected aquifers. So it's a mess; there's no question about that. I don't see it getting any better.

Interviewer: What's your opinion of proposals to import water to the West from the Great Lakes?

Professor Carver: Total nonsense. We've had those proposals to take water from Canada, and the Snake River Basin and move it to California. I don't care how much water any particular area has, they're not going to peaceably agree to applying that water to needs however great they are of Southern California or anywhere else. One modification one might make to that is that with proper incentives they might do it, but those types of incentives are a long way into the future. They're not going to take water from the icebergs of Antarctica, or the glaciers of Alaska. You know they've had all these goofy projects for years and years, and the engineers have fun with them, and maybe sometime they'll get to them, but I don't think they

will in any time frame I care to deal with.

Interviewer: How can we more effectively educate people about better water use?

Professor Carver: Any time you use these terms like “better” or “fairer” I bridle, asking better in whose judgment? It is an unspoken proposition here that there must be some right answer somewhere. The *better* use of the water was once to build huge dams; otherwise it was wasting to the sea. Now the *better* use is to let it flow untrammelled to the sea. So you can't get me to get into any argument about better use. If you want to talk to me about less wasteful uses or greater efficiency, then I'm all for that, but if your making some kind of a political or social judgment about better then I'm obviously against it.

Interviewer: How then can we educate the public, municipalities, our representatives, state administrators, water lawyers, water courts to help them prioritize making more efficient, and less wasteful use of water?

Professor Carver: Well that's a battle. In Denver when I first got here, there were no household meters. Water was a kind of free use. That has changed. Another way to educate is to improve the knowledge of how water is being used, and use that as your starting point. The other is to get the correct analysis of the true cost and the market values involved and things tend to adjust themselves. But you can't talk to people about being efficient if there's no meter in their house, and even if there's a meter in their house you can't talk about being efficient if you're subsidizing that water and giving it to them for less than cost, less than the true cost. So that's the starting point. I don't think pedagogy is the answer, telling them about water law or anything like that is going to work. It's kind of like gasoline prices.

Interviewer: Have we learned the necessary lessons administering the interstate distribution of Colorado River water to create an effective system of interstate water delivery and administration?

Professor Carver: Whether we've learned the lessons or not, if you're talking about interstate water such as that in the aquifers, then we've got a long way to go. If you're talking about the efficacy of the compacts and agreements, we've got a long ways to go there, too. If you're talking about the efficacy of Supreme Court decisions, if you believe in *Arizona v. California*, well then that's the law of the river and that's that. But if whether you stepped back from it and said that was the right way to allocate the stream in terms of the present or the future, I'm not sure you'd agree. I wouldn't agree that building swimming pools in Phoenix or Tucson, at the enormous cost that it costs us to do that was a wiser thing to do than to let California to

continue to use and pay for that water for high value agricultural products in the Imperial Valley. But those things can even out over time, costs can be internalized, so you have to face every day with whatever the situation is that day.

Interviewer: What professional or personal advice can you give the water law and natural resources community?

Professor Carver: I'm not very good at giving advice. I don't think that anyone should be dealing with water administration until he becomes thoroughly imbued with its history. I think that's absent in pedagogy and it is absent in administration. Too many people are unwilling to step back to the time of John Wesley Powell and work forward to see what water development has meant to this West. That's a blank wall to them, and we wouldn't have the problems that we have here because we'd be a desert if we hadn't figured out the Colorado-Big Thompson project, or built the Boulder Canyon Dam and the Arrow Rock Dam up in Idaho and things like that. We wouldn't have the problems because there wouldn't be any people here. Now that the people are here, it's feckless as far as I'm concerned to say the whole problem is because of the greedy farmers using up the water or because of these wasteful practices or whatever. As if somehow or other you can zero in on some group and blame them. So my advice is to study a little history.

Interviewer: Is there anything else you'd like to address before we close?

Professor Carver: Well there's one thing you didn't ask me about, that is the twenty-some year continuous relationship I've had with water law, as I've taught the subject. I know that I've enjoyed the process, and I think generally the students have benefited from it. I'm kind of a throwback in terms of teaching water law, just as Trelease's casebook is a throw back. I like to deal with it in terms of the perspective that I've gotten of it over my lifetime, rather than the perspective as an administrative law problem of particular proportions. I think the basic thing is to figure out what's best for the country and then allocate the water accordingly. So I would suppose that in you and others who have had my courses, there ought to be something that would indicate that I've been at least moderately successful.

Interviewer: Absolutely.