

## Playing Justice Heydenfeldt

BY PETER L. REICH

“So who’s right, the upstream miner or the downstream miner?” Hands shoot up. “I think the upstream miner because he got to the water first,” says the first student I pick. “But the downstream miner owned land on the river and the upstream one didn’t, so the downstream miner wins according to the rule,” says another. “Maybe the rule is wrong,” ventures a third.

This colloquy on the prior appropriation doctrine in western water law is typical of a law school property or natural resources course. But for the last five years I have posed these questions and received these answers in the fourth-grade class of Valley Beth Shalom Day School in Encino. Dressed in a black “judicial” robe, a billowing cotton shirt, and a mid-nineteenth-century ribbon tie, and using my best tidewater southern accent, I recreate the figure of California Supreme Court Justice Solomon Heydenfeldt, who served on the Court from 1852 through 1857. The children attend my living history impersonation during the Gold Rush unit of their California history course, and learn about frontier California’s legal battles over water and religious freedom via the Socratic method.

Heydenfeldt is best known for his opinion in *Irwin v. Phillips*, 5 Cal. 140 (1855), which established the “first in time, first in right” principle by which water could be appropriated in this state. This doctrine came to be widely adopted in the nineteenth-century Far West. In only five years on the California high court, Heydenfeldt authored more than four hundred and fifty opinions, including influential decisions on land, mining, and water rights.

One of the first two Jews on the court (the other was Henry Lyons, who served from 1849 to 1852), Heydenfeldt was a Charleston, South Carolina, native; active in Democratic Party politics; a noted philanthropist; a pioneering leader of the kindergarten movement; and often a spokesman for the San Francisco Jewish community during the Gold Rush era. Perhaps his most oft-quoted opinion is *Robinson v. Pioche*, 5 Cal. 460 (1855), a personal injury case in which the plaintiff had fallen into an uncovered hole, where he stated, “A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it.” Heydenfeldt later returned to private practice and, on



Peter Reich as Justice Solomon Heydenfeldt in his living history presentation of Gold Rush water law.

behalf of a Sacramento merchant, argued this state’s earliest successful challenge to a Sunday closing law, in *Ex Parte Newman*, 9 Cal. 502 (1852).

As a law professor, I have taught water law to students for years. But I have been amazed that fourth graders are so quick to grasp the relationship between priority in water rights, economic development, and the environment: “Sure this helped miners, but didn’t it also wreck streams?” they always ask. This usually leads into a discussion of hydraulic mining, a practice which was facilitated by the prior appropriation doctrine.

My experience playing Justice Heydenfeldt has shown me that legal education is too important to be limited to prospective lawyers. All citizens, from childhood on, should learn about the historical evolution of legal problem-solving, and about the importance of the courts in accommodating competing societal interests. As Justice Heydenfeldt wrote in *Irwin v. Phillips*, “[c]ourts are bound to take notice of the political and social condition of the country, which they judicially rule.” Just like miners and merchants in frontier California, we still use the courts to resolve conflicts over natural resources, religious values, and numerous other issues. Everyone should understand and participate in the legal process by which we settle the most vital questions of the day.

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