

From the Oral History of

THOMAS J. GRAFF

California Regional Director of the Environmental Defense Fund, 1971–2009

Interviews conducted by Ann Lage in 2009, Regional Oral History Office, The Bancroft Library, UC Berkeley.¹

LAGE: I think we had decided to maybe start with some thought about where you stand in the annals of environmental law?

GRAFF: Okay. Good. Yeah, EDF's motto when I first joined was "Sue the bastards." And particularly in my first — well, really three or four years at EDF, in the early seventies, I complied with the motto.

LAGE: It was sort of what you thought you were expected to do —

GRAFF: Right.

¹ Presented here is a brief excerpt from Thomas J. Graff, "California Regional Director of the Environmental Defense Fund, 1971–2009: Applying Economics to Environmental Policymaking, Reforming California Water Policy," an oral history conducted by Ann Lage in 2009, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2011. © 2011 by The Regents of the University of California.

The oral history excerpts in this "Environmental Law — Oral History" section are intended to provide personal commentaries on the topics discussed in the preceding Environmental Law "Articles" and "Book" sections. This excerpt relates to the article: Peter L. Reich, *What Happened to Hispanic Natural Resources Law in California?*, in this volume, 13 CAL. LEGAL HIST. 43 (2018).

LAGE: — a lot of litigation. Was this a motto that they spoke about openly, or it was just in the background?

GRAFF: No, it was definitely part of the landscape. It was discussed as such.

LAGE: And your training.

GRAFF: To the extent I had training in litigation at all, it was to view issues from a litigator's point of view. But the reality, even in the early days — and certainly later, for me — was that I didn't litigate much, if at all, in the traditional way people do that, which is with depositions and interrogatories and the trappings of modern civil procedure.

LAGE: Even from the beginning, you're saying?

GRAFF: Even from the beginning. I'll give you a couple —. The only real counter-example wasn't litigation at all, but I got involved in early PUC cases, California PUC cases, which are administrative hearings. Although they're sort of formal and they have cross-examination and —

LAGE: And you use your legal skills.

GRAFF: Your skills, right. So I did a couple cases like that. But in the cases I actually filed in court, or I was involved in in court — the *Coastside* case,² which we've discussed; CEQA case;³ the Auburn⁴ and New Melones⁵ cases, which were anti-dam environmental impact statement cases —

LAGE: Sort of traditional at that time.

GRAFF: Right. Well, they were pretty new at that time.

LAGE: But that's what was happening at the time.

GRAFF: Right. And then in a way, the most interesting, the litigation against East Bay MUD [Municipal Utility District]. They were all pretty much litigated on the pleadings.

LAGE: On the what?

² Environmental Defense Council, Inc. v. Coastside County Water District, 27 Cal. App. 3d 695 (1972).

³ Planning & Conservation League v. Department of Water Resources, 17 Cal.4th 26 (1998).

⁴ Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., 20 Cal.3d 327 (1977).

⁵ Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50 (N.D. Cal. 1972).

GRAFF: Pleadings. Motions for summary judgment. But not a lot of prep time with witnesses, in advance of the actual appearances in court. I had some distinguished witnesses that I put on the stand at the PUC. In particular, Bill Vickrey, who became a Nobel laureate in economics, testified on time of day pricing. . . .

Back to East Bay MUD. I remembered something that I'd forgotten but I did not know at the time we filed the suit, that was probably the most innovative suit I ever filed, or innovative legal action.

LAGE: Now, tell how it was innovative. We talked about it, but really not in any depth, from a legal point of view.

GRAFF: There're basically two theories for getting at the fundamental tenets of California water law. It's much more complicated than I'm going to make it sound in the next couple of minutes, but basically, California water law is based on prior rights. So if you got there early, you have the water and it's almost an ownership interest. And that potentially causes a lot of problems, because what made sense and was an economic activity in 1880 or in the 1920s, when East Bay MUD really got going, does not necessarily make sense in 2009, or even in 1972.

LAGE: When you filed your suit.

GRAFF: When I filed the suit. But challenging the prior rights system directly and saying it's outmoded is problematic, from a legal point of view. And not just because we have a conservative judiciary, both in California and nationally. There's something to be said for some form of property right in water. Anyway, so there're basically two theories that have evolved over the years to at least chip away at the prior rights, prior appropriations concept. East Bay MUD, by the way, is not directly applicable, because it's a contract with the federal government and we were challenging the contract, basically.

LAGE: You mean their right is based on a contract with the federal government?

GRAFF: Right.

LAGE: But didn't they buy up water rights, a lot of the —

GRAFF: Yes, that was earlier. That was much earlier. But they wanted a supplemental supply.

LAGE: I see.

GRAFF: And our two theories in the lawsuit were, one, that any supplemental supply was a waste of water; that they could reclaim existing water and undertake conservation measures. So that's, in a way, an attack on the prior rights because it meant they had to use their prior rights more efficiently. That was our theory. The second theory was that there was unreasonable diversion of water because they wanted the secondary supply, upstream on the American River, depriving the city and county residents of Sacramento County — as the river flowed down to the Sacramento — of recreational and environmental rights and fisheries interests. . . .

LAGE: Did you think this through on — did you draw on some thinking at the time, as you filed this —

GRAFF: Well, there was a young guy who had just graduated from Boalt, I think — maybe Hastings — named Steve Cavellini. And he and Jerry Meral were involved in kind of designing the suit. Once the suit got going, I brought in one of my quite brilliant law school classmates, by the name of Bruce Dodge, who was in one of the downtown firms in San Francisco. I think Morrison and Foerster. But it was a group effort, basically.

The other innovative piece of the suit, which turned out to be the piece of it that got it noticed, ultimately, by the U.S. Supreme Court, was that it was a tricky combination of federal and state law, because this was a federal contract with the Bureau of Reclamation. And so we debated back and forth for a long time, before filing the suit, two things. One, whether to file in federal court or state court; and two, whether to include the federal government as a defendant. We finally decided to file in state court, in Superior Court in Alameda County, and not to join the feds.

LAGE: And why?

GRAFF: I can't remember all of the thinking, but it was basically that what we were really challenging were issues of state law, not of federal law, and not of contracting and so on, and we were better off without the feds in. And we guessed — and as it turned out, correctly — that for its own reasons, East Bay MUD also would not want the feds in the case. But it was always lurking in the background.

LAGE: So you didn't sue the bureau.

GRAFF: No, just East Bay MUD and its directors, I think.

LAGE: I wonder why the East Bay MUD didn't want the feds in.

GRAFF: Well, I think because — I don't think it was because they didn't think they were reliable allies. Maybe they thought it would slow down the whole contracting and approvals. In order to make this happen, in the old formulation, they would've needed water out of the old Auburn Folsom South project, flowing down the Folsom South Canal. And Auburn Dam was already controversial. There was other litigation, ours included, going on on that. So I don't know the answer. And I think maybe they thought they could get the state courts to throw the case out, on the basis that an indispensable party, namely the federal government, was not a party. And then there's also complex jurisprudence around when the federal government can claim sovereign immunity from prosecution by private parties.

LAGE: Were you concerned that the Alameda County courts would be sympathetic to East Bay MUD?

GRAFF: Well, a perfect question. [Lage laughs] Only many years later, did I learn that the Superior Court judge, who's name was Brunn, behind everybody's back, ours and East Bay MUD's, asked Mike Heyman, who was then a professor at Boalt, for help in the case, because it was a complex —

LAGE: To help him sort it out?

GRAFF: Sort it out. And Heyman assigned, I don't know how many, but some Boalt law students. And they were working in the back rooms, unbeknownst to us.

LAGE: Is this something that happens a lot? So the judge is getting consultants —

GRAFF: It's like a special master, consultants, yeah.

LAGE: But it wasn't upfront.

GRAFF: It wasn't upfront. I don't know how I eventually learned about it, but it was interesting. . . . Anyway, so Mike helped the judge. And the judge wrote a quite erudite opinion on this simple little case.

LAGE: The Superior Court judge.

GRAFF: Right.

LAGE: And in your favor?

GRAFF: No. Well, it depends how you define favor. He ruled against us; but he put in all kinds of stuff that clearly would interest the Court of Appeal, so that they would take the case seriously.

LAGE: Fascinating! And also considering that environmental law was sort of in its infancy, this behind-the-scenes effort of Heyman and his students would, you would think, have some impact on environmental law.

GRAFF: Right, and something similar happened in the *Coastside* case. Again, I think the judge —. And this was surprising to me at the time. I should've known better, but it was in the air. Environmentalism had just come in, was coming into its own. So the judges were interested in it, too.

LAGE: Sure.

GRAFF: Right? So the court of appeal decision in the *Coastside* case also showed a lot of thought. In the last few decades, there's this whole question of, do judges make law or do they interpret law? This was really a set of cases in the early seventies — and not just mine, many others, too — where judges were having to make it up as they went along.

LAGE: Yes, they really had to make it up because it didn't exist.

GRAFF: Right. That's right. David Sive, do you know that name?

LAGE: Yes, I interviewed him.

GRAFF: Oh, you did?

LAGE: Yes.

GRAFF: He did stuff like that in the *Con Ed*⁶ case and . . . then, of course, the *East Bay MUD* litigation, which never had witnesses. Well, it had witnesses in a much later stage, stages.

LAGE: So this early part was not witnesses, it was —

GRAFF: It was all on pleading.

LAGE: — just discussion of the law?

GRAFF: Right, right. Yeah. I think — I moved for summary judgment, so they assumed our facts were valid.

⁶ *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

LAGE: I see.

GRAFF: Which they were. But they —

LAGE: They weren't disputing the facts —

GRAFF: They were all on the record. Right.

LAGE: — they were disputing the law. . . . And then, of course, the litigation went on for a long time after Judge Brunn's ruling. It went to the Court of Appeal. . . . And did you carry it on in the Court of Appeal?

GRAFF: Well, Bruce Dodge and I did the appeal brief together. And just as an aside, I think I mentioned in one of the early interviews that a cataclysmic moment in my life was when I got my grades from first year law school. I was sixth in my class; Bruce Dodge was fifth.

LAGE: Oh! [they laugh]

GRAFF: Anyway, he's an interesting guy. We got sidetracked off the legal theories. Waste of water, unreasonable diversion, and unreasonable use were all kind of untested theories, in terms of kind of the actual practice of a utility or of a water agency. The other big strand of law that attacked the prior rights doctrine, in some sense, was the public trust. And of course —

LAGE: And was that at that time —

GRAFF: That was brewing at that time. And the most notable advocate of the public trust, from a legal point of view, was Joe Sax; whereas Charlie Meyers, who I mentioned earlier, was the most active proponent of using water markets as a different way of loosening prior rights. Basically, allowing sale —

LAGE: But it's not really — is that a legal theory, or just a kind of a practical accommodation to prior —

GRAFF: Well, that's an interesting question again, because one of the unanswered questions — here we are thirty-five years, thirty-seven years after the National Water Commission report, on which both Sax and Meyers were staff. How much of the resistance to water markets over the years has been based on a set of legal theories, and how much has just been good old boys, or "that's the way we've always done it, that's the way we're going to keep doing it" kind of thinking.

LAGE: But would the resistance be coming from the public trust people? The public trust proponents?

GRAFF: Well, we have critics — I'll use the old terminology — on our left who are big public trust advocates, who don't —

LAGE: And they'd rather attack the doctrine of prior appropriation?

GRAFF: Yes, attack it head on and say, "That old use is no good anymore and it ought to be something else." And there is some precedent in California water law. The most famous case is *Joslin v. Marin Municipal Water District*.⁷ . . . The issue there was a gravel mining operation on a stream where the growing areas of Marin wanted to use the water for municipal use. And to the surprise, I think, of many, the California Supreme Court said, if it's a higher use, the old gravel operation has to give way. So there is some —

LAGE: That's quite a precedent.

GRAFF: Right. But here it is forty years or more later, forty-five years, and that and the *Mono Lake* case⁸ — which, by the way, Bruce Dodge also was a key litigator in — have chipped away at the prior rights doctrine. And in that article I wrote in 1981, I kind of allude to the shakiness of the Imperial Irrigation District's prior rights, which also are complicated because it isn't clear that it's the district's right or the farmers' right. And it's a federal project and — But the Imperial Valley was there before the Colorado River Compact and the Hoover Dam. So none of these water law questions are easy. So these are to some extent competing, and to some extent complementary theories for direct legal challenge or indirect legal challenge of the prior rights system. But we're 130, 140 years into the prior rights system.

LAGE: It's hard to overthrow it.

GRAFF: Right.

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⁷ 67 Cal.2d 132 (1967).

⁸ Nat'l Audubon Soc'y v. Superior Court, 33 Cal.3d 419 (1983).