Riverside Lawyer

July/August 2007 • Volume 57 Number 7

MAGAZINE

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Greenhouse Ruling

Land Trusts

Maneuvering Through the Maze of MSHCP

Supreme Court Issues Decisions

Love Thy Neighbor

The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER
MAGAZINE

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Cover photo courtesy of Heidi Fron

Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

Calendar

JULY

24 **LRS Committee**
RCBA – Noon

AUGUST

1 **Bar Publications Committee**
RCBA – Noon

3 **Enrobement Ceremony for Hon. John Monterosso**
Dept 1 – 4:00 p.m.

14 **DRS Board**
RCBA – Noon

24 **Enrobement Ceremony for Hon. Charles Koosed**
Dept 1 – 4:00 p.m.

SEPTEMBER

5 **Bar Publications Committee**
RCBA – Noon

10 **CLE Committee**
RCBA – Noon

11 **PSLC Board**
RCBA – Noon

Landlord/Tenant Section
Cask 'n Cleaver, Riverside – 6:00 p.m.

Legal Education Forum
"The ABC's of Estate Planning
Speaker, Scott Grossman, Esq.
Law Library – 7:00 p.m. – 8:00 p.m.

12 **CLE Brown Bag Series**
"Duty to Defend"
Speaker, D.W. Duke, Esq.
RCBA Bldg., 3rd.Fl. – Noon
MCLE

Mock Trial Steering Committee
RCBA - Noon

20 **Annual Installation Dinner**
Mission Inn – 5:30 p.m.

President's Message

by David T. Bristow

And so it ends.

Although my term as RCBA President doesn't officially conclude until September, my duties are nearly over, including this, my final President's Message. It has been a pleasure and an honor serving in this office, and I thank my fellow members for the privilege. I relish the practice of law, and to be able to ply my trade in such an exemplary system as Riverside's is a true delight. This is true primarily because of the professionalism and civility of our bench and bar, and I thank all of you for your commitment to the profession and for the continued high standards that we have achieved.

This has been a difficult year for Riverside County's legal system, as we confront a host of systemic challenges to an efficient and fair justice system. I believe that the RCBA has acquitted itself admirably in its role as the guardian of our third branch of government, as our members have addressed the issues confronting our county's courts with passion and aplomb, never losing sight of our commitment to civility, yet refusing to yield on the issue of demanding a superior legal system for the county's inhabitants. We have continued to agitate for the changes necessary to insure that our county enjoys the same basic legal rights, access and protections afforded our larger neighbors to the west, and we have placed the issues squarely on the political radar. Of course, we have some excellent news on this front: Chief Justice Ronald George has responded to our requests for help by assigning a strike team of judges – both sitting and retired – to Riverside County for the sole purpose of helping to eradicate our backlog of criminal cases. Chief Justice George has also appointed Justice Richard Huffman of the Fourth District Court of Appeal (First Division) to act as a facilitator with our courts' primary constituents in creating an administrative framework that will hopefully result in a permanent solution to the problems that have plagued us. We are indebted to Chief Justice George for his leadership on this issue, and he has, yet again, demonstrated his exemplary talents as both a jurist and the leader of our state judicial system.

As I reflect on this past year, I feel the RCBA has much of which to be proud. Aside from advocating for our county's legal system, we initiated the James Wortz Distinguished Speakers Series for the purpose of bringing prominent legal speakers to our community, while also raising funds for our programs. We were honored to feature our very own Justice John Gabbert as the inaugural speaker, and his engaging discourse on early California legal history set a high standard for future Wortz addresses. The RCBA continued to build on its successful programs this past year, such as our Elves Program, which provides Christmas gifts to underprivileged families, and our Good Citizenship Award, which recognizes high school juniors county-wide who have exhibited exceptional citizenship.

Throughout this past year, the RCBA Board continued to exercise fiscal responsibility, and we have done an excellent job of husbanding the resources of the organization. As the result of the hard work of our predecessors, the financial condition of the RCBA is solid, and we are well-positioned to face the future.

I would like to thank those who made this year such a gratifying experience. Space limitations render it impossible for me to list every person who assisted me in my endeavors this year, so I apologize in advance for any omission.

My tenure as president would not have been possible without the enthusiastic support of my friends and colleagues at the law firm of Reid & Hellyer, including my partners, my fellow attorneys, and our wonderful staff. There is no finer law firm in this state, and it is an honor and a privilege to be counted amongst its members. Special thanks go to our office manager, Cathy McDavitt, and to my assistants, Julie Ruschell and Tammy Sosa, who literally made this year possible through their superhuman support, loyalty and brilliance. We at Reid & Hellyer labor in the shadow of a long line of legal giants, but I owe an impossible debt of gratitude to two giants in particular: Don Powell and David Moore. Through their example, not only have they taught me how to be a great lawyer, but they are a daily reminder of how to be a great man. Although Don is no longer with us, his spirit is a constant companion, joining Dave in guiding the advice dispensed at Reid & Hellyer on a daily basis.

I would also like to thank my fellow board members, who made serving as president such a pleasure. My utmost thanks to Dan Hantman, Aurora Hughes, Harry Histen, Harlan Kistler, Robyn Lewis, my partner Dan Katz, Richard Kennedy, Theresa Savage, Jackie Carey-Wilson and John Higginbotham. The RCBA will be in good hands for years to come due to the commitment and excellence of our board.

I am so very thankful for our staff at the RCBA. Their efficiency, ability and positive attitude make being president almost a mere titular position. As with most nonprofits, our staff is overworked and under-

paid, yet they perform in an exemplary fashion day in and day out, serving our clientele to make our county's legal system more efficient in the delivery of legal services. Many, many thanks to Lisa Yang, Sue Burns, Joan Dlouhy, Mae Krems, LuLu Ayala and Vickie Moneymaker.

Particular attention must be paid to one very special person, however. Our Executive Director, Charlotte Butt, has run the RCBA with supreme efficiency for the past seven years, and she has left an indelible imprint on this magnificent organization. She has put in more hours, worked harder, gone above and beyond the call of duty more often, and, in short, has put the RCBA ahead of her own interests more than anyone else in our organization. In spite of her efforts and achievements, she has actively resisted any attempt by the board to acknowledge or otherwise publicize her role in the organization. She has done more to advance the causes of this county's legal system than most lawyers, and she exhibits those qualities and characteristics that are the mark not only of an excellent attorney, but of an excellent human being. Charlotte, the RCBA can never thank you enough for your efforts, and we are fortunate indeed to have you at our helm. On a personal note, I am fortunate indeed to have you as a friend.

Finally, I want to thank my wife Kristen for her love, patience and understanding over the past year. I could not wish for a better partner, for not only did she take my frequent scheduling conflicts in stride, she encouraged me in any endeavor required to fulfill my duties. I am a fortunate husband indeed.

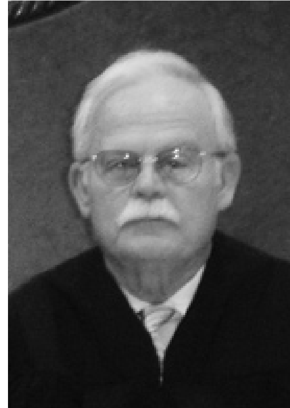
Thank you for the opportunity to serve you, and I'll see you in court.

David T. Bristow is a Senior Partner with the law firm of Reid & Hellyer in Riverside.

Judicial Profile: Hon. David B. Downing

by Donna Johnson Thierbach

After serving 11 years in the Marines and 25 years in the Riverside County District Attorney's office, Judge David Downing has no plans of slowing down or retiring anytime soon!



Hon. David B. Downing

Judge Downing was born and raised in Massachusetts. As he was growing up, he was not sure what career he wanted to pursue, but he knew what he did not want to do: He did not want to teach, since both of his parents were school teachers. Interestingly, his wife has been a school teacher for the past 15 years. He said it is amazing that his wife talks about the same issues his parents would discuss over 50 years ago, when he was growing up.

Judge Downing attended St. Michael's College in Burlington, Vermont and joined the United States Marine Corps upon graduating. He served in the Marines as an officer in the infantry and in communications from 1963 to 1974. He did two tours in Vietnam and developed a love for California after he was stationed in Camp Pendleton twice. He left the Marines in 1974 with the rank of Captain. It was while he was in the Marines that he developed an interest in law. He said that, at that time, a Marine accused of misconduct on base was not represented by a lawyer. Rather, officers would be assigned to serve as the prosecutor, defense counsel and court members. If an offense occurred off base, officers would be assigned to work with the police and assist in negotiating an appropriate disposition. When he left the Marines, he used the GI Bill to attend Western State University in San Diego. (He was a pretty busy guy, because he also used the GI Bill to earn a Master's in Business Administration from National University!)

After graduation, he went into private practice in Vista, California. It was there that he met our own Judge Dennis McConaghy. (Judge McConaghy served as a Riverside County Judge from 1987 until he retired this year. He now sits on assignment in Banning.) They were both leasing offices in the same building. After Judge McConaghy accepted a position in Riverside County (at first with the office of the Public Defender and later with the office of the District Attorney), they remained in contact. Judge McConaghy really enjoyed working in Riverside County and encouraged Judge Downing to apply for a position with the Riverside County District Attorney's office.

The rest is history. The Riverside County District Attorney's office offered Judge Downing a position in Indio, and he immediately accepted. He had interviewed for the position in Riverside and was to start in September 1981. He had never been to Indio, so in August, he and his wife decided to drive to Indio to check it out. The drive was fairly pleasant. Indio seemed ideal, until they got out of their air-conditioned car and realized it was over 100 degrees outside. However, when they went in the office, everyone was very friendly and even invited them to a retirement party later that evening. So, in spite of the heat, he was excited about his new position and the people he would be working with. That summer, he

and his wife moved from San Diego to the desert and never looked back. He became involved in the community and even served as a volunteer firefighter at Station 32 in La Quinta for 25 years, from 1981 until 2006.

Judge Downing said when he started in the District Attorney's office, there were probably 12 lawyers in the Indio office. He said now there are over 50 Deputy District Attorneys in Indio. As a Deputy District Attorney, he worked in both the Indio and Palm Springs offices and tried everything from misdemeanor to capital cases.

After serving 25 years as a Deputy District Attorney, Judge Downing made the decision to submit his application for judge. He had been a Supervising District Attorney since 1992. He said he had pretty much done everything in the District Attorney's office and he was ready to try something new. He was concerned that he would not be considered because of his age (he is now 64 years old), but was encouraged when then-District Attorney Grover Trask said he would support him.

In June 2006, Judge Downing was appointed to the bench and assigned to the Southwest Drug Court. He said serving in Southwest was very enjoyable. Everyone was very professional and courteous, and each day brought new experiences. The only downside was the drive from Indio to Murrieta each day. Beginning May 14, 2007, Judge Downing was reassigned to the Indio Drug Court, which will save him several hours of driving each day. What will he do with all that free time? Judge Downing enjoys antiquing and pistol-shooting competitions. Watch out, because he even loads his own ammunition!

Donna Johnson Thierbach, a member of the Bar Publications Committee, is currently the Director of the Adult Division of the Riverside County Probation Department.

Greenhouse Ruling

by Richard Brent Reed

Should the Environmental Protection Agency regulate the production of carbon dioxide as a pollutant? The Clean Air Act requires that the Environmental Protection Agency "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . reasonably . . . anticipated to endanger public health or welfare." (42 U.S.C. § 7521(a)(1).)

Last year, a clutch of environmental groups petitioned the EPA to set emission standards for CO2. The EPA argued that the Clean Air Act "does not authorize it to issue mandatory regulations to address global climate change" and that "even if it had the authority to set greenhouse gas emission standards, it would have been unwise to do so at that time because a causal link between greenhouse gases and the increase in global surface air temperatures was not unequivocally established." The state of Massachusetts joined the groups in the action as an intervenor under the doctrine of *parens patriae*. In *Massachusetts v. E.P.A.* (2007) ___ U.S. ____ [127 S.Ct. 1438, 167 L.Ed.2d 248], the Supreme Court decided that the EPA should and must regulate the production of carbon dioxide.

Parens Patriae

The threshold issue was Massachusetts' standing to sue the EPA to force that organization to regulate CO2. "To demonstrate standing," the court explained, "a litigant must show that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will likely redress that injury." (See *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560-561 [112 S.Ct. 2130, 119 L.Ed.2d 351].)

Massachusetts claimed standing as *parens patriae* ("father of the people"), asserting a "quasi-sovereign interest." Justice Stevens, writing for the majority, came up with a case supporting that state's position: *Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230 [27 S.Ct. 618, 51 L.Ed. 1038]. In that case, Justice Oliver Wendell Holmes explained:

> "This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

How imminent is "imminent"?

The court's majority accepted the propositions that global warming is a looming threat and that it is anthropogenic: human-induced. The dissent maintained that the connection between human activity and palpable environmental harm in the distant future is too tenuous, suggesting that the global nature of global warming thwarts the "concrete and particularized injury" element of standing. Nor does the imperilment of the New England coast satisfy this requirement. Chief Justice Roberts, writing for the dissenters, challenges the concreteness of seaside flood projections:

> "One of petitioners' declarants predicts global warming will cause sea level to rise by 20 to 70 centimeters *by the year 2100*. [Citation.] Another uses a computer modeling program to map the Commonwealth's coastal land and its current elevation, and calculates that the high-end estimate of sea level rise would result in the loss of significant state-owned coastal land. [Citation.] But the computer modeling program has a conceded average error of about 30 centimeters and a maximum observed error of 70 centimeters. [Citation.]"

Chief Justice Roberts concludes that allegations of possible future injury do not satisfy the requirements of Article III and that a threatened injury must be certainly impending to constitute injury in fact.

But does the EPA's "steadfast refusal to regulate greenhouse gas emissions present[] a risk of harm to Massachusetts that is both 'actual' and 'imminent'"? The court addressed this question thus: "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. [Citation.] They instead whittle away at them over time . . . ." Having said that, the court shifted the burden to the government:

> "EPA can avoid taking further action only if it determines that greenhouse gases do not con-

> tribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."

It continued:

> "If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. . . . The statutory question is whether sufficient information exists to make an endangerment finding."

The Court concluded that the EPA's refusal was "'arbitrary, capricious, . . . or otherwise not in accordance with law.'"

The Greenhouse Effect

In understanding global warming, a couple of Wikipedia articles are helpful:

> The greenhouse effect, discovered by Joseph Fourier in 1829 and first investigated quantitatively by Svante Arrhenius in 1896, is the process in which the emission of infrared radiation by the atmosphere warms a planet's surface.

("Greenhouse effect" <http://en.wikipedia.org/wiki/Greenhouse_effect>, as of June 14, 2007.)

> When sunlight reaches the surface of the Earth, some of it is absorbed and warms the Earth. Because the Earth's surface is much cooler than the sun, it radiates energy at much longer wavelengths than does the sun. The atmosphere absorbs these longer wavelengths more effectively than it does the shorter wavelengths from the sun. The absorption of this longwave radiant energy warms the atmosphere; the atmosphere also is warmed by transfer of sensible and latent heat from the surface. Greenhouse gases also *emit* longwave radiation both upward to space and downward to the surface. The downward part of this longwave radiation emitted by the atmosphere is the "greenhouse effect." The term is a misnomer, as this process is not the mechanism that warms greenhouses.

> The major natural greenhouse gases are water vapor, which causes about 36-70% of the greenhouse effect on Earth (not including clouds); carbon dioxide, which causes 9-26%; methane, which causes 4-9%, and ozone, which causes 3-7%. It is not possible to state that a certain gas causes a certain percentage of the greenhouse effect, because the influences of the various gases are not additive.

("Greenhouse gas" <http://en.wikipedia.org/wiki/Greenhouse_gas>, as of June 14, 2007.)

As Oliver Wendell Holmes presciently said in *Abrams v. United States* (1919) 250 U.S. 616, 630 [40 S.Ct. 17, 63 L.Ed. 1173], "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."

Richard Reed, a member of the Bar Publications Committee, is a sole practitioner in Riverside.

Land Trusts

by Heidi Fron

Land trusts are sprouting up all over the United States. In 1950, there were 53 land trusts in 26 states. Now there are more than 1,600 nonprofit land trusts in all 50 states, helping communities save land that represents America's heritage and future. Together they have protected more than 37 million acres, according to the Land Trust Alliance's most recent census.

Some land trusts, such as the Coastal Conservancy and the Trust for Public Land, are created by the government and function more like governmental agencies. This article, however, focuses on the independent, entrepreneurial, nonprofit organizations founded by individuals or groups of citizens. These are the groups that need legal counsel from attorneys in private practice.

California has over 470 land trusts. More than 18 operate locally in Riverside and San Bernardino Counties. Many of these local organizations coordinate joint projects without concern over county boundaries, thus multiplying the benefits to the public.

At the same time, however, it seems that no two organizations are alike. Differences in priorities, funding levels, and staff or volunteer resources result in unique organizations with varying needs. Some focus on land acquisitions and stewardship while others focus on conservation easements or other preservation tools. These and other aspects of land trust management that require legal counsel are briefly described below.

Nonprofit compliance

To get started, a group that wants to establish a nonprofit land trust needs the services of an attorney to draft its articles of incorporation, by-laws and other documents to be filed with the Secretary of State. It needs advice on how to obtain tax-exempt status with the Internal Revenue Service and how to stay in compliance. Numerous federal and state laws govern the activities of nonprofit organizations, and good legal advice is essential on an ongoing basis.

Land acquisitions

Some land trusts acquire land that is unique, scenic and irreplaceable; or land that has historic, archaeological or educational features; or land that is valued for its wildlife habitat or as a wildlife corridor or for its open space value. Contrary to popular belief, land trusts rarely acquire land merely to protect their own back yards by defeating or hindering development.

Sometimes acquisition of vacant land calls for a standard purchase and sale agreement (PSA). In such cases, a land trust will try to save money by relying on experienced staff, board members or a trusted real estate broker to steer them through the transaction. More often, however, the transaction is complex, and legal counsel is sought when the acquisition calls for careful negotiations and a customized PSA.

Sometimes land is purchased with the intent to donate it to a governmental entity. Many people question why anyone would donate land to the government: The idea is objectionable to many people. But consider the benefits to thousands of people when land is donated to a city for a community park, or to the county for a regional park.

Donations to the federal government usually involve consolidating lands within a national park, national preserve or wilderness area to protect wildlife and natural resources. Such donations also protect financial resources. For example, park rangers are expected to patrol all borders within and around a park or preserve. When there are numerous private in-holdings, it is time-consuming for rangers to patrol all areas. Acquiring in-holdings from willing sellers makes it easier and more economical for the park staff to maintain and patrol the area. Such is the focus, for example, of the San Bernardino Mountains Land Trust vis-à-vis its national forest. One would think it would be easy to donate land to the government; on the contrary, it is complex. For the transaction to pass scrutiny with the Department of Justice, someone needs to pay attention to detail and must understand the underlying legal principles.

Another good example of land acquisition for governmental agencies: When a summer camp is put up for sale, savvy land trusts will purchase the camp and donate it to a school district for use as an outdoor science school or as a camp for underserved children. The Los Angeles County Education Foundation and UCLA's official charity, UniCamp, both acquired camps for children by donation.

Stewarding the land

Land trusts that can afford to own and maintain land will acquire it for public benefit.

Cleaning up any environmental messes left behind by prior owners involves contracts with specialists who evaluate the presence of asbestos, lead paint and mold in old buildings. Positive findings will lead to contracts

Naturalists lead the children on hikes, teaching them about plants and animals and how to take care of the environment.

Some land trusts discover a timely opportunity to save a unique, scenic piece of land. Perhaps the organization can afford to purchase it, but cannot afford to steward the land. In such a case, the land trust will donate the property to another land trust that can steward the land. The Whitewater Trout Farm in Riverside County is an outstanding example. Established in 1939, the trout farm was owned by a family that set up a commercial hatchery, ponds for public fishing, cabins and RV hook-ups for camping – all for a price. A residence for the family, housing for employees, a restaurant, various buildings and mobile units were added over the years. Eventually, the company

Photos courtesy of Heidi Fron

with other specialists who properly remove contaminated materials and properly dispose of them. The prudent organization will get legal advice at each step of the process until the staff is experienced enough to make such arrangements on its own.

Land trusts like the Wildlands Conservancy (TWC) will remove non-native trees and plants and revegetate with natives and drought-tolerant plants. Rangers and maintenance workers will establish trails for hiking and park areas for picnicking. These parks are open to the public at no charge on weekends. During the week, the preserves host busloads of school children from low-income neighborhoods at no cost to their families. For many of the children, this is their first time away from their urban neighborhoods and in spectacular natural areas.

was put up for sale. This desert oasis along the Whitewater River was too good to pass up. The Coachella Valley Mountains Conservancy and the Friends of the Desert Mountains were able to purchase it, and immediately began to search for a conservation-minded organization to steward the land. TWC met with CVMC and the Friends, cash in hand, ready to sign a conservation easement and to turn the property into a nature preserve for public visitation on weekends and outdoor education programs for children during the week.

Conservation easements

Conservation easements are legal agreements between a land owner and a land trust or other qualified entity to permanently limit land uses in order to protect the conservation values of the property. Restricting development potential lowers the market value of the land, usually resulting in lower property taxes. This may enable a farmer or rancher to continue working the land and to pass it on to the next generation (or sell it), with the conservation easement as a deed restriction. Conservation easements must be carefully drafted. The services of an attorney can prevent misinterpretation and misunderstandings in the future. The land trust – or other entity that holds the easement – has ongoing responsibilities to monitor and enforce the conservation easement. If problems arise, legal advice may be sought once again.

Lobbying

Lobbying is an area that requires careful guidance by a legal advisor who knows the requirements, prohibitions, problems and pitfalls. Many land trust managers don't know the difference between hiring professional lobbyists and using the efforts of staff members or volunteers. Reporting requirements can be confusing and, without good legal guidance, deadlines can easily be missed.

Fundraising

Similarly, fundraising can be tricky and it is easy for a nonprofit to make mistakes. Donations of cash, stocks, land, goods and in-kind services have varying requirements. Planned giving is a difficult area for a land trust, but it can be a rewarding way to ensure the organization's future. A potential donor needs to rely on his or her own attorney to determine whether a charitable remainder unitrust, charitable remainder annuity trust, charitable lead trust, pooled income fund, charitable gift annuity, or bequest is appropriate for the donor's particular situation. It makes sense that the land trust would rely on outside counsel to coordinate properly with the donor's attorney. A larger land trust might be able to afford an experienced development director to handle most fundraising functions, but an inexperienced staff needs counsel from an attorney who knows estate planning as well as nonprofit compliance

Finance and tax law

Most land trusts rely heavily on a certified public accountant for financial and tax advice. However, there might be limits to that CPA's knowledge of the fine points. An on-going relationship with a tax attorney is essential to ensuring that the land trust obtains good advice all year, rather than getting advice only at tax time.

Employment law

Small land trusts have a volunteer board of directors and volunteers who handle projects. As the organization's projects grow, the need arises for paid staff. At this point, the land trust needs good advice on employment law. Too many groups think that the rules do not apply to small nonprofits. In addition, land trust founders tend to be free spirits who would rather be out hiking the trails than monitoring compliance with the Labor Code. Strong guidance is needed – at least until the organization can hire a professional human resources manager. Even then, the HR manager will need legal advice.

Workers' compensation issues arise with land trusts, particularly if they steward land. Again, free-spirited staff members would rather blaze a new trail without any safety training. A strong counselor will guide the staff through the maze of OSHA regulations and workers' compensation insurance issues. But no matter how conscientious the effort may be, injuries will happen. Proper follow-up will keep the organization out of trouble.

Heidi Fron is in-house counsel for the Wildlands Conservancy, based in Oak Glen.

Some Land Trusts in Riverside and San Bernardino Counties	
Anza-Borrego Foundation	Borrego Springs
Coachella Valley Mountains Conservancy	Coachella Valley
Crafton Hills Open Space Conservancy	Yucaipa
Desert Tortoise Preserve Committee	Riverside
Friends of the Desert Mountains	Palm Desert
Mojave Desert Land Trust	Twentynine Palms
Redlands Conservancy	Redlands
Riverside Land Conservancy	Riverside
San Bernardino Mountains Land Trust	Lake Arrowhead
Southern California Agricultural Land Foundation	Ontario
The Wildlands Conservancy	Oak Glen
Transition Habitat Conservancy	Pinon Hills
Yucaipa Valley Conservancy	Yucaipa

Maneuvering Through the Maze of the Western Riverside County Multiple Species Habitat Conservation Plan

by Karin Watts-Bazan

In the late 1990's, the Riverside County Board of Supervisors embarked upon a unique and innovative planning effort called the Riverside County Integrated Project (RCIP). The mission of RCIP is to integrate land use, transportation and conservation planning and implementation for future development in Riverside County. As a first-of-its-kind endeavor, RCIP is intended to be a model for streamlining the environmental process while providing for the long-term development, economic growth and quality of life of the citizens of the county. RCIP is now complete and incorporates three regional components: an updated County General Plan; a Community and Environmental Transportation Acceptability Process, to determine present and future regional transportation infrastructure; and a Multiple Species Habitat Conservation Plan (MSHCP), to conserve listed and sensitive species and their habitats.

The MSHCP forms the nucleus of an open-space plan for western Riverside County. The largest habitat conservation plan in the nation, it covers land within the county and 14 cities. It focuses on the conservation of 146 plant and animal species and will ultimately include a publicly owned reserve system of approximately 500,000 acres. The MSHCP establishes a 300,000 acre "Criteria Area" within which 153,000 acres of privately owned land will be acquired through direct purchase or through the development review process. To date, approximately 36,000 acres of these lands have been acquired and conserved.

When development entitlements are sought for property within the MSHCP Plan area, the following MSHCP requirements must be complied with: 1) protection of riparian/riverine areas; 2) protection of narrow endemic plant species; 3) urban/wildlands interface guidelines; and 4) other additional survey requirements. Additionally, *conservation* of all or a portion of the property may be required if the property is located within the Criteria Area.

With respect to the protection of riparian/riverine areas, the MSHCP requires project-specific analysis and mapping of riparian/riverine and vernal pool habitat. This type of analysis is prepared by a qualified biologist who is familiar with the project and has surveyed the property in question. The project must be designed to provide 100% avoidance of these areas, if feasible. If avoidance is not feasible, then further analysis supporting a "determination of biologically equivalent or superior preservation" (DBESP) must be provided. The DBESP analysis documents the infeasibility of avoidance and establishes biological mitigation for the riparian/riverine areas impacted by the project. This analysis is also subject to review and comment by the U.S. Fish and Wildlife Service and the California Department of Fish and Game.

Riparian/Riverine Habitat in Southwestern Riverside County

Environmental Programs Department Biologists David Carr and Jared Bond holding Burrowing Owls

Stephens' kangaroo rat trapped during ongoing monitoring efforts

Oftentimes, the riparian/riverine protection requirements of the MSHCP are confused with the Clean Water Act Section 404 Permitting and the California Fish and Game Code

Streambed Alteration processes. In some instances, property owners and their consultants have assumed that compliance with the Clean Water Act and section 1600 et seq. of the California Fish and Game Code also constitutes compliance with the MSHCP riparian/riverine protection requirements. This is not the case. However, mitigation proposed in connection with these MSHCP requirements may serve as a basis for mitigation proposed in connection with these and other similar federal and state processes.

The MSHCP also requires project-specific narrow endemic plant surveys to be conducted if the property is located within certain identified survey areas. Such surveys are required to be conducted because the existing MSHCP database does not provide the level of detail sufficient to determine the extent of the presence or distribution of certain narrow endemic plant species covered by the MSHCP. Narrow endemic plant surveys are conducted during specified times of the year by qualified biologists with expertise in identifying the specific type of plant the survey is intended to address. In some instances, specific species goals and objectives identified in the MSHCP may

require *conservation* of plant populations determined to be located on the property.

The urban/wildlands interface guidelines contained in the MSHCP are intended to address indirect effects associated with locating development in close proximity to the MSHCP reserve system. These guidelines require project-specific analysis to occur in those instances where future development may adversely affect biological resources within the MSHCP reserve system. The following areas are required to be addressed in this analysis: drainage, toxics, lighting, noise, invasive plants, and wildlife movement and plant dispersal barriers, as well as the location and extent of grading activity proposed.

The other additional survey requirements contained in the MSHCP are necessary in order to achieve coverage for certain identified plant and animal species. As data are collected and conclusions are made regarding the presence of occupied habitat within the MSHCP reserve system, survey requirements for these species may ultimately be modified or terminated. The burrowing owl is one of the more problematic species required to be surveyed, because the survey area is extensive and surveys can only be conducted during its nesting season. Additional surveys and corresponding mapping are required to be completed during specified times of the year by a qualified biologist with expertise in identifying the specific type of plant or animal the survey is intended to address. In some instances, *conservation* of the burrowing owl and other species populations may be required.

As previously mentioned, conservation of all or a portion of property located within the Criteria Area established by the MSHCP may also be required. The 300,000-acre Criteria Area is composed of numerous 160-acre "cells" with unique numerical identifiers. Specific MSHCP criteria described in the MSHCP apply to each cell. Property located within the Criteria Area is subject to a criteria review process called HANS. HANS is an acronym for the property-owner-initiated "Habitat Evaluation and Acquisition Negotiation Strategy" established by the MSHCP. Riverside County staff, specifically the Environmental Programs Department, performs the HANS review. Other jurisdictions may use other MSHCP review and implementation tools. For example, the City of Lake Elsinore calls their process "LEAPS."

All discretionary projects/permits applied for in connection with the development of property located within the Criteria Area are subject to review pursuant to the HANS process. Some examples of discretionary projects/permits are: specific plans, subdivision maps, use permits and grading permits. The Implementing Agreement for the MSHCP defines a discretionary project as "a proposed project requiring discretionary action or approval by a Permittee, as that term is used in the California Environmental Quality Act (CEQA) and defined in State CEQA Guidelines Section 15357, including issuance of a grading permit for County projects." Riverside County uses the HANS process to implement the MSHCP through the identification and delineation of *conservation* on specific parcels of land in accordance with the criteria established for each cell within the Criteria Area. HANS is also the vehicle by which incentives may be used to acquire land for building the MSHCP reserve system. For example, clustering of development on smaller lots to achieve larger open-space areas is a critical tool which can allow for a viable development project and compliance with the MSHCP criteria.

The HANS process is also available to property owners who may not want to develop their property but are interested in selling their property for inclusion in the MSHCP reserve system. In this instance, the HANS process is initiated and a review of the applicable criteria is conducted in order to determine if property within the Criteria Area is appropriate for inclusion in the MSHCP reserve system. If the property is determined to be necessary for conservation, an *appraisal* process is initiated and the property may be purchased from willing sellers at fair market value.

Upon completion of the HANS process, a discretionary project/permit is subject to "Joint Project Review" (JPR). JPR allows for the Western Riverside County Regional Conservation Authority (RCA), the U.S. Fish and Wildlife Service, and the California Department of Fish and Game to review development projects within the Criteria Area and provide guidance to the affected jurisdiction on MSHCP compliance. The RCA is a joint powers authority, comprised of the county and 14 cities, which oversees MSHCP compliance, acquires land, and manages and monitors RCA-owned land within the MSHCP reserve system.

Property owners who intend to build a single-family home on an existing legal lot within the Criteria Area are subject to an "Expedited Review Process" (ERP) rather than the typical HANS process. This process allows county staff to determine the appropriate location of a building footprint area and any necessary access roads on the least sensitive portion of the lot. Any development on the property is then restricted to this building footprint area.

Clearly, the MSHCP is a maze of complex requirements necessitating careful maneuvering by property owners in order to achieve a successful outcome. Attorneys with extensive knowledge about the MSHCP can be very instrumental in assisting their clients in this arena. The MSHCP can be viewed on line at www.tlma.co.riverside.ca.us/epd.

Karin Watts-Bazan is a Deputy County Counsel with the County of Riverside.

Supreme Court Issues Decision on Long-Term Water Supply Planning

by Jason Ackerman

Earlier this year, the California Supreme Court issued its decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 (*"Vineyard"*), finding that an Environmental Impact Report ("EIR") prepared for a large community plan and specific plan failed to adequately assess the impacts of long-term water supplies under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq. The basis for the court's decision was that the EIR's assessment of the availability of long-term supplies was inadequate and the EIR did not consistently and coherently describe future demand for water. This article examines the court's decision and its reasoning, then discusses its local implications.

A. Factual Background

The project in *Vineyard* proposed the development of nearly 6,000 acres in a rural portion of eastern Sacramento County. When fully built, the master-planned community, named Sunrise Douglas, would include more than 22,000 residential units housing as many as 60,000 people, plus 480 acres of commercial and office space. Concurrently proposed for approval was the SunRidge specific plan, the first phase of the community plan, which proposed the development of approximately 2,600 acres, including approximately 9,900 residential units.

Water demand for the specific plan totaled approximately 8,500 acre-feet annually (afa), and demand for the remainder of the community plan totaled approximately 13,500 afa. According to the EIR, groundwater from a proposed well field would be used to eventually supply 5,500 afa of water to the project. Additional future water supplies would be met with surface water diverted from the American River by the Sacramento County Water Agency ("Water Agency").

According to the EIR, future surface water diversions were part of the Water Agency's service supplies for a larger area of the county known as Zone 40, which included the Sunrise Douglas area. The EIR relied heavily on a water supply planning document, entitled the Water Forum Proposal, to analyze the availability of future surface water diversions. The Water Forum Proposal stated that increased water diversions from the American River would be available in the future, but that such diversions would have significant environmental impacts.

The developers for the project had no existing contractual entitlements to water supplies, and therefore, the EIR included a mitigation measure prohibiting subsequent entitlements, e.g., subdivision maps, tract maps and use permits, until the project obtained definite water supplies.

Plaintiffs challenged the project on the grounds that the EIR failed to identify the actual source of most of the water needed to fill the project's demand and that the proposed mitigation measures were inadequate. The trial court found that the EIR was valid because it relied on identified potential water supply sources. The Court of Appeal for the Third District affirmed. On review, the California Supreme Court affirmed in part and reversed in part, concluding that the EIR adequately addressed short-term water supply issues, but failed to adequately analyze long-term water supplies.

B. The Court Examined CEQA Principles

The primary issue on review in *Vineyard* was the level of uncertainty that is acceptable in an EIR for water supplies, and in rendering its opinion, the court discussed some of the general principles of CEQA as they pertain to water supply analysis. First, the court said that CEQA is supposed to provide transparency to the public, and an EIR cannot simply assume that water supplies will eventually materialize in the future. Second, the court said that an adequate environmental analysis for a large project, to be built over a number of years, cannot be limited to the water supply for the first stage or the first few years. All reasonably foreseeable significant environmental impacts must be analyzed, and an EIR must assume that all phases of the project will eventually be built. Third, the court said that an EIR must address impacts of likely future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability. Finally, if it is still impossible to determine confidently that anticipated future water sources will be available, despite an EIR's full discussion of the issue, the court said that CEQA requires some discussion of possible replacement sources and of the environmental consequences of those contingencies.

C. The Court Examined S.B. 610 and S.B. 221

The court next examined the applicable water supply assessment and verification statutes applicable to land use and water planning, and its discussion here narrowed the scope of CEQA review. California's Water Code requires a city or county to obtain a water supply assessment from the public water system serving a large land use project prior to approval of the project. (Water Code, §§ 10910-10912.) While water supply assessments should provide written documentation of existing water supplies, assessments are only required to provide estimates and plans for acquiring future supplies.

The court acknowledged that, for residential subdivisions of more than 500 units, the written verification required before the approval of a subdivision map must be based on firm indications that the water will be available for a projected 20-year period. (Gov. Code, § 66473.7.) Thus, the court noted that water supplies must be identified with more specificity at each step of the process as project approval moves from general phases to more specific phases. Consequently, interpreting CEQA as requiring firm assurances of future water supplies at early stages of the land use planning and approval process would put CEQA in tension with the more specific water-planning statutes.

D. The Court Held that the EIR Adequately Analyzed Near-Term Water Supplies

Applying these principles, the court held that the EIR adequately analyzed near-term water supply issues. The early phase of the project proposed to rely on water extracted from the well field, a new facility drawing from the region's aquifer, and the EIR analyzed both the impacts of and necessary mitigation for the extraction. While there was some uncertainty with respect to other planned developments that might compete for water drawn from the well field, there was substantial evidence in the record demonstrating that supplies would be available, at least in part, for the early stages of the project. Indeed, it was not until the second phase of construction that the well field would be connected to the Water Agency's larger Zone 40 system, where the well field would be used to serve other users. Given the well field's capacity – 10,000 afa – and the projected near-term usage – 5,500 afa – the court held that the EIR's analysis of near-term supplies was supported by substantial evidence and, thus, must be upheld.

E. The EIR Did Not Adequately Analyze Long-Term Water Supplies

The court held that the long-term plan for the project's water supply was inadequate because the EIR's discussion of the Water Agency's Zone 40 left too much uncertainty. There was no consistent or coherent description of future water demand based on future growth, and the estimated supply and demand in the EIR conflicted with the estimated figures in the Water Forum Proposal without any explanation of the divergence in the figures.

Although the county did not need to repeat the impact analysis for new surface water supplies included in the Water Forum Proposal, the EIR should have incorporated the environmental impacts of the mitigation discussion in the Water Forum Proposal's EIR. The court noted that the administrative record contained no information on other planned long-term developments in Zone 40, what their specific water needs would be, or when they would rely on available water supplies. Thus, the EIR could not show a "likelihood" of adequate long-term water supply for the project without showing that plans for the Zone 40 area required at least a "rough balance" between water supply and demand.

The court rejected the mitigation measure stating that entitlements would not be received until agreements and financing for supplemental water supplies were secured because the EIR failed to analyze the environmental impacts of these supplemental supplies.

The court concluded that, even without a showing that water from the identified source is likely to be sufficient, an EIR may satisfy CEQA by fully disclosing the uncertainty, the other possible outcomes, their impacts and appropriate mitigation measures. CEQA's informational purposes are not satisfied when an EIR ignores or assumes a solution to the problem of supplying water to a proposed land use project, and an EIR must present sufficient facts to evaluate the "pros and cons" of supplying the amount of water a project will need.

F. Conclusion and Implications

While construction activities in the Inland Empire have recently slowed down, large projects continue to be approved. CEQA requires that large development projects adequately analyze long-term water supplies during the environmental review process. In Vineyard, the court explained that an EIR must show that there is a reasonable likelihood that water will be available from an identified source. If it is uncertain that water supplies will materialize, an EIR must discuss possible alternative supplies, their impacts and feasible mitigation measures in order to achieve CEQA's informational purpose.

Jason Ackerman is an attorney at Best Best & Krieger LLP, where he is a member of the Environmental and Natural Resources Practice Group. He specializes in the representation of private and public clients in the areas of environmental and water law.

Love Thy Neighbor

by Randall S. Stamen

Environmental law encompasses a number of issues, including disputes between neighbors regarding their trees. A majority of these disputes concern trees that are cut down or cut back severely during a trespass. Ordinarily, the trespass and cutting occur because an uphill owner wishes to improve the view from his or her home. The uphill neighbor will typically wait until the tree owner is away, jump a fence, and either cut the tree himself or herself or have an unlicensed contractor or day laborer do the cutting.

Randall Stamen

An airline pilot once admitted to me that he dressed up in black, crept into a neighboring property during the night, and killed a tree with a handsaw to improve the view from his home. The pilot's wife kept a lookout and arranged to flicker their patio light if her husband was in danger of being detected.

As a general rule, there is no right to a view from one's property. (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147.) Further, Business and Professions Code section 7026.1 provides that an individual who regularly prunes trees that are over 15 feet tall must have a contractor's license.

Civil Code section 3346, Code of Civil Procedure section 733, and the cases that interpret these sections provide that a judge, jury, or arbitrator must award double damages in a tree trespass lawsuit. Treble damages may be awarded if the trespass and cutting of the tree were malicious. The doubling and trebling provisions of sections 3346 and 733 are the subject of CACI 2003, VF-2003, and VF-2004.

These doubling and trebling provisions are both a blessing and a curse to litigants. Proving that a trespassory tree-cutting was willful or malicious and that treble damages are in order takes a case outside of insurance coverage. (Ins. Code, § 533.) As a result, homeowner's insurance companies typically defend their insureds under a reservation of rights.

More often than not, the destruction of a tree will not diminish the value of a parcel of property. Nevertheless, the tree owner may recover the "aesthetic value" of a tree if: (1) the owner has a "personal reason" for restoring his or her property to its original condition, and (2) restoration costs are unreasonable in relation to the damage inflicted and the value of the property before the trespass and cutting. (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858.)

Believe it or not, there is a formal method of appraising the aesthetic value of trees. It is based on the application of a formula that takes a tree's species, size, location, and pre-cutting condition into account. In other words, appraising trees is similar to appraising automobiles. There are a number of experts who make a good deal of money applying the appraisal formula for attorneys and insurance companies.

Despite the above statutes and case law, tree lawsuits are neighbor disputes. Neighbor disputes are particularly nasty. People who are ordinarily rational and nice turn into monsters when it comes to their own property. Often, clients are best served by directing tree cases to a mediator who has patience and understands that emotions are driving the parties.

A mediator has done a good job when the case has settled and neither the tree owner nor the tree cutter emerged from the mediation happy. Hopefully, the two will be civil to one another, or at least ignore one another, the next time they encounter each other while taking their trash cans to the curb or while retrieving their morning newspapers.

Randall S. Stamen is a sole practitioner in Riverside and an International Society of Arboriculture Certified Arborist. Randy is the author of California Arboriculture Law. A large portion of his practice involves tree-related litigation and risk management.

Opposing Counsel: Arthur L. Littleworth

by Jason Ackerman

In a corner office with views of the historic Mission Inn, Arthur L. Littleworth works thoughtfully and diligently at the law firm Best Best & Krieger LLP, as he has done for more than 55 years. Conspicuously absent from Art's desk, which previously belonged to Riverside founding father and former Judge John W. North, is any sign of a computer. Times have changed, but not that much.

Art grew up in Los Angeles, went to Yale, having won the Pacific Coast Regional Scholarship, served in the Navy in World War II, and then went back to Yale Law School. He was about to take a job in one of the large L.A. firms when he met Gerry Brown (later Presiding Justice of the San Diego Court of Appeal), who encouraged him to come out to Riverside on a Sunday to meet the other BB&K partners in their homes. The firm at that time had only four practicing lawyers. Art was attracted to Riverside, then a community of about 45,000 people surrounded by orange groves and vineyards, seeing it as a good place to raise a family. Moreover, he said, the lawyers in the firm were clearly top-notch, and he was impressed by their dedication to the community.

Art carried on the firm tradition of community service, serving on the Board of the Riverside Unified School District from 1958 to 1972, and holding the office of President from 1962 through 1972. Those were tumultuous times to be in that position. In 1954, the United States Supreme Court had delivered its opinion in *Brown v. Board of Education*,[1] requiring the elimination of race-based "separate but equal" accommodations, and local governments and school districts were continuing to grapple with how to implement the mandates of integration. In an effort to advance integration, the California Supreme Court had also recognized the inherent authority of school districts to take affirmative measures to eliminate "de facto" segregation resulting from neighborhood residential patterns.[2] Riverside Unified took action to implement these high court pronouncements. In 1965, racial tension reached a boiling point when the Watts Riots broke out in Los Angeles, and the effects reverberated throughout Southern California. In August 1965, Lowell Elementary School, a predominately African-American school in Riverside, was burned to the ground, and many civil rights activists from the community and around the country converged upon Riverside demanding immediate integration. A racially charged school boycott was organized, and threats of more violence were prevalent. Art met tirelessly with community and civil rights leaders to work out a solution. Art's good nature and ability to find reasonable compromise allowed him to end the school boycott and restore order. He spent much of the next year working to continue earning the trust of the whole community so that the integration measures would be successful.

During his tenure with the school district, schools were integrated at a pace that was unprecedented in the state. In recognition of the importance of education to the community and to each individual child, barriers were broken that separated children of similar age and qualifications solely on the basis of race. Among other things, the school district organized busing programs that helped to implement the integration measures. These efforts not only proved to be successful, but earned the overwhelming support of all elements of the community.

Recently, Art received the Federal Bar Association's Erwin Chemerinsky Defender of the Constitution Award for his efforts in integrating the Riverside schools. The award recognizes outstanding members of the local legal community who demonstrate an unyielding commitment to protecting the freedoms enshrined in the United States Constitution. The Honorable Virginia A. Phillips, United States District Judge, presented the award to Art. Reflecting on the award and his other public service, Art said that he is most proud of the fact that he had a role in bringing the community of Riverside closer together as one people.

In addition to his many contributions to Riverside, Art is an accomplished lawyer who has established a remarkable reputation in the field of water and environmental law. He has been involved in virtually all of the major water rights litigation in recent years. He was lead counsel for the State Water Contractors, representing some 20 million users in the early phases of the Delta proceedings before the State Water Resources Control Board. These proceedings determined the amount of water that can be exported from the Delta. He has been, and is, water rights counsel to numerous water districts and cities, as well as to private developers such as the Irvine Company.

Awareness of Art's knowledge and skill in the field of water law has spread beyond the State of California. One Saturday morning in 1987, Art received a telephone call at his home from United States Supreme Court Justice Byron White. Justice White explained that a case of origi-

Peggy and Arthur Littleworth

Judge Virginia Phillips, Arthur Littleworth, Prof. Erwin Chemerinsky and Judge Stephen Larson

Photos courtesy of Jacqueline Carey Wilson

Peggy Littleworth, Arthur Littleworth and Judge Virginia Phillips

nal jurisdiction had been filed between the State of Kansas and the State of Colorado. The dispute involved the allocation of water from the Arkansas River, with Kansas alleging that Colorado was materially depleting water otherwise available for use by Kansas in violation of an interstate compact. Justice White was calling Art on behalf of the U.S. Supreme Court to ask Art if he would be willing to serve as the Special Master in the case. At that time, Art did not know that the case would still be in his hands today.

Over the course of the next several years, Art tried the case in the federal Court of Appeals courtroom in Pasadena. The case was bifurcated into a liability phase and a remedies phase. In the liability phase, Art concluded that Colorado had violated the Arkansas River Compact because post-Compact well pumping in Colorado had materially depleted the usable flow into Kansas. Art's initial report to the Court detailing his findings and recommendations was over 600 pages. In an opinion delivered by Chief Justice William Rehnquist, the U.S. Supreme Court unanimously agreed with Art's disposition of the liability issues.[3]

In the remedies phase, Art submitted two additional reports. For the first time in a case of this kind, he concluded that money damages based on losses sustained by individual Kansas farmers should be allowed, and that such an award did not violate the Eleventh Amendment because Kansas had a direct interest in the lawsuit. Establishing another precedent, he also concluded that prejudgment interest was appropriate, and that interest should accrue from 1969, the year that Colorado knew or should have known that it was violating the Compact. In reviewing the report, the U.S. Supreme Court unanimously agreed with all of his findings and recommendations, except on the issue of the date from which interest should accrue. Justice O'Connor, Justice Scalia and Justice Thomas took the position that pre-judgment interest should not be awarded, not because it was legally improper, but because it was not in the minds of the framers when the Compact was negotiated. Justice Kennedy and Chief Justice Rehnquist were of the opinion that pre-judgment interest should run from the date of the filing of the complaint, i.e., 1985. Justice Souter, Justice Ginsberg, Justice Breyer and Justice Stevens agreed with Art's view that interest should run from the time when Colorado knew or should have known that it was violating the Compact. However, in order to produce a majority opinion for a judgment, the four Justices who agreed with Art voted to endorse the position expressed by Justice Kennedy and Chief Justice Rehnquist.[4]

Art continues to serve as Special Master in this case, and the final decree is being prepared, a voluminous document detailing how the Compact will be administered in the future. Indeed, it is his dedication to the law that has enabled him to be named by the *Daily Journal* as one of the top 100 lawyers in the state. Looking to the future, Art shows no sign of slowing down, and we hope that he will continue his practice as he has done in the past.

Jason Ackerman is an associate in the Riverside office of Best Best & Krieger LLP, where he is a member of the Environmental & Natural Resources Practice Group.

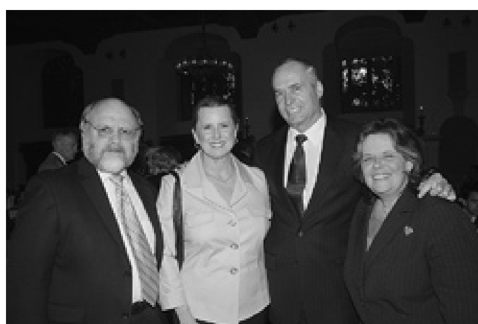
1 Brown v. Board of Education (1954) 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873.

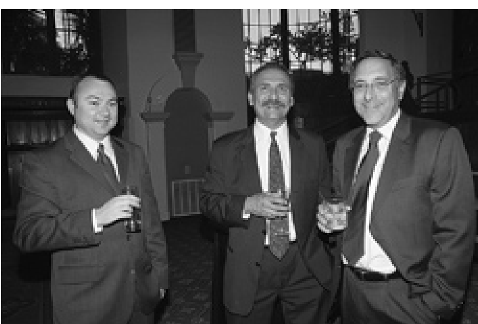
2 See Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876.

3 Kansas v. Colorado (2004) 543 U.S. 86 [125 S.Ct. 526, 160 L.Ed.2d 418].

4 Ibid.

Wortz Distinguished Speakers Series–May 31, 2007





Photographs by Michael J. Elderman.

Enrobement Ceremony for the Honorable Mark Petersen

Photographs by Robyn Lewis

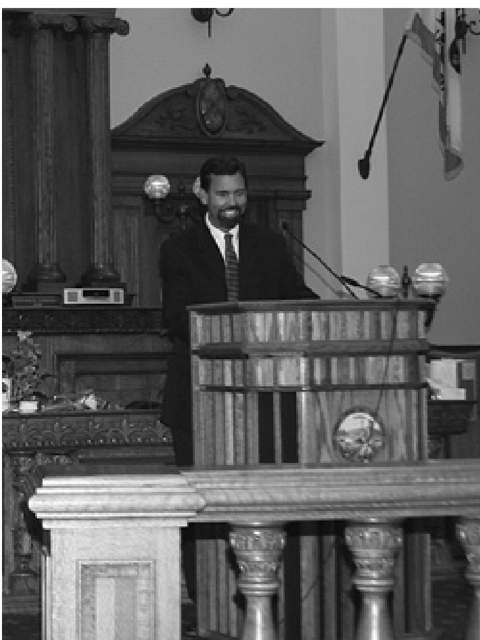
Heather Henry singing "God Bless America"

Mark Petersen being sworn in by Presiding Judge Richard Fields

Comments by Attorney Donald Steier

Comments by Attorney Samra Roth

Enrobing by Lourdes Petersen and Darlene Petersen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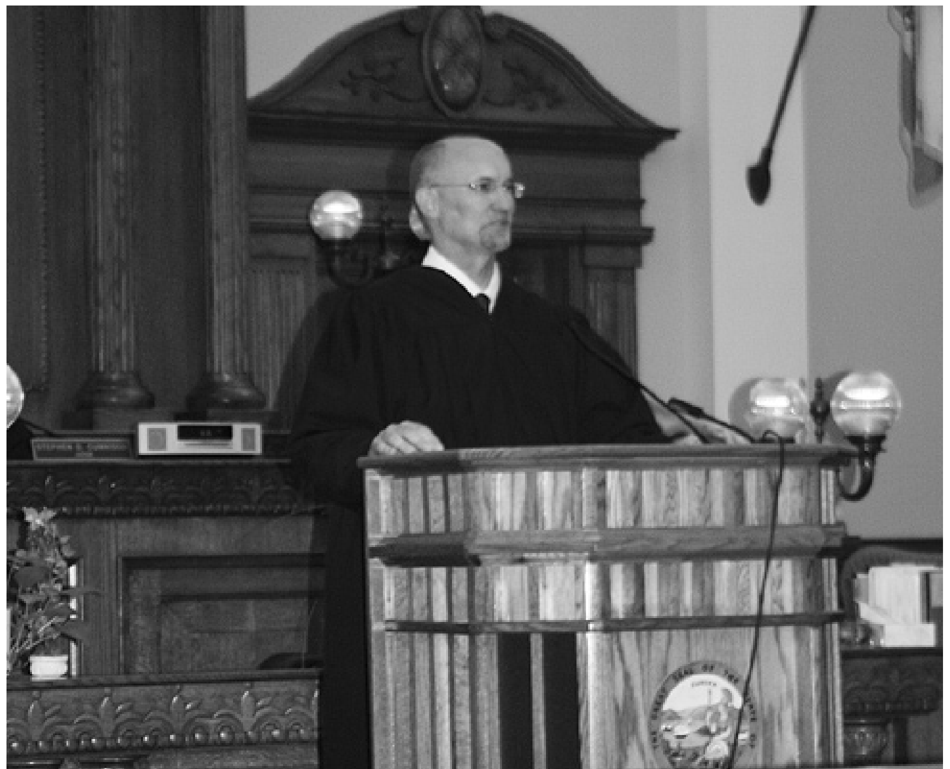
Judge Mark Petersen

Riverside County Rededicates 1933 Addition to the Historic Courthouse

Photographs by Robyn Lewis

The reopening of the 1933 addition of the Riverside County Court House was commemorated on Thursday, June 7, 2007, with a rededication ceremony held in the courthouse rotunda. Riverside County executive officer Larry Parrish presided as master of ceremonies at the event hosted by Riverside County Facilities Management. The ceremony featured remarks by John Tavaglione, Chairman of the Riverside County Board of Supervisors, Richard Fields, Presiding Judge of the Riverside Superior Court, and Douglas Miller, Associate Justice of the Court of Appeal, and a ribbon-cutting by county and court officials.

The courthouse, damaged by earthquakes in 1992 and 1994, was closed for refurbishing and seismic improvements in 1994. When the main portion of the building reopened in 1998, the 1933 addition remained closed for lack of funding to finish the project. The court's executive offices, a clerk's office, and human resources, fiscal services, and legal research divisions will occupy the space.

Justice Douglas Miller, Court of Appeal, 4th District Div. 2

Reception in Courthouse Rotunda

Ribbon Cutting by Judge Sharon Waters, Presiding Judge Richard Fields, Justice Douglas Miller, Supervisor John Tavaglione

RCBA President David Bristow (right) and Secretary Harlan Kistler

John Tavaglione, Chairman, 2nd District Supervisor

Presiding Judge Richard Fields

Historic Courthouse Rotunda

Barristers

by John D. Higginbotham

On behalf of the entire Barristers Board, I want to thank everyone who participated this year, from the judges and seasoned attorneys who donated their time to teach us a thing or two, to the many attorneys, young and older, who attended our monthly meetings. We had a terrific year. All of the speakers were excellent, and we had the best attendance that I can remember. The year ended with a bang, with Mark Easter illustrating a point about being prepared for expert depositions by explaining how he learned (the hard way) that bulls are necessary to the successful operation of a dairy farm, and that being a bull would be a pretty good gig. As those of you who know Mark can probably imagine, it was hilarious.

I am grateful for having had the opportunity to serve on the Barristers Board for the past several years, and I look forward to continuing to serve as a member of the RCBA Board in the years ahead. I would encourage everyone who hasn't come to Barristers yet to give it a try this upcoming year. The speakers are great. The food is good, and so is the company. It is a wonderful way to network, and to earn some free and easy MCLE. We have an excellent Board this upcoming year, and I'm sure they will do a terrific job. The meetings are always on the second Wednesday of each month, from October through June, at 6 p.m., at the Cask 'n Cleaver on University Avenue. Come on out! You'll be glad you did.

John Higginbotham is a Partner in Best Best & Krieger LLP's Riverside office. He practices exclusively in the area of litigation, with an emphasis on business, employment, and construction litigation.

Vacancy in DRS Board of Directors

by Geoffrey H. Hopper

For those who are not familiar with RCBA Dispute Resolution Service, Inc. (DRS), it is a nonprofit corporation which has been associated from its inception with the Riverside County Bar Association. It provides arbitration and mediation services directly to the public. It also has a contract with the County of Riverside to provide mediation services for parties participating in court proceedings.

As all individuals who have ever been members of the Board of Directors of DRS are aware, this is one of the easiest Board of Directors positions to hold. This is for many reasons, including the fact that we have an outstanding staff that makes all the board members look very good. Our meetings typically take place once every three or four months and last an hour to an hour and a half on the average, and you get a great free lunch; on top of that, all our board members sincerely believe that we are providing a great service to the community, which makes us all feel quite proud. It is for all of these reasons, I believe, that we have a very low turnover on our Board of Directors, which consists of seven individuals.

It has been a while since we have had a vacancy to fill on our board, and therefore we are putting out notice for this one opening. In the past, we have typically received numerous applications for a single position, as we anticipate will be the case in this situation, and therefore we are requesting that, if you have an interest in applying, you submit not only a cover letter, but also a résumé to be screened by our Board of Directors. If interested, please respond before August 10th by sending your cover letter and any accompanying attachments you deem appropriate to: Lisa Yang, RCBA Dispute Resolution Service, 4129 Main Street, Suite 100, Riverside, CA 92501.

Geoffrey Hopper, of Geoffrey H. Hopper & Associates in Redlands, specializes in labor and employment law, serves as President of the RCBA Dispute Resolution Service and also is a Past President of the Riverside County Bar Association.

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September 1, 2007 – August 31, 2008

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Conference Rooms Available

Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlotte at the RCBA, (951) 682-1015 or charlotte@riversidecountybar.com.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective July 30, 2007.

Rachel A. Chapman (A) – Penny Bail Bonds, Murrieta

Steven G. Counelis – Office of the District Attorney, Riverside

Peter J. Daniels – Sole Practitioner, Riverside

Gary Philip Dufour – Sole Practitioner, Rancho Cucamonga

Michael L. Duncan – Sole Practitioner, Riverside

Jeffrey R. Erickson – LaFollette Johnson, et al., Riverside

Lawrence LaRocca – Sole Practitioner, Riverside

David S. Lee, Jr. – Reid & Hellyer, Redlands

Ryan P. McClure – Sole Practitioner, Chino Hills

Amy M. Oakden – Grace Hollis, et al., Temecula

Jamie Ostroff – Slovak Baron & Empey LLP, Palm Springs

(A) Designates Affiliate Member