

# Atchafalaya Floodway: A Memoir

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*This is both a legal history and a memoir of an environmental controversy that consumed South Louisiana for more than a decade, some fifty years ago. It seems urgent to record now because several of the key players have passed on, others are on the brink, and the memories of those left standing are fading. One testimony to the intensity of this struggle is that such vivid recollections still remain. Every effort has been made to include them here, including perspectives that did not jibe with my own. The result is an unusual form of history, and although the lawsuit was its trigger, the outcome required so much more.*

This story is about a lawsuit that was never filed but wound up saving the largest cypress forest in America. The fate of the Atchafalaya swamp was the hottest environmental issue in Louisiana for its time and drew a cast of characters ranging from Sierra Clubbers and hook-and-bullet sportsmen to private landowners, three state Governors, several federal agencies, and a congressional delegation joined at the hip to the activity in contest.<sup>1</sup> Front and center when I became involved were the U.S. Army Corps of Engineers, flying high at the time with the momentum of a multi-billion dollar project to save the City of New Orleans on its hands, and a World War II airman who had been shot down several times, was one of the first into the death camps of Dachau and Buchenwald, and brought a fear-nothing tenacity to the table. His name was Charlie Bosch, a big man with an alligator grin and the sole credential of heading up the Louisiana Wildlife Federation.<sup>2</sup>

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1. See generally, MARTIN REUSS, DESIGNING THE BAYOUS: THE CONTROL OF THE ATCHAFALAYA BASIN FROM 1800-1995 (1998) (a complete history of the Atchafalaya from its early geography to the running controversy over its management written by an Army Corps historian); see also JOHN MCPHEE, THE CONTROL OF NATURE 3-92 (1989) (another more synoptic view focused primarily on the Old River Control structure at the top of the basin with glimpses of several actors in the floodway saga).

2. Telephone interview with Jackie Bosch (May 20, 2020) [<https://perma.cc/S5AJ-VZ XV?type=image>]. Jackie married Charlie Bosch shortly after World War II, and later said that he “worked like a donkey for the Louisiana Wildlife Federation, traveling all over the state.” While

The scene opens at the headquarters of the Corps New Orleans District in late 1971. It was not the imposing, convention center-like building that tops the levee today (the only building in Louisiana allowed to do so). Instead, it consisted of two Quonset huts and a concrete rectangle with outfall pipes that discharged directly into the Mississippi. Their one amenity was a coffee machine rim-full of chicory coffee that settled into sludge as the day went on. I was there with Charlie, and our reception ranged from curiosity to disbelief that a young lawyer from Washington, D.C, who knew nothing about engineering and nothing about Louisiana, would be telling them what we all were going to do together.

By the time I had endured an elaborate dog-and-pony show about the importance of the District, replete with slideshows of its many projects, my stomach was in full rebellion against several cups of chicory and my head buzzing from cigarettes I had learned to smoke from off-duty policemen while serving as a prosecutor.<sup>3</sup> The meeting, which we expected to be with the District Engineer, turned out to be a gathering of all his staff, standing room only. They were not there for the slideshow. They were there to see a creature they had only heard of up to now: an environmental lawyer. From Washington, no less. My journey to this room had been equally bizarre. It began with a phone call insisting I come down and save the “chafalai.”

The Atchafalaya is a menacing stretch of water running from the Mississippi to the Gulf of Mexico.<sup>4</sup> At one point it had *been* the Mississippi, and as a faster gradient to the coast, it was now poised to reclaim that prize.<sup>5</sup> Following the great flood of 1927—which drowned hundreds of Louisianans and all but New Orleans itself—Congress directed the Corps to convert the Atchafalaya into an escape valve, a floodway funneling high water from the Mississippi safely to the Gulf.<sup>6</sup> The engineers began construction at the top with guide levees some twenty miles apart, interior levees walling off the river itself, and a 60,000-square-foot dredged canal down the middle to speed it south. What didn’t come

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Charlie never talked about the War in detail, he did tell her about his air force assignment and the Nazi death camps.

3. The author served as an Assistant U.S. Attorney in Washington, D.C. from 1967 to 1971, at which time he joined the National Wildlife Federation as counsel. See Oliver A. Houck, CV (Mar. 2019) <https://law.tulane.edu/sites/law.tulane.edu/files/Files/FacultyCVs/Houck%20CV%202019.pdf> [<https://perma.cc/U7JW-SJ87?type=image>].

4. The description of the Atchafalaya and its floodway development that follows that follows is taken from REUSS, *supra* note 1, at 137-201, 249-72.

5. *Id.* at 12.

6. *Id.* at 139.

up on Corps radar was that the interior levees and the enlarged channel would be drying up and opening to development the very land they would be inundating when the floodway was called into play. As for environmental effects, the cypress forest was going to be history. This was the prospect that haunted Charlie Bosch, an avid fisherman, duck hunter, and closet greenie, drawing him into the game.

He came in late. The Corps had already sealed off the upper portion of the river and dredged it deep. There were no restrictions on development. In authorizing the project back in 1928, and subsequently, Congress acceded to the interests of private landowners by including the purchase of flowage easements and no more, leading to a landscape that, on one wing, now featured soybean barns, small towns, and schools.<sup>7</sup> One burgeoning development when I arrived was called Atchafalaya Acres. It would be hard to blame the Engineers. Given their marching orders, this result was inevitable.

What remained wet and wild for the Atchafalaya was the lower half of the basin, some half million acres in all, a brooding forest of cypress trees rising straight from the water whose branches shaded the bayous and whose lakes produced a year-round fishery with hoop nets and trot lines for paddlefish, catfish, and gaspergou, and a crawfish harvest that led the nation.<sup>8</sup> The low-sill houses of fishermen bordered the floodway in a line, flatboats up on trailers, and they worked the swamp hard. Off season they took jobs on oil rigs in the Gulf, the brims of their cloth hats turned backward to accommodate, depending on the month, either a welder's mask or the buffeting winds of their boats speeding toward crawfish traps under the Cypress trees. They were a signature mark of the Basin. The roar of their motors and those of thousands of Louisiana sport fishers filled levee-side parking lots and put-ins along the floodway. This is where much of the Atchafalaya fight arose, and there was no law for them or anyone else to hang onto. Then suddenly, there was.

In the closing days of 1969, with little fanfare, Congress passed the National Environmental Policy Act (aka NEPA), which caught many

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7. *Id.* at 188-203. Congress, after a running debate, eventually authorized flowage easements that cover both the West Atchafalaya and the Lower Atchafalaya Floodways, but included proscriptions on buildings in the Morganza Floodway, which would be more frequently used. *Id.* As a result, development in the West Atchafalaya boomed, while the Morganza remained restrained, although actual restrictions were viewed as discretionary.

8. *Id.* at 137-201, 249-72.

federal agencies by surprise, none more so than the Army Corps.<sup>9</sup> Up and down the line the Corps refused to comply with the Act's principal requirement, the preparation of an Environmental Impact Statement, arguing that it was exempt because Congress had already authorized its projects. The first court to review this position thought otherwise, leading to an injunction against another large and favored project, the Cross Florida Barge Canal (through the Everglades, effectively cutting the state of Florida in two).<sup>10</sup> A bouquet of similar lawsuits followed, each catching projects like the Atchafalaya Floodway midstream.<sup>11</sup> It was at this juncture that I received the long-distance call from Bosch saying he wanted me to come down and save the chafalai. I'd no idea whether this was a fish, a duck, or his favorite bar. Charlie led the National Wildlife Federation's state affiliate, however, and without an inkling of what I was getting into, I said "sure."

Having ascertained there was indeed a Corps project here and that it had no impact statement, I told my partner, Bob Kennan, that a NEPA suit would be a laydown.

"And then, what?" Bob said.

The question took me aback.

"After you win your decision, they write an impact statement. What's that get us?"

While I groped for an answer he went on: "Why don't we take it to the Chief of Engineers downtown? See if he'd like to make a deal."

And so, in early October 1971, we drafted a letter from Tom Kimball, the Federation CEO, to Lieutenant General Frank Clarke, telling him that an impact statement on the Atchafalaya project was overdue, and also offering us both the opportunity to "re-evaluate" the project and "explore alternatives that could meet both of our objectives in flood control and environmental protection."<sup>12</sup> In the meantime, we added as if it were a given, "during the course of this review" no action would be taken to

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9. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (1969). For the impact statement requirement, which was to be implemented "to the fullest extent possible," *see id.* § 4332(C)(1), i, 4332(D).

10. *Env't Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 324 F. Supp. 878, 882-83 (D.D.C. 1971) (rejecting the Corps' defense of congressional authorization).

11. *See, e.g., Env't Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 325 F. Supp. 749 (E.D. Ark. 1971), *aff'd*, 470 F. 2d 298 (8th Cir. 1972) (Cossatot River); *see also Env't Def. Fund, Inc. v. Froehlke*, 348 F.Supp. 338 (W. D. Mo. 1972), *aff'd* 473 F.2d 346 (8th Cir. 1972) (Truman Dam); *see also Akers v. Resor*, 339 F. Supp. 1375 (W.D. Tenn. 1972) (Obion-Forked Deer).

12. Letter from Thomas L. Kimball, Exec. Dir., Nat'l Wildlife Fed'n, to Lieutenant General F. J. Clarke, Chief of Eng'rs, U.S. Army Corps of Eng'rs (Oct. 12, 1971) [<https://perma.cc/4P8K-QMC5?type=image>].

compromise “those values we are trying to identify and protect.”<sup>13</sup> In effect, we were asking for an open-ended restraining order on the largest Corps project in the country.

It was a bold ask, but it came from an organization with a good reputation in D.C., and for the Corps it provided a way out of another major NEPA defeat. In early December General Clarke replied: “[W]e are in agreement on the specific central areas of understanding listed in your memorandum,” he wrote, and “welcome the National Wildlife Federation’s offer of assistance” in the preparation of the impact study. By separate letter he was asking Major General Noble, Chief of the Lower Mississippi Division, “to devote his personal attention” to the necessary steps to follow.<sup>14</sup> The next step would be the meeting of Charlie and me with the New Orleans District, now under orders to work with us. It was the beginning of a stormy relationship, at one point leading to the preparation of a formal litigation complaint that we showed to Corps counsel . . . but never filed. It hung over the project for a decade.

The District’s perspective, as might be expected, was quite different from ours: to have as little to do with the Wildlife Federation as possible, to get help on environmental issues, and to keep our hands off the project the Corps had designed and been implementing for half a century. To its mind, we were writing a document about impacts, period. During our first meeting, Charlie noticed that Colonel Richard Hunt, then in command, drew a small box on the sheet of paper in front of him and spent the rest of my presentation filling it in, over and over, his pencil never straying from the frame. Looking back, he was quite inadvertently telling us something. Charlie himself had another impression. Describing the meeting and me with wonder to his friend Vic Lambou, he said, “*the man talked for hour and he never looked at his notes.*”<sup>15</sup> One never knows what sticks in the mind.

It took me no long while to understand that our principal adversary in the District was the Chief of its Engineering Division, Fred Chatry, who was totally committed to this project, his life’s work, and who was lawyer-like in his ability to argue facts and language as he chose. He was seconded by the District’s Congressional Liaison, Buzzy Dodd, who had taken me aside when the first meeting ended to say in a hoarse whisper, as if sharing

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13. Letter of F. J. Clarke, Chief of Engineers to Thomas L. Kimball (Dec. 6, 1971) [<https://perma.cc/4P8K-QMC5?type=image>].

14. *Id.*

15. Conversation with Victor Lambou, Environmental Protection Agency, following first meeting with New Orleans District (Jan. 1972) (notes on file with the author).

a confidence, “We’re going to build a Ruhr Valley along the Atchafalaya, bigger than the Mississippi corridor!” As Colonel Hunt approached us, Dodd told me in a louder voice, facing the Colonel directly now, that his particular job was to keep the District Engineer “out of trouble with Capitol Hill,” particularly if he wanted promotion to a higher rank. Hunt took it stoically; it was the simple truth. As a practical matter, Chatry and Dodd outranked the Colonel, who was into a standard three-year rotation. They had been there long before him and would be there after he was gone.

Some years later, it would take two remarkable District Engineers to break the mold. The first, Colonel E.R. Heiberg (“Vald”) went on to become a four-star general and Chief of Engineers. The second, Colonel Thomas Sands, retired as a lieutenant general and chief of the all-powerful Lower Mississippi Division. Among other things, they listened. In the interval between them, however, there were Corps officers in New Orleans and up the line who wanted nothing to do with the Wildlife Federation or the agreement with General Clarke.

Predictably, then, the action in New Orleans quickly dissolved into guerilla warfare, for which we were badly outgunned. We needed some semblance of engineering expertise and the off-setting power of other federal agencies. Luck was in our corner. We discovered a recent LSU doctoral dissertation by Kermit Hebert called “The Flood Control Capabilities of the Atchafalaya Basin Floodway.”<sup>16</sup> With bullet-proof charts and tables, he had concluded that its riverside levees and dredging would encourage private development in the floodway, present a significant conflict with public interests in wildlife and fisheries, and that work on the center channel should be “terminated” in order to allow it to reach its natural cross-section<sup>17</sup> . . . lest the Corps be dredging out new sediment deposits forever.

Needless to say, none of these conclusions pleased the Engineers, and Hebert had to find out-of-state employment. When I called him up, however, he was quite willing to participate, leaving the question of how to compensate him. Pushing my luck, I requested that the Corps fund his work, which was like asking the agency to fund its own saboteur. Insisting that an independent view was necessary for a successful impact statement, I called Washington and the word came down: Do it. Over the next few years, this became standard practice when things got sticky in New Orleans. By another stroke of luck, Dr. Ben Dysart, a Wildlife Federation

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16. See generally Kermit L. Hebert, *The Flood Control Capabilities of the Atchafalaya Floodway* (Apr. 1967) (Ph.D. dissertation, Louisiana State University).

17. *Id.* at 83, 84.

board member and Professor of Civil Engineering at Clemson University, had signed on with the Assistant Secretary of the Army, Victor Veysey, who sat above the Corps in the chain of command. Veysey was no environmentalist, but he had a penchant for facts and objectivity. Thinking back fifty years, Dysart recalled:

Veysey was an engineer himself, graduate of Cal Tech, and he had great respect for the Corps. It took him a while to realize that the respect was not mutual. A major flashpoint was the Corps' insistence that the project would not dry up the lower basin. By coincidence I received an inch-thick report from the Corps' Waterways Experimental Station in Vicksburg. Based on state-of-the-art analysis it concluded that, indeed, the project as designed would de-water the entire lower floodway in seventeen out of twenty years. This was exactly of course what the Federation and others were claiming, but it was coming from the Corps' best hydrologists instead. Presenting the report to Veysey, I said: "They're not being straight with you." Veysey replied, with reluctance, "I think I should do something about this." Shortly afterward I prepared an options memo I called the "Three Bears" for Mr. Veysey: one flatly directed the Corps to come clean on the project ("too hot"), another simply recommended it ("too cold"), and the third said they "ought" to do it ("just right"), but leaving them the fig leaf of a choice. It worked, in particular in silencing the Vicksburg Division that had dug in its heels against the whole scenario.<sup>18</sup>

Vicksburg was particularly critical of Corps money spent down in New Orleans on studies that were unrelated to flood control. Rightly so, as it turned out. The natural values of the Atchafalaya were largely unknown and completely unquantified. In 1972, the Corps and the state Department of Fish and Game conducted a User Survey, staking out more than a dozen major boat landings and, after such conventional questions as to what had been caught and how many miles driven to get here, added a new one: How much do you make an hour during the week?<sup>19</sup> Combining these "wages foregone" with the reported frequency of visits, University of North Carolina economists estimated the fish and wildlife values of the basin, by themselves, at more than \$47 million annually (over \$293 million today).<sup>20</sup> Peripheral research to be sure, but it made headlines and a headache for the project as designed.

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18. Telephone interview with Dr. Benjamin Dysart, May 13, 2020. *See also* email from Ben Dysart to Oliver A. Houck (May 7, 2020), detailing several of the same events [<https://perma.cc/QAD7-MT64?type=image>].

19. *See* Oliver A. Houck, *Good News from the Old Atchafalaya*, *FIELD & STREAM* 28, 32 (July 1973).

20. *Id.* at 32.

The search for other federal partners turned out to be easy. EPA Region VI in Dallas was in the hands of Adelene Harrison, the former mayor of Dallas and a cowboy-boots-on-the-desk Texas brand of environmentalist. Her water-quality man in Louisiana, Victor Lambou, was a friend of Charlie and already on the case. The U.S. Fish and Wildlife Service for its part had been into the Atchafalaya project since the 1950s, with its slim statutory power still sufficient to secure two lateral canals from the main channel intended to feed the backwater areas. Its principal actors in the 1970s were Bob Misso from the area office in Jackson, Mississippi, and Dave Soileau in the field office in Lafayette. As Misso later recalled:

The best thing I ever did on the Atchafalaya was hire Dave Soileau. We had both gotten our Master's degrees at LSU, and after short stints with other agencies I abandoned a Ph.D. program in Texas to join Fish and Wildlife Service. I served on, officially, the basin agency management group, but it was just a talk fest and going nowhere. The action was with Dave in Lafayette. He was the perfect hire, smart, wrote like a pro, and he was Cajun to boot, from Martinsville right next door. Whatever a fish and gamer named Soileau said about the Atchafalaya had real credibility in those parts.<sup>21</sup>

Soileau recalled:

I was teaching at Southeastern in Hammond, but in late 1973 I joined the Army Corps of Engineers. It offered rather handsome salaries for "biological types," driven by the new Environmental Protection Act. I started by writing impact statements and was soon elevated to the Atchafalaya one. Although their "single-purpose" projects were contrary to my ideals, I sucked it up and tried to meet their expectations. I was a rising star, got along with everybody, but I became more and more frustrated by their approach to flood control. I was advised not to have any contact with the environmental community. I never heard of the work you were doing with the District on the same EIS, and not even told about the meeting on the first draft in Lafayette. I began to support recommendations made by USFWS and LDWF, and was told by the Chief of Planning, Mr. Jack Roy, that if I ever spoke out against a Corps position on the Atchafalaya Project again, he would "personally see to it" that I be fired! I told him, "go for it . . . I'll see you in court," but from then on my days were numbered. So, in 1977 I called my buddy Bob Misso and asked if he could get me out of COE and into the office in Lafayette. He said yes, if I also represented FWS on the agency management group. He threw

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21. Memorandum from David Soileau (May 15, 2020) [<https://perma.cc/TF6X-ZYQA?type=image>]. Much of this memo was recaptured in a subsequent telephone interview the following day.

me into the briar patch. The Corps pretty much dominated it. The same single-purpose bullshit I already knew.<sup>22</sup>

The activities of Misso and Soileau frustrated Fred Chatry, Jack Roy, and the New Orleans District to no end. Ironically, they would go on to do the same to me in the final stages of the controversy, which were not easy for any of us.

The local environmental community, small as it was at the time, had been into the Atchafalaya well before I came, and joined the renewed action with enthusiasm. Like another gift from the sky, a young photographer named Clyde “CC” Lockwood had just cut his teeth on a 35 mm film called *Atchafalaya* with a dramatic opening (white-tailed deer leaping through the swamp kicking up sunlit spray, an alligator waiting below a low-hanging egret nest for an egg to drop . . . which it did), and an equally dramatic conclusion by the preeminent LSU ornithologist George Lowery that if the Ivory Billed Woodpecker, the missing Lord God bird of the American South, still existed it would be in the Atchafalaya swamp.<sup>23</sup> Lowery should know; he was the last living person to see one alive.<sup>24</sup> Charlie Bosch would say often and loudly, “Ollie, they find that woodpecker in there, we win!” CC’s movie made the rounds of more secondary schools, church socials, scout troops, and PTA meetings than perhaps any other film in the history of Louisiana:

Lockwood recalled:

I was born Arkansas but spent my adult life in Louisiana. I remember attending a hearing on the Atchafalaya in Morgan City and being addressed directly by an irate landowner who’d apparently seen my movie, saying “that monkey in the tree with his camera needs to go home.”

When we premiered the film at the LSU student union, we thought the 1,200-seat auditorium would swallow the attendance, but we filled it and had to turn away 400 people to boot. One of the speakers was U.S. Congressman Henson Moore and on seeing the crowd and the pro-Basin hoopla I believe he changed his tone and gave a more pro-environment talk.

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22. Telephone interview with Bob Misso (May 15, 2020) [<https://perma.cc/KXT6-G8AT?type=image>].

23. See ATCHAFALAYA: AMERICA’S LARGEST RIVER SWAMP (Cactus Clyde Productions 1977) (presenting Dr. Lowery’s hypothesis that if the Ivory Bill exists, it exists in the Atchafalaya swamp).

24. See GEORGE H. LOWERY, JR., LOUISIANA BIRDS 354-55 (1955) for a dramatic, firsthand account of Dr. Lowery’s first, and last, sighting of the Ivory Bill.

I later took him into a big rookery in the Basin, which we canoed and then had to wade to, which he much enjoyed. He was a trooper in the water.<sup>25</sup>

Meanwhile, on the west side of the floodway another die-hard fisherman and insurance salesman named Ben Skerrett approached Senator Ellender, whom he'd met on an airplane flight.<sup>26</sup> Ben was particularly wedded to a nearby lake studded with young cypress, an uncommonly beautiful place called Buffalo Cove. More than anything else, he wanted this spot protected. Ellender and others responded by authorizing an Atchafalaya Water and Land Use Plan, which led to an ill-fated Agency Management Group (AMG). When, at almost the same time, the Federation-Corps EIS study started up, the New Orleans District often fused them. This made sense of course, but I remember spending hours on the phone with Skerrett from my apartment in D.C. saying, "Ben, please, this has to be about more than Buffalo Cove or we'll lose it all."<sup>27</sup>

More than anyone on the citizen side, however, while Charlie Bosch had started things for me, and Ben Skerrett, the Johnson study, and CC Lockwood had fanned the flames, a professor of landscape architecture at LSU named Charles Fryling carried the ball to the end, an enthusiastic Sierra Club leader (favorite expression: "you betcha") and an indefatigable spokesman for saving the basin ("I showed Lockwood's film more times than he did . . . got invitations from all over the state").<sup>28</sup>

The Atchafalaya gradually caught national media attention, including two National Geographic articles<sup>29</sup> and a one-hour PBS special called "Goodbye Louisiana," narrated by Burt Lancaster with a one-minute cameo by yours truly in a pirogue under a stand of cypress saying something over-the-top like "who on God's Earth has the right to *destroy* all this?"<sup>30</sup> My alliance with Fryling became so entwined that at one point we were both interviewed by ABC News, Charlie in his Baton Rouge kitchen, me in an Atlanta airport corridor with hurrying passengers

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25. Email from Clyde Lockwood (July 7, 2020) [<https://perma.cc/H82A-KLG2?type=image>].

26. REUSS, *supra* note 1, at 260.

27. Email from Clyde Lockwood, *supra* note 25.

28. Telephone interview with Charles Fryling (May 9, 2020) [<https://perma.cc/TJL4-7KYG?type=image>].

29. See Jack & Anne Rudloe, *Trouble in Bayou Country, Louisiana's Atchafalaya* NAT'L GEOGRAPHIC, Sept. 1979, at 377. For its enduring appeal see *Atchafalaya*, NAT'L GEOGRAPHIC, Sept. 1989, and Andrew Nelson, *Louisiana Three Stories: Atchafalaya Swamp*, NAT'L GEOGRAPHIC (Nov. 3, 2014), <https://www.nationalgeographic.com/travel/intelligent-travel/2014/11/03/louisiana-three-ways-atchafalaya-swamp/> [<https://perma.cc/FU3E-DQKN?type=image>].

30. *NOVA: Goodbye Louisiana* (PBS television broadcast, Nov. 30, 1982).

peeking around the camera, all for perhaps thirty seconds of footage that showed my face talking and underneath “Charles Fryling environmentalist.” I told Charlie afterward that it was a perfect split.

Meanwhile, I had begun commuting down to Louisiana about every two months for a running skirmish with Chatry, Roy, et al. at the New Orleans District. I stayed at the swank Monteleone Hotel at a bargain rate; they assumed that the National Wildlife Federation was a federal agency, a mistake I accepted as a form of charitable giving. Several of us would meet in my room the evening before our official meetings, sitting on the bed and chairs, talking about what issue was hot and how to respond. The media campaign was going swimmingly, the other agencies and NGOs were pulling strong oars, but we were still with the Corps District where we had last left it, with the District happy to receive our environmental information but loathe to consider any changes of plan. We had not been able to move the District, but there was another legal card to play.

One would think that an environmental impact statement would be about just that, describing a project’s impacts, but there was more. Recognizing that NEPA would need a second vehicle to change entrenched agency policies “while alternative solutions remained available,”<sup>31</sup> the Senate had made consideration of alternatives a requirement for all statements and all federal actions, the only mandate to be stated twice in the statute.<sup>32</sup> Council on Environmental Quality regulations called alternatives “the heart” of the process, and for good reason.<sup>33</sup> Alternatives routinely framed any agency decision, and when one thinks about it, nearly any decision one makes in life. The beautiful part of the NEPA requirement was that, unlike squabbles over the severity of impacts (which abounded in the Atchafalaya),<sup>34</sup> a sensible alternative could be easily grasped, including by a judge, which made it enforceable by a court of law.<sup>35</sup> But this is exactly where we did not want to go.

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31. S. Rep. No. 91-296, at 5 (1969)

32. See 43 U.S.C. §§ 4332(C)(iii), 4332(E) (2019).

33. See 40 C.F.R. § 1502.14 (2012), entitled “Alternatives including the proposed action.” (“This section is the heart of the environmental impact statement.”).

34. For the power of alternatives in the development of federal environmental policy, see generally Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. Colo. L. Rev. 773 (1989) (contrasting their effectiveness with impact-based analysis).

35. See IREUSS, *supra* note 1, at 297 (describing a “vitriolic” exchange between a timber representative arguing that birds were responsible for as much damage as dewatering the basin, to which Soileau responded “bullshit,” to which the timber man “unimaginatively” also responded, “bullshit.” Moral of the tale: environmental impacts are rarely a given).

Our strategy with the Atchafalaya from the beginning was to avoid a lawsuit that could kill our best chance for actually *getting* an alternative, not just as a consideration in an impact statement but as a new decision, and this required turning the Corps around. We had a good alternative in mind: Leave the lower Basin alone. The floodway could carry high water without riverside levees and a deep-dredged canal. However, in order to persuade the Corps to voluntarily abandon a project it had been working on for half a century, we also needed to show that its current plan wouldn't work. No mean feat. As the philosopher Freidrich Nietzsche said, "The best way to enrage people is to ask them to change their mind about you."<sup>36</sup> In this case, we were asking the entire Corps District machine.

Our first opening to do so came in January 1975 with the arrival of a new District Engineer, Colonel Elvin Rogvald ("Vald") Heiburg. A tall man with a serious face, he was a cipher to everyone in the state, but since he had come up through the ranks, I had little reason to expect anything different. Heiberg soon learned that his biggest headache was the Atchafalaya Floodway. Within weeks, he called a public hearing on a preliminary impact statement in Lafayette, not far from the western side.<sup>37</sup> It was co-sponsored by the Department of Transportation and Public Works (the state's engineers), and the plaques on the presiding dais featured the names of the two agency heads in bold letters. The hearing drew a standing-room-only crowd and blanket coverage by radio stations, television cameras, and a half-dozen newspapers, including the *New York Times*.

Scheduled for six o'clock in the evening, the first hour was consumed by a yet more elaborate show-and-tell by District personnel describing the project's structural elements and its virtually incalculable benefits to New Orleans and the surrounding parishes. Then came local politicians (all in favor), including the Mayor of Morgan City at the foot of the floodway, who wanted the channel dredged to 100,000 square feet as soon as possible, apparently oblivious to the fact that it would send 1.5 million cubic feet per second of flood water at twelve miles an hour smack into his town. They were followed by federal and state agencies in what became a cacophony of competing views. A state Public Works speaker extolled the project, fish and wildlife agencies deplored it, the Attorney

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36. See Joanne Kavenna, *Pseudonymously Yours: The Strange Case of Benjamin Black*, NEW YORKER (July 4, 2011), <https://www.newyorker.com/magazine/2011/07/11/pseudonymously-yours> [<https://perma.cc/S3WR-6FBV?type=image>] (paraphrasing a statement by Nietzsche in his treatise on human behavior, GOOD AND EVIL).

37. REUSS, *supra* note 1, at 284-85.

General's office warned that by drying up the basin, the state risked losing millions in oil and gas revenues,<sup>38</sup> and the head of a newly formed Atchafalaya Basin Commission, Sandra Thompson, a woman I'd never heard of, stated that the Governor himself was "committed" to saving the basin. Who knew?

Sandra Thompson recalled:

I came into the picture in 1970. The year before Governor McKeithen had endorsed a proposal to create an Atchafalaya National Recreation Area, but it ran into serious opposition from landowners and was going nowhere. Instead, he appointed an Atchafalaya Basin Commission headed by Secretary of State Wade O. Martin, a basin landowner himself, to "work this thing out." Martin called a big meeting of all the parties, invited the media, and soon they were all squabbling right into the noon break. Just after lunch Martin went to the front, jabbed one finger into the air, and said "one thing we will NOT have is expropriation of the Atchafalaya from the sky to the center of the earth." I was his secretary and too young to be afraid, so I wrote him a letter and left it on his desk the next morning saying that as chair of the commission he should not take sides. I waited for him to buzz me and when he did, he said: "Young lady, you are right, and would you like to assist?" I jumped at it, and I became a sort of offset to him from then on.

Under Governor Edwards, this commission was placed under Public Works. Not long afterward the Corps had a hearing in Lafayette that I attended, and when I spoke, I said that the governor was "committed" to saving the basin. I heard a few gasps of surprise behind me. I introduced a letter from him saying those very words, signed by him in pen, it was not a machine signature. Back in Baton Rouge the next day I caught some flak from Public Works about it. But the outdoor writer for the [Louisiana] *Advocate*, Mike Cook, wrote a glowing column about it praising the Governor and the die was cast.<sup>39</sup>

The hearing had been a show with no hint of consequence until, close to 10 p.m., it was finally the citizens' turn. More than 100 of us remained. I went to the mic simply to note that the Corps District personnel had left the building, as had the politicians, the state agencies, and the media, so there was no one left to talk to. Colonel Heiberg, smiling, reached over to take the Public Works name plaque and turn it face down. "You have me,"

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38. The speaker was Assistant Attorney General Fred Ellis who had successfully represented state agencies in the so-called Tidewater litigation claiming oil rights from water bottoms along the coast. He feared that if the floodway project dried up the basin those rights would disappear.

39. Telephone interview with Sandra Thompson (May 20, 2020) [<https://perma.cc/7V56-77HD?type=image>]; telephone interview with Harold Schoeffler (May 16, 2000) [<https://perma.cc/V4DJ-Z75D?type=image>].

he said, “and I will stay until you’re done.” We did, until well past midnight. Up on the dais, he made notes. One speaker with a ground-level view was Harold Schoeffler, the owner of the Cadillac dealership in Lafayette, Chair of the Sierra Club Delta Chapter, and a born storyteller.

Shoeffler recalled:

I talked about water quality. I grew up in the basin. From the time I was four while other kids were off playing baseball, I’d be catching frogs and netting fish in the swamp. A few years later my father would drop me and a friend at a nearby landing on Friday afternoon and come get us two days later. He’d made us rods out of automobile antennas; bamboo came from Japan and we were at war. The water was so clear you could see the bottom no matter how deep. It flowed overbank through the swamps and came out filtered clean. I drank from it some hot days and never got sick. When the engineers started dredging the big canals, first way up there, now down here, it all went to hell. You need to get the water quality right again.<sup>40</sup>

Given permission to close, I took a leap and said that there were obvious issues with this project and better alternatives that I hoped we could discuss further. Colonel Heiberg replied: “You are in New Orleans; why don’t you come see me?” With one gesture and a simple invitation, the earth beneath the Atchafalaya Floodway project began to shift.

The operative word here, however, is “began.” No one knows what, with a little help, Heiberg could have done, but less than year into his term he was promoted to General and given a command in Ohio. We were back to square one. In a last-ditch effort to keep his District on this new course, he invited Fred Chatry and me, with our wives, for dinner at his apartment. A more uncomfortable evening for all concerned could not have been staged. We were left groping for conversation. Toward the end, Heiberg took Chatry and me aside and said that he knew we could get along and he wanted us to do that. I think we shook hands. Then again, boxers touch gloves before a prize fight and when the prospects for a rapprochement are close to zero. In retrospect, they were doomed to stay that way. Fred had been an engineer all his life, a very successful one, and his major achievement had been moving the Atchafalaya project forward. I was disrupting all that. I was his worst nightmare. Later—much later—I would come to feel sorry for him.

The gods, in their inexplicable way, remained with us, though not at once. The next District Engineer had no appetite for the Federation or the NEPA process. At one particularly low point, he proposed splitting the

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40. Telephone interview with Harold Schoeffler, *supra* note 39.

impact statement in two, one for the authorized project and another to follow on environmental management.<sup>41</sup> I said I didn't see how it could be done without violating NEPA, and that it would be an easy challenge in court. Still wanting to keep the door open, however, I appealed it up the line and General Graves, head of the Corps Department of Civil Works, emboldened by the Veysey memorandum, sent the word "no" back down the line.<sup>42</sup> There would be but one NEPA document.

After several more years of guerilla warfare, yet another Colonel arrived, and like Heiberg, he was a departure from the norm. Thomas Sands was sandy-haired, friendly, and sharp as a tack (after retirement he became a lawyer). He also had the knack for thinking creatively and getting things done. Unknown to me until recently, he had been sent personally by the new Chief of Engineers, Jack Morris, to get the Atchafalaya problem resolved.

Sands recalled:

You owe the Atchafalaya to the Chief. General Morris told me he had a strong personal interest in the Atchafalaya and that it was the most important study in which the Corps was engaged, nationwide. I was on his staff at the time and ready to assign myself to Nashville, my hometown, but he said no. I would go to New Orleans instead. "I want you to solve this thing." The Corps had been directed to do two studies, a land and water management one and the impact statement, but the latter came with legal requirements and ultimately led to a new plan. In the District I did little on anything else but the Atchafalaya, and when I was finally promoted to a new post, I took the portfolio with me. It was clear to me that there were two "influencers" here, Newman Trowbridge for the basin landowners and you. Newman was not part of the study team, but he knew what was going on. I talked with both of you, separately, about the need to get together and "work it out."<sup>43</sup>

Whatever Sand's personal preference for the outcome—and he may not have held one—he was active and fair. He participated directly in the environmental impact statement meetings and, when he spoke, it was toward what more information was needed and consensus-building efforts. Before one such meeting, he asked a staff engineer, Billy Garrett, to take an independent cut at the hydraulics of an enlarged center channel. Garrett reported back that at 100,000 square feet it could not be sustained. At low water levels the silt would drop straight to the bottom and require

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41. REUSS, *supra* note 1, at 286-87.

42. *Id.* at 287.

43. Telephone interview with Thomas Sands (May 9, 2020) [<https://perma.cc/X4WY-T2B6?type=image>].

heroic amounts of dredging to maintain. This had been, of course, exactly the conclusion of Kermit Hebert and his Ph.D. thesis a decade earlier. Now that the channel was enlarging naturally, I hoped Sands would conclude that no more dredging was needed and that, by the same measure, no internal river levees were needed either.

The real hang-up, as it had been since 1928,<sup>44</sup> was what Corps historian Marty Reuss called the “real estate problem”: private development in the basin.<sup>45</sup> The Corps had seen the growth of so much farming infrastructure in the New Madrid Floodway that its first use provoked an uproar quelled only by the Secretary of War.<sup>46</sup> The same was now happening in the upper Atchafalaya, without any controls to stand in its way. Developments like Atchafalaya Acres were penetrating the lower basin too, along with a new refinery at Krotz Springs and a stream of land poachers near Lafayette.<sup>47</sup> The immovable obstacle, as always, was the opposition of landowners, large and small, with interests in oil and gas, timber, residential communities, and farming soybeans. A dry basin would turn \$200-an-acre property to several thousand in a heartbeat. Big money was at stake; they were poised to resist, and they had a very able lawyer.

In 1978 Patrick Rankin was working with other attorneys in New Orleans on the Atchafalaya issue. On the behalf of several environmental groups, he attended a Corps hearing at Tulane’s McAlister Auditorium on a related Atchafalaya Floodway issue, the operation of a control structure at its mouth. Environmental groups wanted it wide open, for the Basin to be “wet and wild,” while the landowners represented by Newman Trowbridge wanted it largely closed. The hearing drew a crowd. McAlister was the largest indoor venue on Tulane’s campus and it filled up early. Rankin had come in the day before to prepare.

Rankin recalled:

The night before the hearing a local TV station featured an “Atchafalaya dialogue.” I was on with a man named Schueler from the local Audubon, a field agent from the Fish and Wildlife Service, and Newman Trowbridge. We had a field day. Trowbridge had been running television ads against the environmentalists saying, “Stop the Government Takeover,” so I wrote the

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44. See REUSS, *supra* note 1, at 126-27.

45. *Id.* at 188, 324.

46. *Id.* at 190. This experience led then Chief of Engineers Edward Markham to recommend the purchase of all floodway lands in fee simple. *Id.* at 192. Once again state opposition defeated it. *Id.* at 194.

47. Telephone interview with Thomas Sands, *supra* note 43 (land poachers). The Krotz Springs refinery drew another contentious Corps public hearing described in OLIVER A. HOUCK, DOWNSTREAM TOWARD HOME 111-14 (2014).

stations a “stern lawyers’ letter” demanding equal time under the Fairness Doctrine. To my surprise, two stations agreed, so I scrambled to round up a film crew and Schueler, a woman from the Sierra Club, and an attorney named Mike Osborne. Our thirty-second spots were aired on these two stations and I think a third. It was a blast.<sup>48</sup>

Newman Trowbridge, though young in years, had an active practice in Franklin on the west side of the floodway. He was both counsel to and a member of a suite of business groups, including the Louisiana Landowners Association and the Louisiana Landowner and Royalty Owners Association, each with an axe to grind.<sup>49</sup> He was also close to Congressmen Billy Tauzin and John Breaux, both from Cajun country and, like Trowbridge, firmly opposed to wetland protection laws at any level. Indeed, we crossed paths on these issues too as the Atchafalaya controversy rolled on. Newman was handsome in the Cajun style, with a quick tongue and a sense of humor that made him all the more formidable. I am sure he thought I was a communist, particularly when it came to buying up land rights in the Atchafalaya basin.

Trowbridge’s worst fears came true when two of my allies, Soileau and Misso of the U.S. Fish and Wildlife Service, came up with a formal proposal to purchase the entire lower floodway, by condemnation where necessary, 400-thousand acres of bayous, lakes, and forest.<sup>50</sup> It was ultimately presented in a glossy brochure entitled “Atchafalaya: The Establishment of the Atchafalaya Plan for Fish, Wildlife and Multiple Use,” complete with persuasive text and attractive photos.<sup>51</sup>

Soileau recalled:

It was Bob Misso’s idea, a concept for mitigating the damaging effects of a single-purpose project. I made my move from the COE to the Lafayette Office in 1977 and we began working on fleshing it out. It’s really amazing how much support we got up the line. Our Washington office gave us a lot of rope and freed up lots of extra money that allowed us to produce our booklet. And they never did put a “chokehold” on the rope.<sup>52</sup>

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48. Telephone interview with Patrick Rankin (May 9, 2020) [<https://perma.cc/AYH9-VL FV?type=image>]; email from Patrick Rankin to author (June 23) [<https://perma.cc/ZS2N-DAHP?type=image>].

49. REUSS, *supra* note 1, at 288. The Louisiana Land and Royalty Owners Association ultimately merged with the South Louisiana Landowners Associated to form the Louisiana Landowners group.

50. *Id.* at 303. The development of this plan is described more fully at 299-305.

51. A copy of the brochure is on file with this author.

52. Memorandum from David Soileau, *supra* note 21.

Misso added:

David made it happen. Others worked on it, but he wrote our multi-purpose plan. He got help from a friend at the Stennis center in Slidell on the layout and graphics. It looked good. We peddled a PR campaign around it, and it caught on fire. We had interviews, letters, and op-eds in all the major media, three of them in one week in a newspaper in Shreveport. We were campaigning for it as far north as Bossier City. We spread it around the French Quarter. We almost won. I was told by Edwards' Chief of Staff, Charles Roemer, that Edwards was going to endorse it the following Monday, a major press event and all. He was going with the flow. We waited but it didn't happen. Roemer told me later that Newman Trowbridge had visited the Governor that weekend and said not to do it.<sup>53</sup>

Theirs was not buy-the-basin's first rodeo. Similar proposals had been made as early as the 1930s and the last one in 1970,<sup>54</sup> this time by LSU's Dr. Leslie Glasgow, a respected Professor of Forestry, former head of the state's Fish and Wildlife Commission, and then Assistant Secretary of Interior for Fish, Wildlife, and Parks.<sup>55</sup> It lasted less than a week. He recommended the creation of a National Recreation Area to Governor McKeithen, who quickly endorsed it.<sup>56</sup> Charles Fryling and the environmental community seized on it immediately, and provisions for fishing and hunting brought in the Louisiana Federation as well. It came as a total surprise to the Basin landowners, however, who put on a full court press to defeat it. The Governor had announced his endorsement on a Thursday. The following Monday he retracted it for a face-saving "reconsideration" that never happened.<sup>57</sup> Now, with the USFWS plan, it was raising its head yet again.

Trowbridge's opposition to the latest proposal was both inevitable and strident. He published a glossy brochure of his own called "The Atchafalaya Land Grab" and whipped his friends in the state legislature and on Capitol Hill into a lather.<sup>58</sup> Creeping Socialism was now no longer creeping, he said, it was running all over Louisiana. Everyone's property rights were at risk to the whims of environmentalists from Washington. No wonder that Governor Edwards, like McKeithen before him, had backed off.

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53. Telephone interview with Bob Misso, *supra* note 22.

54. See REUSS, *supra* note 1, at 167-71, 188-92 (describing earlier proposals).

55. *Id.* at 2.

56. *Id.* at 267.

57. *Id.*

58. *Id.* at 305-07.

To the Service, Fryling, and many environmentalists, however, the Service plan was still the flagship solution, the last chance to save the Basin, lock, stock, and barrel. To Colonel Sands, who'd first told Misso and Soileau he found it "interesting,"<sup>59</sup> it was in fact exactly the wrong move at the wrong time.<sup>60</sup> It could kill any chance of achieving the consensus he was looking for to resolve the Atchafalaya conflict. He resented in particular the Service's lobbying against the current project, including the postcards bombarding him from the French Quarter.<sup>61</sup>

For my own part, as highly as I thought of the proposal, I saw little chance for its survival even in Louisiana and yet less in Washington where it would have to be authorized—not with a congressional delegation tightly tied to Corps projects, financially beholden to oil, gas, timber and the landowners themselves, and firmly wedded to private property rights. Condemnation was out of the question. The plan was not likely to get a sponsor, and in no way a hearing. It would go north and die. But Bob Misso was entirely correct in one assessment: it was drawing well in Louisiana, which made what I felt I needed to do all the harder.

I reached out to Newman Trowbridge. After ten years of combat over the Atchafalaya, neither of us had an appetite for ten more. I did not want to come up empty, and as any good lawyer, Newman had to anticipate the worst case happening: a buy-out of the Basin. Although he never acknowledged it, the USFWS proposal may well have concerned him enough to explore another option and, as Bob Misso would later contend, convince him to sweeten the deal. Newman has now passed and there is no way to know, but Misso could be right on this assessment too. At this point in time, however, there was no deal at all on the horizon. There were just two lawyers in a room in Franklin, Louisiana with warring constituencies behind them, meeting in secret, trying not to lose the last decade of work.

What emerged was a compromise. The starting point was this: Suppose we did not condemn land rights across the lower basin: how could we save it in a less harsh (and, for my part, more politically viable) manner? Our first session framed this question and we retired to think it over. The second and third hammered out an answer. We would agree on the purchase of some Basin lands from willing sellers in full fee simple, targeting 50,000 acres of cypress, largely on the east side. All lands and

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59. Telephone interview with Thomas Sands, *supra* note 43; *see also* REUSS, *supra* note 1, at 303.

60. Telephone interview with Thomas Sands, *supra* note 43.

61. *Id.*

waters remaining would be covered by what we called “status quo easements,” retaining private ownership but prohibiting their conversion to agriculture, real estate, or development of any kind. Oil and gas revenues would continue to flow to the private owners, as would the right to harvest timber in a limited way that would maintain the existing environment. In retrospect, the terms seem obvious, but each one was bargained for against a background of “my clients would never accept this” and “my clients would insist on. . .” Meanwhile, while they were going on, neither of us could reveal the content of these negotiations, or even the fact of them, for fear of spooking our clients on both sides.

My professional problem here was that—other than the Wildlife Federation—I had no client. Newman had been retained by and represented a suite of individuals and organizations. I was neither retained by nor representing any of the remaining environmental community, at least some of which would not want this deal at all. I was on my own. The challenge was to present it to allies whom I knew would be surprised by it, and more than a few offended. I began with Charlie Fryling, my comrade in arms for nearly a decade. He was aghast. We spent much of an afternoon at his house. He was polite but too upset to sit down for long. He’d put so much work into this thing and I was killing his dream. He listened to my reasons, without landowner buy-in we could never win the game in Washington, but they were not convincing. I’m sure he felt betrayed. Though we remain friends, I suspect he feels so even now.

Fryling recalled:

The Atchafalaya still haunts me. This was a real blow. We were so close to purchasing the whole thing. We should have done that. We should have just bought the basin and we didn’t.<sup>62</sup>

Fryling was right; it would have been ideal. Given the failure of five identical proposals over the past fifty years (one by the Chief of Engineers himself), however, and for the same reason facing us now,<sup>63</sup> I did not see how we could make this one happen. Nor do I today.

The battle between the Service plan and the A-7 easement did not stop here. The Service continued to promote it, and I went so far as to write the Service Director Lynn Greenwalt in Washington literally begging him not to support condemnation of floodway lands.<sup>64</sup> Things came to a head in January 1980 at five Corps hearings on the final impact statement

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62. Telephone interview with Charles Fryling, *supra* note 28.

63. See note 7 (recounting the proposals) and note 44 (the Chief of Engineers Markham proposal), *supra*. They were all buy-outs and in all important respects the same.

64. REUSS, *supra* note 1, at 305.

scheduled by Colonel Sands. Leaving no room for litigation on this issue, ten alternatives were presented including the A-7 easement and the Service's multipurpose plan<sup>65</sup> with a single caveat: No individual of whatever stature could testify at more than one hearing.<sup>66</sup>

Fryling attended the first hearing in Jonesville west of the basin, along with Barry Kohl of the New Orleans Audubon Society and its regional representative, Dede Armentrout. She had paddled into the swamp with Charlie and it was all she needed. She turned out to be a serendipity. In Fryling's words she "spoke like a professional actor and had her facts down cold. If a Best Oralist medal existed she would have won it, hands down."<sup>67</sup>

Fryling, Kohl, and Armentrout had already spoken at other hearings before the last at Tulane's McAlister Auditorium (again), but they got their licks in anyway.

Fryling recalled:

Before it began Dede dressed up in a gorilla suit, mask and all, with a sign [made by Kohl and his wife] on a tall stick reading 'Sasquatch Wants to Buy the Basin.' While people and the media were still trickling in, she carried it into the building, down the center aisle, up onto the stage, and around the table where the Corps and other officials would sit, back down to the corridor and out the building followed by laughter and a swarm of press all curious about who she was and what she was saying. Like the Pied Piper. Of course, she was prepared by now from the first hearing, and again Dede stole the show. Made all the evening news, the lead-off image of the hearing.<sup>68</sup>

When the dust had settled, the hearings had heard from 533 speakers: 222 of them favored outright public acquisition, only 80 preferred the easements approach, and 208 opposed any acquisition proposal.<sup>69</sup> Now what? The final arbiter would be the Corps, but Colonel Sands was still looking for a compromise he could sell up the line and then to Congress. Deftly, he turned to the one voice remaining to be heard, that of then-Governor David Treen. Treen's Executive Assistant Kai Midboe picks up the tale:

Dave Treen was not an environmentalist, but on the basis of good government he had advocated for a coastal wetlands tax on oil and gas

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65. *Id.* at 306.

66. Telephone interview with Thomas Sands, *supra* note 43.

67. Telephone interview with Charles Fryling, *supra* note 28.

68. *Id.* This recollection was shared by Dr. Barry Kohl of the New Orleans Audubon Society who also attended the hearing; indeed, he made the sign. Telephone interview with Barry Kohl (May 11, 2020) [<https://perma.cc/QB28-YVSD?type=image>].

69. Reuss, *supra* note 1, at 306.

production to fund restoration and secured the creation of Louisiana DEQ. For him the Atchafalaya was about state authority, which in his view came with responsibility to exercise it. Tom Sands reinforced this, telling that land-use decisions belonged to the state. I had worked with Treen when he served in the House in D.C. and he asked me to join him in Baton Rouge after his election. My first job here, he told me, was to “resolve the Atchafalaya controversy.” The Governor himself went on to propose several purchase and easement arrangements, but they all had practical problems. At the time I and Newman had approached him on the 50,000-acre purchase and A-7 easement plan . . . a gift of almost the same acreage came to us from Dow Chemical. Dow had asked Treen to accept it as a credit against a mining operation to the north but when Treen refused the condition Dow gave in and made it a donation outright, giving both of them good press. David ended up supporting the Houck-Trowbridge plan. More than that, he went on to sell it to Ronald Reagan and the incoming Administration.<sup>70</sup>

There can be no doubt that Governor Treen was pivotal in providing Colonel Sands the support he needed up the Corps chain of command. He was still more important to the acquiescence of President Reagan, whose “A tree is a tree; how many are you going to need to look at?”<sup>71</sup> remark to the press while campaigning clarified his personal views, and whose new Secretary of Interior, James Watt, an evangelist who stated that conservation was not necessary because the “end times” were near,<sup>72</sup> had led a law firm in Colorado seeking to open forests and wilderness areas to mining.<sup>73</sup> Treen pursued his case with zeal. Reuss’s history shows a photograph of him holding a large map of the basin at the feet of a bemused President, a pointer on the lower Atchafalaya indicating the

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70. Telephone interview with Kai Midboe (May 19, 2020) [<https://perma.cc/67PZ-C9DG?type=image>].

71. Carl Pope, *If You’ve Seen One Redwood, You’ve Seen Them All—Not!*, HUFFPOST (July 12, 2006, 5:12 PM), [https://www.huffpost.com/entry/if-youve-seen-one-redwood\\_b\\_24927](https://www.huffpost.com/entry/if-youve-seen-one-redwood_b_24927) [<https://perma.cc/38XS-7266B?type=image>] (the statement attributed to Ronald Reagan was in fact that in the text above, saying virtually the same thing and expressing Reagan’s “hostility” to the creation of Redwood National Park in California).

72. Amy Johnson Frykholm, *What Social and Political Messages Appear in the Left Behind Books? A Literary Discussion of Millenarian Fiction*, in RAPTURE, REVELATION, AND THE END TIMES: EXPLORING THE LEFT BEHIND SERIES 176 (Bruce David Forbes & Djeanne Halgren Kilde eds., 2004) (“As a believer in the imminent rapture, Watt saw no reason to introduce policy that would protect the environment for future generations.”).

73. Watt was the founding President of the Mountain States Legal Foundation which, under the rubric of “public interest law,” was funded by, directed by, and represented major corporations opposed to environmental restrictions on the development of western public lands. See Oliver A. Houck, *With Charity for All*, 93 Yale L.J. 1415 (1984) (challenging the tax-exempt status of this and similar foundations under the IRS Code).

outline of the deal.<sup>74</sup> One man is totally engaged, the other all but looking at his watch, but the light ultimately came out green.

It seems obvious that neither man gave a fig for the basin, but they did care about maintaining the Republican grip on the American South.<sup>75</sup> If David Treen needed this to win his impending re-election campaign against a Democratic opponent, then so be it. The Reagan Administration went on to renege by refusing to appropriate moneys for the purchases.<sup>76</sup> The Governor reacted by borrowing monies from the state's refuge budget to get them going.<sup>77</sup> Treen had made the Atchafalaya his thing, and he saw it through.

The Atchafalaya and the environment more generally were big parts of Treen's campaign against Edwards, back again after a four-year hiatus by term limits, and I supported him openly as I had told him I would.<sup>78</sup> I've no idea whether this prompted what came next, but I received a surprising call from Judge Edmund Reggie, a Tulane alumnus and an Edwards friend since boyhood. The "Governor" wanted to see me. Reggie drove me up to a small motel suite in Baton Rouge that Edwards had turned into a governor's office in exile. Edwards sat in the bedroom/war room behind desk full of telephones and asked me straight out to join his campaign as his "environmental advisor," with an implied appointment as DEQ Secretary following. I refrained from pointing out that with his environmental track record I'd be committing suicide. Instead, I replied that I had already committed to Dave Treen for his work on the Atchafalaya.

This may have rankled him—one never knows, Edwin Edwards played good poker—but he invited us to stay for lunch, which he then set out to serve in the motel kitchen by washing his arms and forearms like a surgeon and then ladling out gumbo in large bowls. The conversation at the table turned back to Treen and the "precious Atchafalaya," which drew smirks from both Reggie and Gus Mijalis, the ex-governor's chauffeur and bodyguard. When I only smiled faintly, Edwards pursued by telling us that

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74. REUSS, *supra* note 1, at 342.

75. President Regan was intent on consolidating the "southern strategy" of former President Nixon, who succeeded in wooing conservative Democrats in the South that had become disaffected by their party's integration policies. See James Boyd, *Nixon's Southern Strategy: It's All in the Charts*, N.Y. TIMES, May 17, 1970.

76. Telephone interview with Kai Midboe, *supra* note 70.

77. *Id.*

78. *Inter alia*, at a celebration of the Atchafalaya at Butte Larose during his re-election campaign, I and others lavished praise on Governor Treen for his leadership on the issue and said the same to the media.

Treen's limo had been stopped for speeding in Lake Charles, and "you know what the man *did*?" . . . a pause for effect . . . "the fool *paid the ticket!*" I had to laugh at this one. It was so rich in an unintended way.<sup>79</sup>

My own personal journey was nearing an end. In order to bring closure to the Atchafalaya fight I had taken a leave of absence from the Federation in Washington, D.C. Now I needed a base with credibility behind it to make it happen. Riding back toward Baton Rouge one afternoon in hot July with Dusty Zaunbrecher, John Breaux's legislative assistant, I mused aloud about it and he said why not try a law school? It had some plausibility; I had been teaching adjunct classes in D.C. I asked where the schools were, and he said, "well, LSU is straight ahead." Without a second thought (always a bad sign), we stopped at a phone booth by the highway. I found the number in the yellow pages on a cord and called the Dean's office, trucks and cars roaring past. When he came on the line, I told him I would like to teach at LSU for at least a year. He stopped me right there. We have a hiring process. He thanked me for the call, though I'm sure he meant no such thing.

My lesson learned, the other two schools were apparently in New Orleans, so we drove on down. It was late afternoon when we rolled into Metairie. Loyola was by alphabet the first, so I called but no one answered. Summer vacations were still on. Last on the list was Tulane, and, by a streak of luck that seems to have sheltered me through life, the Dean was in.<sup>80</sup> He had just returned from overseas to find that a criminal law professor had accepted a position at Columbia. Classes started in less than twenty days. I started out by assuring the Dean that I was not looking to join the faculty, but I needed a roost for an involved case and could offer him classes in return. His first words were, "This is highly irregular!", at which point I was thinking this was LSU redux. Then he paused, reflective, and asked what I could offer. Knowing nothing about the Dean's problem but certain that environmental law was still terra incognita here, I said that I used to be a prosecutor and could do criminal law. A very

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79. I thought at the time that this story about Treen, while characteristically combative, smelled of a taste for corruption, but I have since come to suspect that it also came from Edwards' sense of the proper use of power; the Office of the Governor was not to be demeaned by trivialities. At the same time, Edwards was so confident about defeating Treen that he told the press that the only way he could lose would be if he were caught "with a dead girl or a live boy." See Pam Bordelon, *How Does 92-Year-Old Edwin Edwards See Politics Today? Too Much 'Acrimony, Hypocrisy'*, THE ADVOCATE, Aug. 9, 2019. Given his reputation with women the remark went viral, which, also characteristically, he did not seem to mind at all.

80. Paul Verkuil was Dean of Tulane Law School from 1978 to 1983, which meant that my call, and his predicament, came very early in his tenure.

long pause. Could I come by for breakfast in the morning? I certainly could.

I spent the night with Don Schueler in the French Quarter.<sup>81</sup> I'd nothing to wear but my unwashed road clothes and sneakers so Don offered me anything in the closet. There was one problem. Schueler stood at six-foot-four with the shoulders of Hercules and the legs of plastic man. That morning over coffee we tucked up the sleeves of his smallest shirt with rubber bands, cinched his pants up high with a belt, and slipped on some good-looking sandals. Waiting for me at the law school were the Dean and other professors, all of them older than me, some looking slightly amused.

I am still in New Orleans and still teaching at Tulane. The Corps of Engineers now has a formal Atchafalaya Basin management plan, watchdogged from the outside by the Atchafalaya River Keeper, a fiery Cajun named Dean Wilson. The Tulane Environmental Law Clinic represents him when things get sticky.<sup>82</sup> It is difficult to believe that a telephone call from Charlie Bosch back in 1971 would change my life so completely. It is difficult to believe that a few of us, at the beginning quite few, would be able to change the Atchafalaya Floodway plan so completely, and in no small part through a lawsuit that we never filed, but was always there.

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81. Don Schueler was a Professor of English at the University of New Orleans and led the New Orleans Audubon Society. He also played a role in the Atchafalaya controversy, his physical stature and commanding voice making for impressive hearing testimony and good media.

82. Basin management under the A-7 easement remains a tense subject over timber harvest, hydrology, and most recently cross-basin gas pipelines feeding the recent chemical industry boom. Some things never stop. See Sabrina Canfield, *Bayou Bridge Pipeline 'Trampled' Landowner Rights, Court Rules*, COURTHOUSE NEWS SERV. (July 16, 2020), <https://www.courthousenews.com/bayou-bridge-pipeline-trampled-landowner-rights-louisiana-appeals-court-rules/> [https://perma.cc/D7X3-6CDV?type=image].