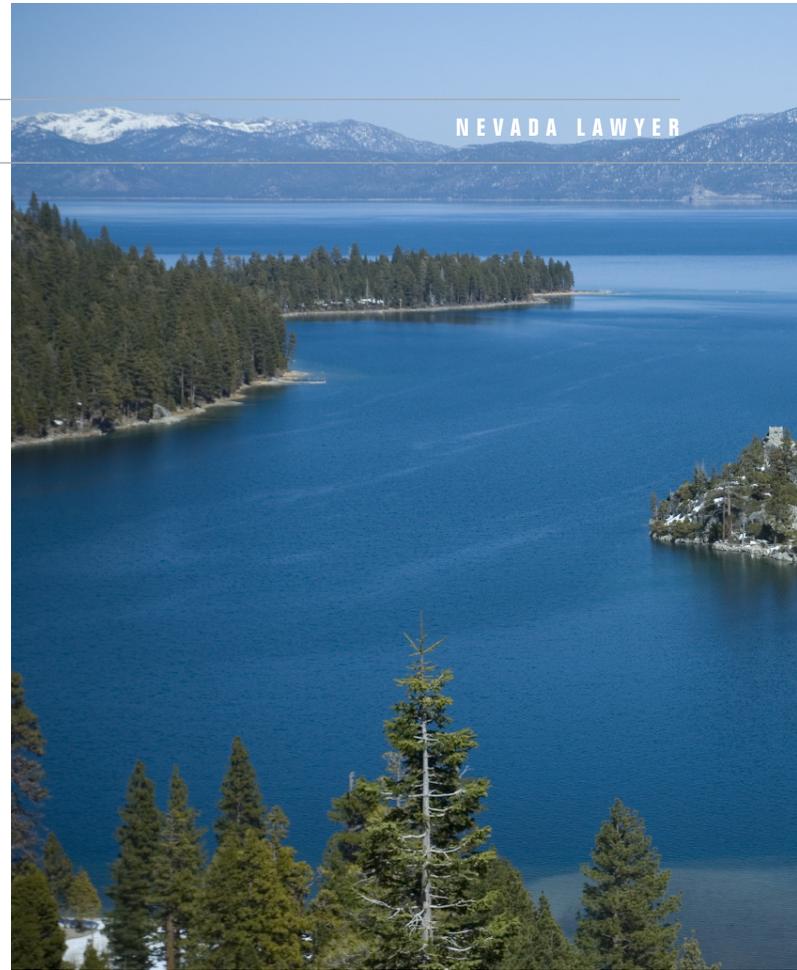


KEEPING TAHOE BLUE:

LAW, POLICY AND THE STRUGGLE TO SAVE LAKE TAHOE

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For more than a century, Lake Tahoe's iconic beauty has been a magnet for development, a flashpoint for conflict and an inspiration to its admirers to find innovative ways to work together to address the region's problems. After spending decades at the center of bitter conflict over environmental regulation and land use, Lake Tahoe emerged in 1997 as a celebrated model for cooperation among advocates for environmental conservation and economic development. That year, at the invitation of Senator Harry Reid, President Bill Clinton led a remarkable bipartisan delegation of elected officials to see the area and to hear how Lake Tahoe's friends had learned to manage disputes once thought to be intractable.



Today, however, Tahoe's approach to harmonizing conservation with economic progress has come under new pressure from a surprising quarter. The Tahoe Regional Planning Agency (TRPA), charged with charting the course for the area's future, has begun a process of permitting and promoting the intensification of development – including taller and more densely packed buildings, more concentrated areas of pavement, more buoys to accommodate far more boats, larger urban areas and new subdivisions of undeveloped land – as a means of paying for the local share of the cost of mitigating the environmental damage that continues to flow from existing development.

Conservation advocates and local residents who reject this approach find themselves profoundly at odds with the agency. As a result, contentious public hearing processes and litigation are rapidly replacing consensus talks among interested stakeholders and government entities as the preferred mode of conflict resolution in the basin.

Can Tahoe's once-admired process of consensus-building be restored in this era of new challenges? This article argues that such a restoration is possible. It calls for the recognition of Lake Tahoe's highest and best use as a place open to all, for inspiration and recreation, and for a renewed commitment to passing it on, unimpaired, to future generations. A return to these foundational policies, as embodied in the Tahoe Regional Planning Compact, and their application through existing law governing Lake

“At last the lake burst upon us – a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snow-clad mountain peaks that towered aloft three thousand feet higher still! As it lay there with the shadows of the mountains brilliantly photographed upon its still surface, I thought it must surely be the fairest picture the whole world affords.”

– Mark Twain

or natural value[s] of the region or to maintain public health and safety within the region.” Finally, it empowers and charges TRPA “to adopt and enforce a regional plan and implementing ordinances, which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent with such capacities.”

B. The Adoption of the Thresholds through Resolution 82-11

The governing board of TRPA unanimously adopted environmental threshold carrying capacities (thresholds) for the region, by its resolution 82-11, on August 26, 1982, following many public hearings and the preparation of an Environmental Impact Statement. The unanimity of the agency’s board on the matter represented an extraordinary achievement, given the level of conflict over policy that existed among its members. In addition to the five threshold areas specified by the compact – air quality, water quality, soil conservation, vegetation and noise – TRPA adopted thresholds for wildlife, fisheries, recreation and scenic resources. For each threshold area, a number of metrics to be measured (threshold indicators) was designated.

CONTINUED ON PAGE 22 ►

Tahoe, offers the best path back to broad agreement on how to care for this acclaimed resource to the benefit of all.

Background

A. Governing Law: the Tahoe Regional Planning Compact

For 40 years, the states of California and Nevada have been parties to the Tahoe Regional Planning Compact, authorized by Congress, pursuant to the Compact Clause of the United States Constitution. The compact, as extensively amended in 1980¹, authorizes the establishment of the Tahoe Regional Planning Agency, composed of a seven-member delegation from each of the two states, and a nonvoting representative of the president of the United States.

The compact includes “Findings and Declarations of Policy” that identify the region as exhibiting “unique environmental and ecological values which are irreplaceable,” and singles out “increasing urbanization” as a threat to those values. It invests TRPA “with the powers conferred by this compact, including the power to establish environmental threshold carrying capacities,” which are defined as “environmental standard[s] necessary to maintain significant scenic, recreational, educational, scientific

KEEPING TAHOE BLUE

CONTINUED FROM PAGE 21

Resolution 82-11 established procedures for the maintenance of the thresholds over time, directing that following the adoption of the regional plan, the thresholds “shall be reviewed at least every five years” using “the most appropriate means.” They directed that following such review, “the pertinent environmental threshold standards shall be amended” where “scientific evidence and technical information indicate” that thresholds are mutually exclusive, lacking an evidentiary basis, unachievable, or “not sufficient to maintain a significant value of the Region or additional threshold standards are required to maintain a significant value.”²

C. The 1987 Regional Plan

Between 1982 and 1987, the unanimity that had characterized the adoption of the thresholds broke down. The agency adopted a regional plan that was designed to maximize the discretion of the agency staff and its governing board in permitting projects, saying, in effect, “trust us; we will decide these things wisely on a case-by-case basis.” Challenged by the state of California and the League to Save Lake Tahoe, the plan was enjoined in a decision upheld by the Ninth Circuit.³

Enjoined from approving development projects, TRPA convened an extensive consensus-building process that ultimately produced a compromise plan. The new plan slowed the pace of development and put in place carefully designed and scientifically based restrictions on the agencies’ discretion to approve projects, especially the development of sensitive lands and the amount of coverage permitted on individual parcels. Various exceptions were agreed upon, in order to accommodate existing development patterns and special needs and to protect property rights.

D. Pathway 2007: Struggle and Stalemate

In December 2004, TRPA, the Lake Tahoe unit of the U.S. Forest Service, and state Clean Water Act administrators (the Nevada Department of Environmental Protection and California’s Lahontan Regional Water Quality Control Board) kicked off an ambitious effort to update the interrelated plans of the four agencies. The timeline for the process, known as “Pathway 2007,” was to develop plans that could take effect in time for Lake Tahoe’s 2007 “building season,” coinciding with the end of the 20-year planning horizon for the 1987 plan.

As this article was under preparation in the summer of 2009, none of these plans had yet come close to being

adopted. In July 2009, the Bush administration’s approach to forest planning was struck down by a federal district court.⁴ The Clean Water Act planning effort remains in the scoping stage (the first stage of formal public participation in decision-making) with a hearing scheduled for August 2009. And TRPA’s efforts to develop a new regional plan to achieve the thresholds remain in suspense. Although public scoping for the regional plan was conducted in 2008, the only clear sign of progress since that time has been the posting of a set of charts, entitled “Draft Alternatives Summary Report,” to the agency’s website on June 19, 2009.

It is beyond the scope of this article to analyze the unhappy history of Pathway 2007. What can be said with certainty is that, as we approach the five-year anniversary of the initiation of that process, TRPA has yet to develop a coherent approach to the maintenance of its thresholds and compliance with the Compact and Resolution 82-11.

TRPA’s past reviews of its thresholds have identified various areas where amendments may be required under Resolution 82-11. In practice, the agency is inclined to disregard thresholds that stand in the way of increasing

urbanization.⁵ During the Pathway 2007 process, the agency staff actually proposed disregarding the existing thresholds entirely and developing a completely new set to replace them.

Nevertheless TRPA is proposing to develop a new 20-year regional plan, to be based on the achievement of the thresholds including ones that it is presently disregarding or that it has already identified as needing strengthening in a variety of ways.⁵ Observers are skeptical about both the wisdom of moving forward with a 20-year plan based on such a weak foundation, and also whether or not such an approach truly fulfills the mandate of the compact or complies with Resolution 82-11. The uncertainty generated by this situation is a matter of deep concern to friends of Lake Tahoe, who come from many perspectives, whether their focus is conservation, economic development, property rights, social justice, public safety, recreational access or the quality of life in local communities.

The Heart of the Matter: the Highest and Best Use of Lake Tahoe

To identify potential solutions to the issues facing Lake Tahoe today, it is helpful to examine the roots of the area’s problems. Of course, America’s great natural and scenic areas are some of its glories, revered by all, celebrated in patriotic songs and visited by vast numbers each summer. Americans’ personal



identities are often deeply entwined with the natural areas where they have enjoyed the best days of their family lives. There is passionate and virtually universal support for the idea that future generations should have the same opportunities to refresh and inspire themselves that preceding generations afforded to us.

Lake Tahoe has been recognized as one of these great natural resources since early in the history of the American west. However, by the time the nation and the two states that share the lake began to seriously pursue the designation of parklands to protect such areas, Lake Tahoe was already largely privatized and its natural resources subjected to unsustainable exploitation.

Thus, from the earliest days of European settlement, Lake Tahoe has had a tripartite existence: first, as a revered special natural area; second, as the location of a number of small communities; and third, as an economic resource attracting activities on a larger scale than one would ordinarily encounter in a small mountain community (from large-scale logging, grazing and fishing in the early days, to the gaming and subdivision development of the last 50 years).

For decades, local communities and advocates for large-scale economic exploitation tended to align with one another against the conservation interests that sought to put boundaries on their growth. In recent years, however, that dynamic has changed. With the proliferation of gaming severely

undermining that sector of the local economy, and with the growing recognition that subdivision for second-home construction is an inherently unsustainable activity, many in the local community are becoming more closely aligned with conservation advocates, who have long argued that natural-resources tourism represents the only sustainable economic hope for the area in the long term.

As our world grows ever more crowded, Tahoe's role as a special natural area will be of increasing importance to both visitors and the local communities. The compact's vision, as expressed three decades ago, is clearer and more pertinent than ever under the present circumstances. TRPA has recently designated a new executive director, who has strongly affirmed allegiance to this vision. These factors all point to the possibility of success for the agency, through a return to the principles of the compact and fidelity to the existing legal structure for its implementation.

The Solution: Keep it Simple, Keep it Blue

The compact gives TRPA a relatively simple core objective: it must maintain thresholds for the area, adequate

CONTINUED ON PAGE 24 ►

KEEPING TAHOE BLUE

CONTINUED FROM PAGE 23

to continue to protect the values that impelled their adoption, and it must continually maintain a regional plan that achieves and maintains them.

The achievement of the thresholds necessarily impacts the achievement of many other economic and social objectives. Indeed, threshold achievement itself may affect other objectives negatively or positively. For example, achieving water quality objectives supports real estate values. To Lake Tahoe basin homeowners, real estate agents and local governments, this may be viewed as a welcome, collateral economic benefit of TRPA's protection of water quality. But to renters and to employers in the area, that same economic effect may impose hardship in the form of higher housing costs and a consequently depleted labor pool.

The drafters of the compact recognized that TRPA's work would pose challenges that might need to be addressed by others. They did not charge TRPA with *achieving* or *stimulating* growth and development, but with the much more limited responsibility of *providing opportunities* for "orderly" development, consistent with achievement of the thresholds. The compact also specifies that "[w]henver possible, without diminishing the effectiveness of the regional plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities, the enactment of specific and local ordinances and rules, regulations and policies which conform to the regional plan."

Over the years, TRPA's understanding of its powers and obligations has strayed far from the compact's direction to assure threshold achievement while offering local communities as much latitude as possible to address social and economic problems. For example, TRPA's new Draft Alternatives Summary Report identifies as key action strategies, in its apparently preferred Alternative 2, that the agency shall "*create* select urban centers" in designated communities and shall "[*r*]estore residential communities to 1980s level of resident occupancies" (emphasis supplied). By contrast, the 1987 consensus-based regional plan identified community planning areas in which local communities would be encouraged to make their own decisions about their future development within the framework of the larger plan.

TRPA's current focus on stimulating population growth and increasing urbanization are leading the agency to places where conservation advocates will not follow, and provoking intense opposition and conflict within small local communities that value their existing character and do not necessarily seek to become larger or more urbanized.

There is a clear and simple path out of this morass: a return to the agency's compact-mandated mission, combined

with fidelity to the legal structure the agency itself put in place to implement that mission.

The time has come for the agency to review and to either resolutely reaffirm its thresholds, or amend them where required by Resolution 82-11. The entire Tahoe community should strive to again achieve unanimity on this most critical matter. Surely if this was achievable in the contentious environment of 1982, it is achievable today.

With a broadly supported suite of scientifically supported thresholds in place, TRPA will be in a position to develop a 20-year regional plan to achieve and maintain them. Lessons learned from the compact and its history, including the desirability of a resolute focus on threshold achievement, acceptance of limits on agency discretion and permitting local communities as much latitude as possible about the extent and nature of their future growth within the framework of the regional plan, will all guide the agency to ultimate success: the achievement of the thresholds in a manner that permits orderly development and supports local efforts to create a sustainable economy based on natural-resources tourism. This is how the TRPA can again take its rightful place as a leader of the cooperative effort to keep Tahoe blue. **NL**

ROCHELLE NASON relocated to South Lake Tahoe in 1992 to become the first staff attorney for the League to Save Lake Tahoe, also known as Keep Tahoe Blue. She became the organization's executive director in 1993. Under her leadership the league has grown to roughly six times its former size, without becoming reliant on government funding, allowing the league to serve as a forceful, yet independent, voice for the public interest in Lake Tahoe. www.keeptahoeblue.org/.

1. (P.L. 96-551, 94 Stat. 3233). The compact can easily be accessed on the website of the Tahoe Regional Planning Agency under the link to "TRPA Regulations" that appears on the home page.
2. Tahoe Regional Planning Agency Resolution 82-11 is not presently available on the website of the TRPA but it is available upon request from the League to Save Lake Tahoe.
3. *State of California ex rel. Van de Kamp and League to Save Lake Tahoe v. TRPA*, 766 F.2d 1308 (9th Cir. 1985).
4. "Judge slaps Forest Service for lack of conservation: Proposed rules did not comply with key environmental laws, judge rules," Summit Daily News, July 13, 2009.
5. For example, contrast the court's discussion of the impervious land coverage threshold at 766 F. 2d 1308, 1315-17, *supra*, with the TRPA staff's recent assertion that provisions of its Code of Ordinances are designed to "allow development projects the flexibility of where projects may occur within [a] hydrologic area", July 2009 Governing Board Meeting Packet at page 54.