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SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Alternative Dispute Resolution Committee Newsletter

Vol. 6, No. 2 June 2005

MESSAGE FROM THE CHAIR

Kathleen Whitby

Welcome to the Section of Environment, Energy, and Resources' Alternative Dispute Resolution Committee's Spring 2005 Newsletter! I hope you find information here that is useful to your practice, whatever your area of expertise. In particular, I hope you'll appreciate our special emphasis in this issue on resolution of intercultural conflicts and disputes, particularly those involving Native American tribes. This issue includes articles on: hydropower re-licensing; preferential power allocation negotiations; a multi-party agreement for dam management to allow fish transits; suggestions for re-contextualizing a conflict; and information about the Native American Dispute Resolution Network. Enjoy!

Now for the committee background and achievements. The Alternative Dispute Resolution (ADR) Committee is a cross-disciplinary group that includes environment, energy and natural resource practioners working in industry, government, non-profit, public policy and private practice settings. Our members are committed to bringing practical conflict management and dispute resolution tools and techniques to our varied business and legal projects. As a committee, we do our best to monitor, encourage and enhance the use of appropriate conflict resolution mechanisms, and to provide accessible education and information about ADR.

We encourage you to become an active member of the ADR Committee. If you are interested in planning a CLE panel or serving as a panelist, please let me know – we love to find speaker opportunities for our committee members. And think about any articles, project summaries, case notes, or other items of interest that you (or others in your organization) have created or may wish to create and share with other committee members. Publication in this Newsletter is not an exclusive undertaking, and we can help you adapt and cross-publish the same piece in several different forums. Let us know what you would like from your committee membership, and we'll do our best to oblige!

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AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

13TH SECTION FALL MEETING
Renaissance Nashville Hotel
Nashville, Tennessee

Sept. 21-25, 2005

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Alternative Dispute Resolution Committee Newsletter
Vol. 6, No. 2, June 2005
Kasha Helget, Editor

In this issue:

Message from the Chair
Kathleen Whitby 1

Creating a Collective Thinking Process: Hydropower Relicensing on the Lewis River
Lois Schwennesen 2

Tribes Negotiate for Preference Power Allocations with Assistance of Third Party Neutrals
Deborah Osborne and Richard Miles 5

Fish to Pass Oregon Dams for First Time in Decades
Debra Nudelman and Robert Williams ... 7

Re-Contextualizing the Conflict: The Key to Successful Negotiation and Mediation
Steven Haberfeld, Ph.D. 8

Native Dispute Resolution Network: A Valuable Resource for Environmental Conflicts Involving Native Peoples
Sarah Palmer, Joan Calcagno and Deborah Osborne 15

Coming Attractions in ADR 16

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.

CREATING A COLLECTIVE THINKING PROCESS: HYDROPOWER RELICENSING ON THE LEWIS RIVER

Lois Schwennesen

Background

In 1999, PacifiCorp and the Cowlitz Public Utility District (PUD) chose the Federal Energy Regulatory Commission's (FERC) Alternative Licensing Process as a stakeholder process to gain relicensing for the continued operation of four dams on the Lewis River in southwest Washington state. Three dams – *Merwin, Yale, and Swift No. 1* – are owned by PacifiCorp and together generate 510 MW. The fourth, the 70-MW *Swift No. 2*, is owned by Cowlitz PUD. With the help of mediators, and after 2½ years of negotiation, 27 parties representing two utilities, two Native American tribes, seven federal and state resource agencies, seven local and regional governments and districts, five environmental groups and four citizen groups signed a detailed, but surprisingly flexible agreement to extend the license for another 50 years. (See end of article for full list of participants. The Lewis River settlement agreement can be viewed at: http://www.pacificorp.com/Article/Article46545.html.)

Highlights of Agreement

Essentially, the agreement provides for future capital investment over the proposed 50-year license term of approximately $290 million by PacifiCorp and $19 million by Cowlitz County Public Utility District for protection, mitigation and enhancement measures covering fish, wildlife, recreation, cultural and flood management. Operations expenses will be linked to the agreed upon measures.

The centerpiece to the settlement is a staged plan to open up to 174 miles of habitat that have been blocked to migrating fish for the past 50 years to assist the recovery of listed salmon and steelhead in the lower Columbia River. The agreement also includes several specific measures to protect and support recovery efforts for several local populations of bull trout, a native fish species listed as threatened under the federal Endangered Species Act.

The licensees submitted the settlement to FERC on Dec. 7, 2004 as the parties' preferred outcome for relicensing. The parties are currently awaiting FERC's ruling on the proposed settlement.

The agreement also provided that a specific fund will be established to enhance and restore habitat for anadromous fish and bull trout. It also commits the licensees to rigorous scientific monitoring and evaluation to provide for adaptive management as new data and information become available. The agreement establishes an Aquatics Coordination Committee composed of all signatories to the agreement to oversee and guide future programs, and a Terrestrial Coordination Committee will guide future decisions related to a fund for protection and enhancement of wildlife habitat.

Keys to Lewis Success

There were certain factors that had extraordinary influence on the successful outcome.

First, there were many side agreements that paved the way for the broader settlement. The agreements dealt with issues important to subsets of the parties to the agreement without breaking the limits of relicensing and provided mechanisms to meet more interests.

Second, the utility negotiators and public agencies with prescriptive authority kept the discussions realistic. They did their homework and knew their interests and bottom line. While causing some tough discussions, this clarity resulted in some unrealistic options being taken off the table early on and avoided the dangerous situation of not having an acceptable option left.

Third, science was treated as a tool, not a solution. While research, modeling, and historical data was heavily used as the best available tool, overall it was used knowledgably and responsibly. Enough experienced parties at the table knew scientists lend structure and credibility, but also may take the negotiations off on a tangent. There were moments when the parties' collective intent and goals had to override conflicting science.

Fourth, full use was made of all four platforms: technical, legal, policy and negotiating. At the Technical level, the parties looked at pre-dam conditions and considered whether complete restoration could be made. They brought varied professional skills to a collective discussion and debate to understand and better determine which mitigation projects would be successful.

The Policy level provided the mediators with policy input early and throughout the process through pre-scheduled check-in meetings and conference calls that were cancelled if not needed. These scheduled sessions helped the Negotiating and Legal groups meet deadlines and provided a place to address policy conflicts and impasses.

The Legal Group handled the agonizing task of collective drafting, based upon mediators' summaries. Building in up-front meeting time for non-utility caucus lawyers to meet before each session often provided a place to resolve secondary debates.

On the key Negotiation level, the parties found that thorough information sharing helped much more than it hurt. The process was as transparent as possible, with questions being asked and information loops closed on an ongoing basis. In the end, the intensely open and often circular nature of the process was a key factor in getting the signatures of all parties at the table onto the agreement.

Finally, the Yakama Nation and the Cowlitz Tribe made themselves heard. Early in the negotiations, there were cultural miscues and confusion, discomfort from differences in communications styles, even searing accusations and posturing. Over time, both tribes established themselves as knowledgeable, earned a large measure of respect, and had great influence over significant portions of the final agreement. That influence and ability to meet many of their interests was critical to their capacity to obtain Tribal Council support and ultimately becoming signatories.

The tribes demonstrated a fundamental and honest treasuring of the resource for the future that provided a moral weight which overshadowed their smaller-sized caucuses. The tribal negotiators had to work hard to

be heard. When they were heard and understood, their interests were addressed. The other parties learned to listen without interruption, and listen with hearts as well as minds. Listening carefully, seeking to understand before being understood, and not interrupting made the difference during the more tense moments.

Some parties went to the trouble to research and understand their organizations' past histories and interactions with the tribes, and worked to address misunderstandings and problems from the past. This established an honest base for communications. The negotiators also built in more informal and social time, which engendered more trust and respect by nurturing personal knowledge of each other. Events that were held on tribal home territory were particularly helpful to building a sense of connectedness between the parties at the negotiating table.

The most difficult hurdles related to changes in leadership that occurred at the Tribal Council levels during the course of the negotiations. When leadership changed, some negotiating parties changed, as did attorneys and technical support. This caused a loss of continuity that could have been devastating. However, the other parties gamely moved on, backtracked and brought the new players into the fold. In retrospect, the mediators could have used a better, more thorough, method to orient newcomers to the negotiations in the event of new hires or changed leadership.

The mediators improved the odds of tribal support for the outcome of a negotiation through practicing utmost respect and confidentiality, making sure progress was routinely memorialized, and requesting that smaller steps toward agreements be reviewed by Tribal Council members. They called often to check on and encourage tribal attendance, arranged meeting locations that showed some deference to tribal travel time or schedules, and waited to start the meetings when additional tribal representatives needed to be assembled. In smaller meetings involving tribes, the non-tribal attendees' stature was matched whenever possible to the stature of the tribal attendees. The mediators needed to stay extremely engaged and alert to relationships between tribal representatives and other individual parties. When relationship issues arose, the mediator took action to address the problem, no matter how small they may have appeared.

Major Lessons Learned from the Process

There were three key lessons derived from the Lewis River relicensing process:

First, do not let today's science run too rampant. It is not possible to know what will be happening decades from now. It is more important to build in adaptive management capability.

Second, build in more personal, social contact with the parties. Much can be learned and shared in social situations. It took me a long time to learn this lesson, but social events are worth their weight in gold.

Third, take a lesson from the tribes and listen to understand each other and each others' missions and interests, before trying to make them understand yours. You will then know how to best describe your interests for maximum support.

Participants to the Lewis River relicensing process: Most of the negotiators individually represented a larger team including technical, legal and policy expertise, which meant that the number of individuals participating in the settlement process was closer to 100. Parties to the settlement agreement are: PacifiCorp, Cowlitz PUD, the Cowlitz Indian Tribe, the Yakama Nation – a band of eight tribes, the Washington Dept. of Fish and Wildlife, the Washington Interagency Committee for Outdoor Recreation, the National Marine Fisheries Service, the National Park Service, the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service, the U.S. Forest Service; Trout Unlimited, the Native Fish Society, American Rivers, Fish First, the Rocky Mountain Elk Foundation, Clark, Cowlitz and Skamania counties, the City of Woodland, the Lower Columbia Fish Recovery Board, the Cowlitz-Skamania Fire District No. 7, the North County Emergency Services, the Woodland Chamber of Commerce, the Lewis River Community Council and a group of Lewis River citizens at-large.

Lois Schwennesen is a mediator from Seattle who specializes in complex natural resource management issues. She was co-mediator with Kristi Wallis on the Lewis River relicensing process. She can be contacted at Lois@Schwennesenandassociates.com.

TRIBES NEGOTIATE FOR PREFERENCE POWER ALLOCATIONS WITH ASSISTANCE OF THIRD PARTY NEUTRALS

Deborah Osborne
Richard Miles

With the help of federal neutrals, two Native American tribes were able to have productive discussions with power providers for the receipt of allocations of power from the Western Area Power Administration (Western). The negotiations were for preference power allocations from Western that are being supplied from the Colorado River Storage Project (CRSP). Each of the scenarios is described below.

Yavapai-Apache Nation

Last year, a representative of the Yavapai-Apache Nation asked the Federal Energy Regulatory Commission (FERC)'s Dispute Resolution Service (DRS), an independent and neutral office within FERC, to assist in negotiations with Arizona Public Service (APS), the state's largest electric utility. The negotiations concerned plans to establish an electric utility grid that would be owned and operated by the Yavapai-Apache Nation. APS currently owns the electric grid.

The parties were experiencing difficulties deciding upon conditions and cost for transfer of ownership of the electric grid to the Yavapai-Apache – in particular, the costs and conditions of a study plan that required the parties' joint approval.

The Yavapai-Apache has found it important to establish its own electric utility. It had signed contracts to receive 2 MW of power from the CRSP allocations beginning Oct. 1, 2004.

After holding separate interviews with the parties, including a meeting with the Tribal Chairman, the DRS conducted a one-day mediation session with all parties in Phoenix, Arizona. Through the mediation process, the parties were able to agree on a study plan, which both parties signed the following week. Joint agreement and commitment to the steps in the study plan is a big step toward the Yavapai-Apache becoming its own independent utility and benefiting from the CRSP allocation.

Hualapai Nation

Following the successful outcome on the Yavapai-Apache case, the Hualapai Nation contacted the DRS. The Hualapai was experiencing similar challenges regarding how to receive its federal CRSP power allocations from Western beginning in October 2004. Mohave Electric Cooperative (Mohave) had been delivering electricity to the Hualapai Nation at a nearby substation. The Hualapai was uncertain that taking the additional power directly from Mohave was the best way to accept the CRSP allocations. One of the greatest challenges for the Hualapai was meeting with the essential parties to share information about the pros and cons of each of four options available for accepting the CRSP power (establishing a utility, bill crediting, benefit crediting or power-pooling).

The DRS made telephone inquiries to the parties and other interested participants and held separate interviews – one with the Hualapai Tribal chairperson and vice-chair and the Bureau of Indian Affairs (BIA), and the other with Mohave at their offices prior to the mediation. Later, the DRS conducted the mediation session at an agreed-upon neutral location in Kingman, Arizona. In addition to the Hualapai, BIA and Mohave, representatives from Western, the Arizona Public Authority and PNM attended the mediation.

During the mediation, Western explained the four options. The group as a whole evaluated which options might result in the greatest benefit to the Hualapai Nation. Today, the Hualapai Nation is receiving the benefits of the CRSP power allocation.

Summary and Lessons Learned

The parties in both cases appreciated the DRS' neutrality, on-site visits, and assistance with facilitating and mediating possible solutions for the tribes regarding their CRSP allocations with a fast-approaching deadline. When this matter was brought to the DRS, first by legal counsel for the Yavapai-Apache, then by word-of-mouth from the Yavapai-Apache to the Hualapai, other key players decided it was important to meet face-to-face and address the issues. In the end, the structure of the mediation and the participation of Mohave and Western, and the expertise of BIA's engineering consultant were all critical to ensure that the tribes and other participants understood every the power option available so they could individually and collectively make the best decisions. Other critical factors in the success of the discussions were conducting the meetings among the parties in their own locales and taking the time to build trust among and between the participants and help each of them understand the perspectives of the others.

Deborah Osborne is a dispute resolution specialist in FERC's Dispute Resolution Service, and an ECR-Native Network member. She acts as a mediator and facilitator for FERC-related proceedings that involve business, environmental, preservation, and energy disputes, often with Native Nations' interests. She also leads national discussions with various agencies and stakeholders and provides training on the increased use of alternative dispute resolution in heritage and cross-cultural conflicts.

Richard Miles is the director of FERC's Dispute Resolution Service and FERC's dispute resolution specialist. Rick acts as a facilitator and mediator in many oil, gas, electric, pipeline and hydroelectric cases, and also appears on panels, conducts ADR workshops and training in negotiation and mediation. Rick is also the chair of the Federal Interagency ADR Working Group's Civil Enforcement and Regulatory Section, and a vice chair of the Alternative Dispute Resolution Committee of the American Bar Association's Section of Environment, Energy, and Resources.

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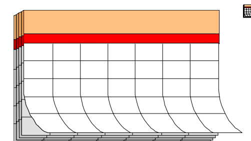
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



Financial Institutions, Corporate Stewardship, and Sustainable Development: Drivers For The Evolution of U.S. Environmental Laws and Practice
June 10, 2005
Baltimore, Maryland
(Cosponsored with ABA Standing Committee on Environmental Law, for information see http://www.abanet.org/publicserv/environmental/home.html.

ABA Annual Meeting
Aug. 4-9, 2005
Chicago, Illinois

13th Section Fall Meeting
Sept. 21-25, 2005
Nashville, Tennessee

24th Annual Water Law Conference
Feb. 23-24, 2006
San Diego, California

35th Annual Conference on Environmental Law
March 9-12, 2006
Keystone, Colorado

For more information, see the Section Web site at http://www.abanet.org/environ or contact the Section at 312/988-5724.

FISH TO PASS OREGON DAMS FOR FIRST TIME IN DECADES

Debra Nudelman
Robert Williams

Salmon and steelhead will migrate past a large series of dams in Warm Springs, Oregon, for the first time since 1968, under the terms of a historic multi-party agreement signed last year by 22 organizations and government agencies, including the project owners.

U.S. Secretary of the Interior Gail Norton hailed the agreement as a way to demonstrate how "water management and hydroelectric operations can be carried out in innovative ways that protect tribal resources, enhance the environment and aid in the recovery of threatened species."

The pact is one of the final steps in obtaining a new federal license for Pelton Round Butte, the only hydroelectric project in the United States jointly owned by a Native American tribe and a utility. The 465-million watt project is one-third owned by Confederated Tribes of the Warm Springs (CTWS) and the remainder owned by Portland General Electric (PGE). Its three dams, rising to as high as 440 feet, blocked salmon and steelhead migration in the Deschutes and two other rivers above the project 36 years ago. The consensus agreement includes creative engineering solutions such as a 270-foot-high underwater tower topped by a 130-foot-wide disc that will usher fish toward an intake where they can be trucked downstream for release on their journey to the Pacific.

Reaching the negotiated settlement involved a determination among all parties to develop and pursue a shared vision for how to enable fish passage. It was this commitment that led the working group to overcome obstacles and have substantive discussions that brought some order and a semblance of predictability to the process.

Among the challenges the working group faced was settling on a reasonable time schedule for each step in the face of deadline pressure under the licensing process rules of the Federal Energy Regulatory Commission (FERC). In addition, some newer members felt like outsiders because others at the table had prior negotiating experience among themselves. On the other hand, participants with previous relationships were wary of the depth of the newcomers' commitment (or lack of it) to an open negotiation process.

Also of concern were the perceived differences in negotiating power, their effect on the collaborative effort, and how the participation on a national level of some parties would complicate the mix of stakeholders and politicize the process and outcome. However, the continued dialogue in which the various interest groups began to build a working relationship, and efforts such as the division of labor among subgroups, and the confidential, closed-to-the-public nature of the facilitated meetings eventually converted the doubters and helped them develop a common understanding and consensus regarding the project's goals. By taking an interest-based approach to problem-solving, the working group participants changed the way they thought about the problems they faced. Rather than looking at each other as obstacles to achieving their own goals, they instead focused on the mutual benefits they could all achieve.

In the end, officials praised the agreement for its positive economic and environmental impact. Besides potentially reopening 226 miles of streams above the dams to fish migration, the plan allows for continued production of low-cost hydroelectric power at the facility, improves the Tribes' fish harvest, and benefits recreational fishing.

"The next 50 years under this new license will create a blueprint for wise natural resources management that is so important to our Indian people and financial resources that are vital to the tribal organization," said CTWS Chairman Ron Suppah.

Added Rebecca Wodder, president of American Rivers, "[T]his agreement sets the bar for other dam operators in the Northwest and across the country. PGE, CTWS, and the other settlement parties have proven that by working together, we can achieve great

outcomes for this river's health, its salmon and steelhead, and its people."

PGE and the Tribes are prepared to spend more than $135 million dollars on the project during the 50-year term of the license, the vast majority going to fish-related measures. More than $21 million is planned for fish habitat improvement on Deschutes River tributaries, including water rights acquisition. FERC is expected to act on the new license in early 2005.

Debra Nudelman mediated the discussions among the stakeholders in the Pelton Round Butte re-licensing effort. She is a senior mediator with RESOLVE, a non-profit provider of consensus-building strategies and services that helps organizations achieve the best outcomes in controversial environmental issues.

Robert Williams is an associate with RESOLVE who assists with all aspects of convening, facilitating, and mediating projects. They can be reached at dnudelman@resolv.org and rwilliams@resolv.org.

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RE-CONTEXTUALIZING THE CONFLICT: The Key To Successful Negotiation and Mediation

Steven Haberfeld, Ph.D.

Parties in litigation and arbitration resolve their conflict by having a third party (*e.g.*, judge or arbitrator) decide the outcome for them. They look to the third party to determine who is right and who is wrong, who shall be the winner and who shall be the loser. They have their attorneys do their talking and usually have no direct contact with one another during the proceedings. Parties in negotiation and mediation, on the other hand, resolve their conflict by working together to reach an agreement. Here, it is not about winning and the other party losing (win/lose), but rather an attempt to "work things out by talking things through" until all the issues that separate them are resolved one way or the other.

While collaboration is by far the superior way to resolve conflict, it is not always the easiest. In fact, it may be the furthest from people's minds when they are in the heat of the conflict. At these times, people are typically preoccupied with the "fight" and the need to protect and promote their own interests. The other side is seen as the "enemy" to be neutralized and defeated.

This article is concerned with preparing parties for collaboration. It outlines a strategy for gradually reducing their apprehension of one another and moving them to a larger context in which they are ready to share perspectives and satisfy mutual interests – a strategy for "re-contextualizing" the conflict. This is the key challenge for the negotiator who seeks to reach agreement with the other party. It is also the key challenge for a mediator who has been asked by the negotiators to assist them to resolve their conflict when they have decided they cannot do it without outside help.

In the Heat of Conflict People See One Another As "Enemies" Not "Collaborators"

People in the heat of conflict will have likely reached such a low point in their relationship and already have

had a sufficient number of bad experiences that they feel angry, threatened, vulnerable, scared and suspicious. Moreover, they will likely be defensive and closed, convinced that they are right and feeling justified in this position. They will not feel safe enough to move out of their "comfort zones" or "think outside the box." Instead, they will default and cling to their first impressions and reactions, to those very concepts, beliefs, attitudes, judgments, and biases that are based on what is most familiar to them given their own limited life experiences, belief systems and cultural values. Is this familiar? This is a description of people who are ready for combat or retreat, fight or flight.

This is a normal reaction that is particularly true when the conflict involves members of different cultural groups. In this case, there will likely be an additional barrier of fear and apprehension. People who have been effectively disenfranchised from the mainstream socio-economic and political systems of society are often reluctant to consider negotiating with their opponents because they are wary of being ignored, dominated, used, violated, co-opted or otherwise tricked by "outsiders." People from dominant cultural groups are also reluctant to negotiate. Initially, they may feel they do not have to respond. But when the conflict does not go away, they too will be trapped by their preconceived ideas, scared of the unknown, and fearful of being challenged and losing what they have.

Given the "feelings" people have at the height of the conflict, it is easy to understand why collaborative dispute resolution processes (negotiation, facilitation and mediation) might be suspect and not the parties' first choice. Litigation, where they can turn it over to a third party to "decide," rely on their lawyers to do their fighting for them, and risk far less personal exposure, may be much more appealing at this point.

Just Why is Collaboration Better than Litigation as a Strategy to Resolve Conflict?

Negotiation and mediation are worth the effort when the comparative merits of litigation and other adversarial forms of dispute resolution are considered. Litigation, for example, will generate a definitive decision by the court, and that is one of its virtues. It may also be your only option if the other party refuses to come to the table and negotiate in good faith. Filing a lawsuit, among other things, may have the effect of persuading your adversaries that you mean business and can cost them plenty (*e.g.*, court costs, bad publicity, reputation, time, missed opportunities, etc.) if they remain intransigent. Finally, you may want to go into court in order to obtain a judgment that will establish a legal precedent that will affect an entire class of people like yourself. Settling your matter through negotiation may not avail you this opportunity to have such a broad impact.

These possible benefits of litigation aside, a collaborative agreement will usually be a better solution to the problem. This is especially true when the parties still have an ongoing relationship after litigation. In many cases, the "legal" decision will not resolve the real underlying problem(s). The problem quite likely will be defined as a legal one because that is the only way to get into court. Moreover, both the legal decision and the adversarial process will undermine the relationship between the parties. The court identifies a "winner" and a "loser," and thus creates the motivation for the latter to continue the fight and try to get even (revenge).

In addition, going into court can be confrontational and nasty. Lawyers representing the parties emphasize differences rather than common ground. They discredit and malign the other party in order to undermine their position and look more virtuous themselves in the eyes of the judge. These are not behaviors on which relationships are built or restored.

In contrast, negotiation and mediation are generally quicker and cheaper. But, just as important, the relationship between the parties fares much better and thus, the "solution" is likely more long-term and durable. When conflict is resolved by agreement rather than by an order issued by a third-party decider, the parties have the opportunity to jointly craft their own solutions and make sure these are practical ways to solve the real problems. Moreover, both of the contending parties walk away from the "table" with something of value to them (otherwise they would not have agreed to it). The relationship intact, it can serve as the foundation for resolving subsequent conflict that

may arise in implementing the agreement or just in the normal unfolding of life.

Methodology for Broadening Parties' Contexts to Consider the Perspectives and Needs of the Other Side

Negotiation and mediation present a challenge that adversarial forms of conflict resolution simply do not. To achieve success, the parties will ultimately have to develop trust and cooperation – two conditions that are not present before parties embark on this approach. They will have to meet the other side within a broader context than their own perspectives on the problems and solutions. They will have to fully acknowledge the separate experiences of their opponents, exchange information, learn what and why things are important to them, and jointly generate and examine options until they have identified solutions that are mutually acceptable.

How do we encourage parties to move beyond their initial preoccupation with their own needs and perspectives and prepare them to be successful in a negotiation? And if the parties are unable themselves to set in place the needed preconditions for success, how do we train mediators to assist the parties to put these in place?

We recommend at least ten different things parties can do to "re-contextualize" the conflict, and shift from just having their own limited and "opposing points of view" to a place where they are looking and working at the problem collaboratively from a "common viewing point." This important shift in the relationship between the parties is achieved by their developing confidence in the negotiation and mediation process itself. By approaching the effort to resolve the conflict in a sensible and systematic way, the parties will be able to slow down, open up and listen without fear or apprehension, begin to hear and be heard, and, perhaps for the first time, understand the other side's perspectives, interests and issues.

The ten strategies used during the preparation, face-to-face and closing phases of the negotiation and mediation are as follows:

(1) Become familiar with the "six stages" of the negotiation process. We break the negotiation or problem-solving process into a progression of six discrete and logical stages. These are: (a) preparation and planning, (b) negotiating procedural ground rules, (c) sharing perspectives, (d) identifying interests and defining issues (agenda), (e) generating options/making proposals, and (f) making verbal and written agreements. The trained negotiator has a sense of how to move the process along. Also, by knowing which stage s(he) is in at any time, the negotiator has a greater sense of order and predictability, and thus increased confidence in the process and in himself or herself.

(2) "Be prepared" by doing extensive preparations and planning. "Surprises" are the enemies of successful collaboration. They send the parties into defensive and reactive modes of behavior that are not conducive to thoughtful and creative problem solving. The use of "surprises" should be left to Perry Mason in the courtroom where getting agreement among the parties is not an objective.

Parties are discouraged from surprising the other side. They are also encouraged to minimize the likelihood of being surprised by engaging in extensive preparation and planning before and during every stage of the negotiations. Contrary to a common misconception, negotiations are a "process," not an "event." They are not consummated in one or several meetings. Negotiations need to be managed, scheduled, orchestrated; resources have to be set aside; research has to be conducted; data has to be assembled; experts should be lined up; the negotiation team should be selected, trained and continually aligned; and multiple proposals and options ought to be outlined to provide for maximum flexibility and resilience during the face-to-face negotiations. A negotiator who is prepared will be clearer about his or her game plan and will be in a stronger position to anticipate the behavior of the other party.

(3) Identify interests and form realistic expectations. Parties are urged to make a thorough inventory of their underlying concerns, interests, values and expectations before they actively enter

negotiations. Unless parties start with a thorough and deep understanding of who they are, what they want, and realistic expectations about existing possibilities and constraints, they will not know whether their behavior is consistent with and serving their interests once they are in the negotiations. Nor will they ever know whether and when the other side is making proposals that serve them. This may lead negotiators to ask for "too much" or for the "wrong" things.

(4) Decide whether negotiations are the best way to advance your interests. In making the initial assessment of interests, parties should also calculate as best they can how negotiation stacks up against other dispute resolution options (*e.g.*, litigation, arbitration, direct action, waiting, etc.) that may be available to resolve the current dispute. What is the likelihood that they would do better, all things considered, by choosing the alternative route and by not entering or continuing negotiations? This will help them define their "bottom line" – the point beyond which they should not make further concessions and would do better pursuing an alternative strategy. The added clarity about the "starting" and "stopping" points will give the parties a greater sense of control and predictability as well.

(5) Start by negotiating "procedural ground-rules" to create an atmosphere of safety and predictability. People must be ensured a high degree of safety, security, predictability and respect during the negotiations process itself. This is especially true in conflict situations when behavior is rarely predictable or safe. Before parties address the "substance" of the negotiations (*i.e.*, the problems that got them to the table), they should mutually agree upon procedural ground rules that will define the resolution process. Ground rules define the who, what, when, where and how of the negotiations. They can define the location and times they will meet, who are the "stakeholders" that will participate, acceptable ways they can speak to one another, how decisions will be made, which issues (the agenda) will be discussed and in which order, which level of confidentiality will be observed, what the parties' ultimate purpose or product is expected to be in the negotiation, who will draft the written agreement, who will have to ratify the agreement before it goes into effect, etc.

Trust is built slowly; it is rarely there at the outset. The ground rules can serve as means by which a party can measure the other side's trustworthiness before any substantive agreement has even been discussed. When parties keep their procedural agreements these can be "confidence-building."

What is also remarkable about starting the negotiation process this way is that the parties begin by agreeing on some of the easier issues (*e.g.*, where and when to meet). They get practice collaborating and jointly taking back some control over their lives. In this stage of the negotiation process, parties invariably observe that "at least we can agree to something." Not only are they creating momentum around "agreeing," but they are beginning to practice searching for solutions that work for all the parties.

(6) Clarify at the outset what is "negotiable," that the process is voluntary, and that the parties will only be bound by whatever it is to which they both explicitly agree. Defining the parameters of the negotiation verbally and in writing helps to build trust in the process as well as in the other parties. One of the first understandings to be established when negotiating the process is whether it is a "negotiation" (in contrast, for example, to a "consultation") and, if so, what is and what is not negotiable. This is a most important distinction, especially where parties are not accustomed to making decisions by mutual agreement.

In addition, people must have the assurance that they will not be forced into anything they do not understand or want. One of the basic tenets of negotiation and mediation is that both are voluntary. Parties can withdraw at any time they conclude it no longer serves their interests. This alone should help alleviate much of the apprehension about sitting down with the other side and trying to resolve the conflict. This is in marked contrast to litigation; it is not voluntary once either party has filed a complaint and the case has been placed on the court docket.

Another source of protection for parties is that agreements in negotiation and mediation are reached by consensus. This means the deliberative process continues **until all the parties are satisfied** the agreement being formulated meets their interests to

some acceptable (not necessarily preferred) degree. Again, parties in negotiations and mediations cannot be forced into anything to which they do not agree.

(7) Accommodate your unique cultural values and preferences by making sure that they are reflected in the procedural ground-rules you have negotiated. There are several points to be made here. First, there is no standard Anglo, Western, Indian, "traditional" or any other type of mediation or negotiations that fits or belongs to different people. There are many too many variations and exceptions for any of these classifications to be useful. Second, cultural differences among the parties are very real, are highly relevant and must be accommodated. Third, the first place to accommodate cultural differences is when the process/procedural ground rules are being negotiated.

Accommodating cultural differences during negotiations is highly important. We are using "culture" here very broadly to include a wide range of relevant differences. In fact, we think that all negotiations and mediations are cross-cultural. Parties will differ in terms of gender, physical appearance, generation, age, disability, sexual orientation, marital status, location, region, history, ethnic and religious affiliation, socio-economic class, organizational roles and other important ways. As a result of these many differences, they will have different "culturally" preferred ways of doing things that will be relevant during a negotiation. The opening ceremony, the timing and location of the negotiations, the seating arrangements, the setting, the language(s) spoken, who speaks to whom and how, the preferred ways of addressing the parties, the level of formality, the agenda items and the order in which they are addressed, and how other procedural issues are resolved will reflect cross-cultural preferences.

The procedural ground rules should be negotiated to accommodate cultural differences. Negotiations and mediations can be culturally responsive and culturally adaptable if the format or process for the encounter is "negotiable" by all the parties involved. Reflecting these cultural preferences in the ground rules, in the process design, is essential to making the negotiation and the mediation processes "user friendly" and to ensuring that all parties feel a sense of joint ownership and equity.

Unfortunately, many parties who enter negotiations fail to appreciate the importance of starting by negotiating ground rules. This is especially true for parties who typically see themselves in the role of "sponsoring" or "hosting" the negotiations (government agencies, management, etc.). They often assume that defining the process is of minor consequence and that they can immediately proceed to what they perceive to be the "essence" of the negotiations – resolving the substantive issues.

When this occurs, the dominating party or parties will default to their own ethno-centric cultural preferences when setting up the negotiation. Groups that are typically not in power and not operating in the mainstream must understand that, if they enter into negotiations with dominant groups exclusively on their hosts' terms, they do so only at their peril. They are buying into being negotiated "upon" rather than negotiated "with," at a decided disadvantage from the outset.

(8) Build into the procedural agreements various ways the parties can "de-compress" during the process. People gain confidence in the process when they are assured that they are not being rushed into anything, and they have ample time to understand what they are agreeing to. Parties can establish as a ground rule that there will be no intimidating, threatening or coercive behavior permitted. They also can build in time for "reflective thinking" and review by anyone whose expert opinion they want before the agreement is finalized. Another device is to allow for "time-outs" or "cooling off periods" for specified amounts of time when a party feels under emotional pressure. Finally, parties can build into the negotiation process the option of calling "caucuses" (private sessions) to speak with the mediator in private and in confidence. The caucus also can enable a negotiating team to leave the table for specified time periods to reduce the pressure, re-energize and realign the members of the negotiating team, discuss new information, review options, plan counter proposals, and consult with their constituents and hierarchy, etc.

(9) Learn inter-cultural communication tools to deal effectively with different perspectives. In addition to ground rules, people need to acquire some tools they can use to diffuse hostility and slow themselves down in stressful situations. Otherwise, they will "react" and default to what is familiar and comfortable rather than "respond" rationally and carefully select a strategy that is in their best long-term interest. Participants may want to learn tools that enable them in inter-cultural situations "to take the time to think things through thoroughly" before making assumptions and jumping to conclusions. Such tools could help them "keep their foot out of their mouth," fully understand other people's perspective, value differences and generate ways to accommodate mutual interests.

(10) Acquire flexibility and resilience by learning and practicing "interest-based" negotiations. Interest-based or value-based "win/win" negotiations (IBN) can reduce the likelihood of confrontation and impasse, and provide yet another way to increase negotiators' confidence in the process. Negotiators can learn to identify and negotiate their underlying interests/values. They can also learn to identify and simultaneously accommodate the interests of the other party where these do not require that they sacrifice their own vital interests. To ensure that proposals are made that satisfy mutual interests, IBN negotiators must build trust and respect, engage in open communication, proactively listen, give reasons for their proposals that convince and persuade, and freely exchange relevant information.

IBN negotiators enjoy much greater flexibility and resilience in responding to the other side than do "positional" or adversarial negotiators because they are committed to satisfying their underlying "interests" rather than being wedded to specific proposals or positions. If the other side does not accept their proposal, IBN negotiators have the option of offering other proposals that may just as effectively advance their own interests. "Positional negotiators" mistakenly think their proposal is identical to their interests, and get bogged down trying to overcome the other side's resistance to their proposals by becoming increasingly more intimidating, threatening and coercive.

In conclusion, parties in negotiation and mediation ultimately have to expand their context large enough to allow for the other side's perspectives to be heard and interests to be considered. They have to realize that they cannot win without the other side winning as well ("win/win"). The final agreement has to provide both parties some "value" otherwise they will not agree to it. In other words, successful negotiators "win" by being involved in two simultaneous operations. They can only successfully advance their own interests, if they also proactively listen for, ferret out and satisfy the other side's interests to some acceptable degree. They must figure out how to make these accommodations without sacrificing their own vital interests. In this way, they have "re-contextualized" the conflict and successfully moved from "me" to "we."

Steven Haberfeld, Ph.D. is a long-time mediator and trainer of negotiators and mediators. He currently serves as the executive director of Indian Dispute Resolution Services, a national American Indian non-profit organization located in Sacramento, California. He also is the principle in the Haberfeld Mediation Group. The article first appeared in the Spring 2003 issue of the IDRS Peacemaker, Volume 8, No. 1.

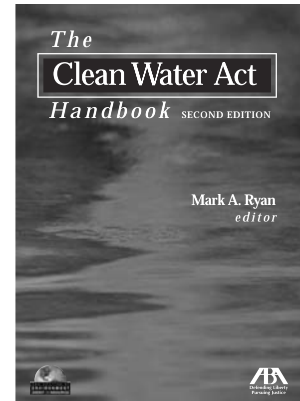
Alternative Dispute Resolution
Committee Newsletter

DO YOU HAVE ARTICLES OR INFORMATION ON ADR?
PLEASE CONTACT US!

We are interested in publishing articles and resource information on the subject of environmental dispute resolution in this newsletter. Please e-mail any pieces or suggestions to Kasha Helget at kasha.helget@ferc.gov. *Thank you!*

From ABA Publishing and the Section of Environment, Energy, and Resources

The Clean Water Act Handbook, Second Edition
Mark A. Ryan, editor



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- Control of publicly owned treatment works
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- Enforcement options under Section 309
- Judicial review

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NATIVE DISPUTE RESOLUTION NETWORK: A VALUABLE RESOURCE FOR ENVIRONMENTAL CONFLICTS INVOLVING NATIVE PEOPLES

Sarah Palmer
Joan Calcagno
Deborah Osborne

Overview

In 2003, the U.S. Institute for Environmental Conflict Resolution (U.S. Institute) initiated the Native Dispute Resolution Network (Network). The Network was established in response to input from a broad range of participants, sponsors and leaders about the need to identify Native dispute resolution practitioners to assist with environmental conflict resolution processes involving Native people or communities. Network members serve in multiple capacities to address environmental, natural resource and public/trust lands issues, and other issues in the future, where American Indians, Alaska Natives, Native Hawaiians and federal agencies are primary parties.

The vision of Network is for an established, self-sustaining, permanently-funded and widely known referral and education resource composed of predominately Native practitioners, who build collaborative capacity by bridging Native and non-Native practices and cultures. The specific objectives of the Network include:

- Encourage collaborative dispute resolution and agreement-seeking processes in matters involving American Indians, Alaska Natives, Native Hawaiians, and federal agencies or interests.
- Broaden diversity of the field of collaborative dispute resolution.
- Foster a deeper understanding of underlying principles and practices of conflict resolution and share skills and expertise among Native and non-Native conflict resolution practitioners.
- Improve the ability of all parties to engage effectively in collaborative dispute resolution processes.

How to Become a Network Member

There are currently 52 individuals in the Network. Members include American Indian, Native Hawaiian and other practitioners who work with Native peoples. Network members have access to a member lists serve to share information and exchange ideas and challenges about the practice of collaborative dispute resolution. Members are also referred in cases and projects where parties are seeking individuals who have expertise and knowledge about working in Native communities. The experience necessary to be included in the Network can be found at www.ecr.gov/naan.htm.

Public Use of the Network

The Network is a resource for everyone – individuals, agencies and organizations seeking practitioners to assist with collaborative conflict resolution and planning related to a wide variety of situations. Examples include: government-to-government consultation involving environmental or cultural property issues, mediating the clean-up of a waste site, or assisted negotiations regarding inter-governmental natural resource issues. For referrals to Network members or to become a member, please contact Joan Calcagno at nativenetwork@ecr.gov or (520) 670-5299, ext. 19.

Upcoming Events at the Institute

The U.S. Institute is developing a skills exchange workshop, designed by and for current and potential members and users of the Network. The first workshop is planned for August 2005 and will provide participants a foundation in a variety of dispute resolution skills. The workshop offers two tracks led by teams of Network members:

- Practitioner-to-practitioner skills exchange that emphasizes the exchange and expansion of skills by practitioners in traditional and "western" dispute resolution methods.
- Practitioner-user training skills focuses on building the fundamental skills and essential knowledge needed by Network users to ensure the selection of an appropriate neutral and to engage effectively in environmental conflict resolution processes.

The skills exchange workshop is underwritten by the JAMS Foundation, the U.S. Institute for Environmental Conflict Resolution, the Department of the Interior's Office of Collaborative Action and Dispute Resolution, and the Federal Energy Regulatory Commission's Dispute Resolution Service. The U.S. Institute invites partnerships in the form of co-sponsorships or services provided in-kind from those interested in supporting the skills exchange workshops. Please contact: Sarah Palmer, Sr. Program Manager at (520) 670-5655 or palmer@ecr.gov for more information about the skills exchange workshop and partnership opportunities. For more information about the Native Dispute Resolution Network, visit: http://www.ecr.gov/naan/naan.htm.

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Joan Calcagno manages the Roster of ECR Practitioners and administers the Native Dispute Resolution Network at the U.S. Institute for Environmental Conflict Resolution in Tucson, Arizona.

Deborah Osborne is a dispute resolution specialist in the Federal Energy Regulatory Commission's Dispute Resolution Service and an ECR-Native Network member. She acts as a mediator and facilitator for FERC-related proceedings that involve business, environmental, preservation and energy disputes, often with Native Nations' interests. She also leads national discussions with various agencies and stakeholders and provides training on the increased use of alternative dispute resolution in heritage and cross-cultural conflicts.

COMING ATTRACTIONS IN ADR

The following is a list of some upcoming events of interest to ADR practitioners, with links to appropriate sites:

Managing Conflict and Removing Barriers to Collaborative Decision Making
The Center for Alternative Dispute Resolution's 17th Annual Conference
June 22-24, 2005
Martin's Crosswinds
Greenbelt, Maryland

International Commercial Arbitration
Arbitration and Natural Resource Disputes – Where We Are and What We Should Do
NEW DATES! June 27 - 28, 2005
Four Season Hotel, Vancouver BC
http://www.cba.org/cba/cle/cle00/commercial.asp

Waves of Change
LEADR's 8th International ADR Conference
Aug. 31-Sept. 2, 2005
College of Tourism and Hotel Management
Sydney, Australia

2005 ACR Annual Conference
"Conflict Resolution in a Changing World: Building the Practice and Fostering Hope"
ACR's Fifth Annual International Conference
Sept. 28-Oct. 1, 2005
Minneapolis, Minnesota