

**NEGOTIATING HIGH STAKES
WATER CONFLICTS:
LESSONS LEARNED FROM
EXPERIENCED PRACTITIONERS**

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October 31, 2003

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¹ Steve Snyder is an attorney, mediator and conflict management consultant who resides in Corrales, New Mexico. Steve would like to thank his colleague and friend, Lucy Moore, for her help and support with this project. Lucy helped Steve find funding for, plan, and facilitate the two workshops that are the heart of this project. In doing so, she brought much needed sensitivity and wisdom to a project that otherwise might have been lacking in both.

I.

Introduction

In an effort to understand the human dynamics at work in a difficult and contentious water negotiation, the Natural Resources Law Center of the University of Colorado Law School convened two workshops of persons with extensive experience in such negotiations. One workshop consisted of stakeholders and attorneys who had participated in one or both of two admirable (but ultimately unsuccessful) efforts to resolve the water conflicts in the Klamath Basin by mediated negotiations. The other workshop consisted of professional negotiators, mediators and attorneys who had taken part in difficult water negotiations throughout the West. The goals of the two workshops were the same: to understand why water conflicts are so difficult to resolve by negotiation and to develop some practical guidelines for how to organize and conduct a difficult water negotiation.²

Part II of this report presents ten guidelines for organizing and managing negotiations that emerged out of the discussions at the two workshops. The guidelines do not constitute a comprehensive manual on how to negotiate contentious water disputes. Rather, they represent a set of ideas, suggestions and warnings from experienced negotiators to those who are about to embark on a difficult but potentially rewarding task.

The gist of this report is contained in Parts III and IV. Part III describes what was truly a remarkable event: a dialogue among the contending sides in the Klamath conflict about why they had been unable to negotiate a resolution to their conflict. Part IV describes how experienced negotiators, attorneys and mediators reacted to the description of the negotiation efforts in the Klamath. Taken together, Parts III and IV of this report illustrate how seemingly inconsequential decisions about the management of the negotiation process can have a major impact on the success or failure of a negotiation.

² The Natural Resources Law Center would like to thank the organizations that provided financial support for this project. The El Paso Corporate Foundation provided the fellowship that enabled Mr. Snyder to devote his time to project. The William and Flora Hewlett Foundation provided the funding for both workshops. The National Policy Consensus Center of Portland State University also provided funding for the Klamath Workshop.

II.

Ten Practical Guidelines for Organizing and Managing High Stakes Water Negotiations

1) Because of the psychological and practical dynamics at work, initiating a negotiation of a contentious water dispute is difficult. A government agency is often in a better position to initiate a negotiation than private parties, but a government agency that undertakes the task of initiating a negotiation must do so in ways that maintain the integrity of the negotiating process without compromising its ability to actively participate in the negotiations.

Organizing a negotiation over a contentious issue is always a difficult process. Someone has to take the first step by proposing that the parties negotiate. No one wants to take this first step because to do so may be misread by one's opponents as a sign of weakness. Most water negotiations are multiparty negotiations. Organizing a multiparty negotiation is an even more difficult process. Someone has to assume the burden of contacting each of the parties to sound out their willingness to negotiate. That person often finds herself emerged in a collateral negotiation about how to organize and manage the negotiations.

When (as is frequently the case) a government agency is involved in a water conflict, the agency can often take proactive steps to organize a negotiation that non-governmental parties would be unwilling to take. Governmental agencies can propose negotiations as part of their public and regulatory functions without fear that by doing so they somehow will appear "weak". Government agencies can devote resources to organizing a negotiation that non-governmental parties may find hard to justify.

Getting the parties to the negotiating table is only part of the problem of convening a negotiation. The other part is making sure that the parties have faith in the fairness and integrity of the negotiation process. What is required to develop such faith will vary with the situation; but, generally speaking, before addressing the substance of the conflict, the parties will need to plan and organize the process, develop written ground rules for conducting meetings and decide whether to retain a mediator.³

When a government agency organizes a negotiation, it is important that it do so in ways that do not inhibit the agency's ability to fully participate in the negotiation. For example, the Oregon Water Resources Department (the "OWRD") attempted to convene a multiparty negotiation of the water rights claims in the Klamath Basin by providing a forum where water rights claimants could come together to negotiate. To alleviate concerns about the neutrality of the forum, OWRD's Director delegated her role as adjudicator of the water rights claims to another official and assumed the role of

³ Two excellent references containing practical guidelines for organizing multiparty consensus based processes are: National Policy Consensus Initiative, A Practical Guideline to Consensus, available at <http://www.policyconsensus.org/pubs/trainingmanual/html>, and Lawrence Susskind and Jeffery Cruikshank, *Breaking the Impasses* (1987)

facilitator and manager of the negotiating process. To ensure that the parties had confidence in the integrity of the process, the OWRD did not actively participate in most aspects of the negotiations. Participants in the Klamath Workshop concluded, in hindsight, that the negotiation process suffered because of the OWRD's passive role. What the OWRD should have done was to assume the role of a principal negotiator, actively advancing water management and other proposals. The integrity of the negotiating process could have been protected by other means, such as hiring a neutral facilitator.

2) In most circumstances, a multiparty negotiation of a contentious dispute should not begin until a conflict assessment has been performed by a neutral third party.

A conflict assessment is an assessment of the opportunities for and obstacles to resolving a conflict by negotiation. To ensure that the assessment is realistic and neither too pessimistic nor too optimistic, the assessment is performed by a neutral third party, such as a mediator or other conflict management consultant. The purpose of the assessment is twofold: to determine (i) whether it is likely to be productive to engage in negotiations given the present state of the conflict and (ii), if an opportunity does exist, to develop some ideas for how to proceed in ways that maximize the opportunities for success. As part of the assessment, the consultant will conduct confidential interviews and based on those interviews make recommendations about how to organize the negotiations. For example, the consultant may make recommendations about the negotiating agenda, identify other parties who ought to participate in the negotiations, suggest ways for dealing with concerns about the fairness of the negotiating process and recommend methods for dealing with disputed technical and scientific issues.

Conducting an assessment is critical when deciding whether to proceed with complex, multiparty negotiation because, among other reasons, it reduces the likelihood that the negotiations will fail on account of some easily remedied problem with the negotiation process itself. For example, a conflict assessment was not performed in connection with the OWRD's effort to organize a negotiation of water rights claims in the Klamath. Participants in the Negotiators Workshop believed that many of the problems that arose in the Klamath negotiations could have been avoided had a conflict assessment been performed as part of the OWRD's efforts to initiate negotiations.

3) If one of the parties to the negotiation is a Native American Tribe, the negotiations must be structured so as to respect and take account of the Tribe's sovereign status.

Native American Tribes are not simply another party to a water negotiation. They are sovereign nations that have unique interests and concerns that must be understood and respected if the negotiations are to proceed in a productive manner. As sovereigns, tribes are responsible for the future needs of their peoples and exercise regulatory authority over tribal resources. Non-tribal negotiators are likely to make more progress if they

consider and respect the unique responsibilities that tribes have towards their peoples when formulating negotiating proposals.

Many tribes regard negotiations and similar consensus based processes with suspicion. They remember past broken promises and are concerned that their voice will be diluted if they are just one of many negotiators in a multiparty negotiation. For these and other reasons, tribes prefer to negotiate on a “government to government” basis with state and federal officials. For this reason, tribal representatives at the Negotiators Workshop cited Montana’s Compact Commission approach (where the State negotiates directly with the tribes) as the preferred approach for negotiating tribal water rights claims.

Tribal representatives at the Negotiators Workshop warned other workshop participants about the hazards of assuming that all tribes will approach negotiations in similar ways. Each tribe is different, the representatives observed. Tribes have different customs, traditions and levels of comfort with the negotiation process. An empathic response to a Tribe’s unique culture and concerns is the most appropriate approach to negotiating with a tribe.

4) A realistic but firm deadline is an essential component of a successful negotiation.

All negotiators must make difficult choices as negotiations proceed. Human nature is such that negotiators are likely to avoid making difficult choices until being forced to do so. An upcoming court hearing, regulatory action or other negotiating deadline forces parties to make difficult choices they would otherwise be unwilling to make in the absence of a deadline. One reason cited at the Klamath Workshop for the lack of progress in negotiating water rights claims was the lack of negotiating deadlines.

Where negotiations are attempted and no court or other externally imposed negotiating deadline is looming, the parties should construct some alternative mechanism for pushing negotiations forward. For example, they might commit in advance to periodically assessing the progress of negotiations and agree to terminate negotiations if sufficient progress is not being made. One reason to hire a mediator is to ensure that someone (namely the mediator) can hold the parties accountable for their lack of negotiating progress.

When setting a negotiating deadline it is important that the deadline provide sufficient time for the parties to deliberate. Also, if unexpected obstacles arise, the deadline should be adjusted so as to allow the parties to respond to those obstacles without unduly eliminating the pressure to reach an agreement.

5) The conveners of a negotiation confront a dilemma when deciding who to invite to the negotiating table. Should only the “key players” be invited or should an invitation be extended to all persons (or their representatives) who are impacted by the conflict?

A negotiated agreement, no matter how beneficial, will not resolve a conflict unless all persons who are impacted by the conflict accept the agreement. In a water negotiation, the number of potentially impacted persons can be numerous. When this is true, the convenors of the negotiation confront a difficult choice. Should they invite all impacted parties to participate in the negotiations? If so, they must confront the difficult task of managing what is likely to be a cumbersome negotiation. Alternatively, should they invite only the “major players”? If so, they must confront the risk that uninvited stakeholders will undermine the negotiations or the implementation of any agreements reached.

Participants in the Negotiators Workshop differed over the question of whether persons who are not parties to pending litigation should be invited to participate in a negotiation. Some participants believed that inviting non-litigants would unduly complicate the negotiations. Other participants believed that the failure to invite someone who, though not a litigant, is impacted by the conflict could ultimately undermine the negotiations. One participant made a practical suggestion for resolving this dilemma that many workshop participants seconded. If the problem underlying the litigation can be resolved by the court’s decision, only the parties to the litigation need participate in the negotiation. However, if the problem will remain regardless of the outcome of the litigation, a consensus based approach where all impacted persons are invited is preferable.

Those who have little experience with multiparty negotiations tend to overestimate the problems that arise when managing a large negotiating group. They sometimes attempt to avoid these problems by unduly limiting the size of the negotiating group. Events in the Klamath demonstrate the perils of not inviting all impacted parties to a negotiation. A major issue in the Klamath is the amount of water necessary to protect endangered fish. At a critical stage in the negotiations of the Klamath Tribes water rights claims, the Fish & Wildlife Service took unilateral action that set the negotiations back. Environmental stakeholders who attended the Klamath Workshop suggested that this problem might have been avoided had environmental interests not been excluded from the negotiations.

6) Fragmented federal and state authority over water issues is a major impediment to successful negotiations and creative ways must be found to address the negotiating barriers created by “jurisdictional fragmentation”.

Many legal and regulatory issues can arise in a water conflict, and regulatory authority over those issues is likely to be disbursed among competing federal and state authorities. For example, in the Klamath, the US Bureau of Reclamation has regulatory authority over the Klamath Reclamation Project, the US Fish & Wildlife Service has authority over certain endangered species issues, the National Marine Fisheries Service has authority over other endangered species issues, the Bureau of Indian Affairs has responsibilities for water rights concerns of several Native American Tribes, and the Forest Service and National Park Service have management responsibilities for lands impacted by the Klamath water conflict. To further exacerbate the problem, the water allocation problems

in the Klamath are interstate problems, necessitating the involvement of multiple Oregon and California agencies.

Jurisdictional fragmentation is a major impediment to negotiations because the federal government (and to a lesser extent, state government) is rarely able to “speak with one voice”. Each agency that participates in a negotiation seeks to promote its own regulatory agenda, an agenda that frequently conflicts with the agendas of other federal agencies. As a consequence, negotiators find that, rather than being presented with a unified federal negotiating position, they confront differing and often conflicting negotiating demands. To deal with this problem, the federal government sometimes (as in the case of Indian water rights negotiations) forms a negotiating team. Unfortunately, the formation of such teams does not solve the problem unless a senior administration official, directly or through a representative “with clout”, heads up the team.

7) If the negotiations involve contentious technical and scientific issues, a joint fact finding process should be established for investigating these issues.

A major impediment to a negotiated resolution of any contentious dispute involving technical and scientific issues is “advocacy science”. Each of the contending sides hires an expert and the experts engage in a debate over which side’s science is “correct”. Since the goal of the parties’ experts is to support their clients’ positions, advocacy science creates much heat and sheds little light on complex issues that need to be satisfactorily addressed before the conflict can be resolved.

In many negotiations involving water issues, the science is uncertain and no amount of debate will eliminate that uncertainty. Moreover, many debates over science are in fact debates over differing values. Pretending that uncertainty does not exist or that there are scientific answers to questions that are in reality questions of values does nothing to further resolution of difficult issues.

A preferred approach for dealing with scientific and technical issues relevant to the outcome of a negotiation is a joint fact finding process. While the structure of the joint fact finding process must be tailored to fit the circumstances, the essences of the process is an investigation performed by a neutral expert (or panel of experts) under the direction and control of all the negotiators. Sometimes the neutral expert is not asked “to find” the correct answer. Rather, the expert is asked to identify areas where scientific opinion is certain and areas where it is not. Sometimes the expert is asked to identify alternative methods for addressing the problems underlying the conflict. When asked to do so, the expert should also be asked to assess the risks and tradeoffs associated with each alternative method.

As part of the joint fact finding process, the parties participate in an interactive dialogue with the neutral expert so as to enhance their understanding of the complexities involved in addressing problems to which there are no clear answers. As a consequence of the dialogue, the parties often find themselves revising their original assumptions and

preconceived notions about what must be done to resolve the problem. They then find they are able to favorably consider negotiating proposals they would never have entertained had there been no joint fact finding process.

8) In most circumstances, the negotiation of a multiparty dispute should not be attempted without the assistance of a neutral mediator, unaffiliated with any of the parties.

Negotiators are sometimes reluctant to retain a mediator, either out of fear of “giving up control” over the negotiation process or out of a desire to avoid additional costs. Oregon did not use a mediator in its Klamath water rights negotiations. Participants at the Klamath Workshop cited the absence of a mediator as one of the factors contributing to the failure of Oregon’s water rights negotiations.

The value that a mediator or skilled facilitator adds to the negotiation process is much greater than most people realize. A mediator can manage the complexities inherent in convening a negotiation, complexities that multiply with the number of stakeholders involved. A mediator can insist that the parties set realistic negotiating deadlines and stick to those deadlines. She can keep the negotiations on track despite the inevitable disruptions caused by aggressive negotiating tactics. A mediator can help the parties think of creative solutions to negotiating problems, solutions that go beyond compromise and “create new value.” She can act as “an agent of reality” by reminding the parties of the need to realistically assess the problems inherent in implementing negotiating proposals.

9) Adequate funding to pay the often significant process costs associated with a multiparty negotiation is an essential component of a successful negotiation.

The process costs associated with a multiparty negotiation of a contentious matter can be substantial. In addition to the costs of a mediator, logistical costs (e.g. clerical support, duplicating and mailing) will not be trivial. Where scientific and technical issues are in dispute, it may be necessary to retain one or more neutral experts. Participants at the Klamath Workshop cited the lack of money for process support as an important factor contributing to the failure of the OWRD’s efforts to facilitate water rights negotiations.

10) Negotiations will fail unless each negotiator, in addition to advancing his own interests, also looks for opportunities to advance the interests of his opponents.

To state the obvious, people negotiate to achieve objectives they may be unable to achieve by other means. Once a person concludes that she cannot achieve her objectives through negotiation, she will abandon the negotiation and pursue her objectives through other alternatives. Successful negotiators pay attention too and respond to the interest

and concerns of their opponents. They look for opportunities to further their opponents' interests to the extent that they can do so without undermining their own interests.

In the Klamath, a federal court ordered that irrigators whose water deliveries had been curtailed participate in court supervised mediation with environmental and other groups concerned about the aquatic ecosystem. Irrigators sought to negotiate over such things as the resumption of irrigation deliveries; the other groups wanted to negotiate over such things as habitat protection and watershed restoration. The irrigators terminated the mediation after they concluded (rightly or wrongly) that the other parties were unwilling to address the irrigators' concerns.

III.

REPORT OF PROCEEDINGS KLAMATH ADR ASSESSMENT WORKSHOP PORTLAND, OREGON MARCH 24-25, 2003⁴

A) Introduction

On March 24 and 25, 2003, the Natural Resources Law Center of the University of Colorado Law School (the "NRLC") and the National Policy Consensus Center of Portland State University convened a meeting of eighteen individuals who participated in one or both of two unsuccessful efforts to resolve the water conflicts in the Klamath by negotiations. The efforts in question were (i) the Alternative Dispute Resolution Process sponsored by Oregon's Water Resources Department (the "ADR Process") and (ii) a mediation (the "Federal Court Mediation") conducted in a federal court proceeding known as *Kandra v United States*.⁵ The goal of the meeting was to develop new insights into ways for overcoming the many barriers to negotiating solutions to difficult water resources conflicts by engaging the workshop participants in a dialogue about what went right, what went wrong and what might have been done differently in their negotiations. The people who participated in all or portions of the meeting are identified in Part V of this report.

This report is a summary of the major underlying themes that emerged from the workshop participants' comments and is not a record of all comments made. This report was prepared by the facilitators of the meeting and does not purport to be a consensus statement about what transpired at the meeting. Consensus was not sought on any points that were discussed at the meeting, and none of the statements and opinions summarized below reflect the views of the entire group. This report does not attempt to evaluate, assess or make judgments about any comments made during the workshop.

B) Origins of the Negotiation Efforts

The origins of the ADR Process are traceable to the Klamath Tribes' proposal that the Oregon Water Resources Department (the "OWRD") resolve the Tribes' water rights claims through negotiations. The OWRD was advised that it could not negotiate directly with the Klamath Tribes because the Director of the OWRD (the "Director") is, under Oregon law, the adjudicator of water rights claims in the ongoing Klamath Basin Water Rights Adjudication. As an alternative to direct negotiations, the Director proposed that a process be created where all water rights claimants would have an opportunity to come together to negotiate their claims. The ADR Process commenced in the fall of 1997, and

⁴ This report of the proceedings of the Klamath Workshop was compiled by Lucy Moore and Steve Snyder.

⁵ 145 F. Supp. 2d 1192 (D. Or. 2001)

was suspended on September 11, 2001, several months after the curtailment of irrigation deliveries to the Klamath Project in the spring of 2001.

The Federal Court Mediation was initiated in response to a court order. In April 2001, several project irrigators commenced a civil proceeding in Oregon Federal District Court seeking a court order prohibiting the Bureau of Reclamation from withholding deliveries of irrigation water during the summer of 2001. The Court, before eventually ruling against the irrigators, referred the dispute to mediation. There were two distinct phases to the mediation—the first phase (which was initiated at the suggestion of the State of Oregon) took place prior to a preliminary injunction hearing in late April of 2001 and the second phase took place following the preliminary injunction hearing. The mediation terminated, without an agreement, in October 2001.

C) Goals of the Two Negotiation Efforts

1) ADR Process

The OWRD intended that the ADR Process would become a forum for sharing of information among stakeholders, that it would foster an atmosphere in which parties could form negotiating groups on their own, and bring back proposals to the ADR group as a whole that could be incorporated into the Klamath Basin water rights adjudication decree.

Two different themes emerged when workshop participants were asked to articulate their reasons for participating in the ADR Process. One theme related to the resolution of water rights claims in the pending adjudication. For example:

- One participant said she hoped to resolve adjudication issues for her family without the expense of an attorney.
- Another participant sought to avoid divisive, expensive, lengthy litigation.
- Another hoped the ADR Process would become a comfortable forum for resolving contested water rights claims.

The second theme related to the use of the ADR Process as a forum for developing and implementing a plan for improving the management of the basin's water resources. For example:

- One participant referred to “looking forward rather than backward”. The adjudication, it was noted, is based on the past; the ADR looks forward and tries to create new solutions.
- Another participant referred to the need to include issues and uses downstream in the lower basin, to reach beyond the state line to include all parties and to create a solution for the entire watershed.
- Another participant talked about the need to create a shared vision, with more water for all needs through new projects.

The former Director of ODWR explained that she conceived of the ADR Process as a method for transforming the "win-lose" nature of water rights adjudication into a "win-win" negotiation by "making more water". The Director's goal was to use the ADR Process as a forum for reaching agreements about a variety of water conservation, water quality improvement and water supply enhancement measures that would rectify imbalances in the supply and demand for water. If this objective could be accomplished, the adjudication of individual water rights claims would have less impact on individual claimants and water rights disputes should, as a consequence, be easier to resolve by negotiation.

At one point in the discussion, a workshop participant stated that it was a "subversion" of the ADR Process to transform a negotiation over water rights into a negotiation about water management issues.

2) Federal Court Mediation

Workshop participants who were involved in the federal court mediation had different views about what should be accomplished in the mediation. The first phase focused exclusively on alternatives for providing some irrigation deliveries in 2001. The second phase was broader and many issues were brought to the negotiating table by the parties. In the second phase, project irrigators continued their efforts to negotiate an immediate resumption of irrigation deliveries and environmental and tribal interests sought to negotiate fish habitat, demand reduction and watershed restoration measures. The State of Oregon sought to harmonize the parties' objectives by combining a drought related reduction in irrigation deliveries, rather than a full curtailment, along with an increased commitment to habitat and watershed restoration.

D) Interstate Aspects of the Water Conflict

Several workshop participants observed that many of the water resource problems in the basin have impacts in both the Upper and the Lower Basins yet no institutional vehicle exists for making coordinated decisions about how to address those problems. For example, while the adjudication seeks to determine water rights in Oregon, no institutional vehicle exists for determining California's share of the Klamath's water generated in Oregon. While an interstate compact exists, the compact does not, as do some other compacts in the west, allocate specific amounts of water between the states.

Except for irrigation deliveries in the Scott and Shasta Rivers and the trans-basin diversion from the Trinity River to the Sacramento River, there are no significant consumptive uses from the main stem of the Klamath River in the Lower Basin. As a consequence, California officials do not feel pressure from "traditional" water users to resolve the question of California's "fair share" of the water. As another consequence, the California Tribes have assumed much of the burden of "fighting for" California's share of the water in the main stem.

The consensus-based processes in the basin have not dealt with the “interstate aspects” of the Klamath’s water conflicts.

- The ADR Process is focused on the determination of water rights in Oregon's portion of the basin.
- The Upper Klamath Working Group does not focus on issues that impact stakeholders in the Lower Basin.
- The federal court mediation was the first forum in which many of the upper and lower basin interests were at the table.

E) Differing Perceptions About the Adequacy of the Water Supply

"People are in denial about the adequacy of the water supply," commented one long time basin resident who had copies of letters written in 1937 that discussed the impact on the watershed of water shortages.

Workshop participants engaged in an extended discussion about the validity of a draft scientific report prepared by the Interior Department and the Department of Justice on behalf of the California Tribes that concludes more water is needed to sustain the Basin’s the fish population. Some participants believed that the objectivity of the report could not be questioned, at least by anyone who took the time to study it. Other participants strongly disagreed and raised concerns about the fact that project irrigators had been excluded from the process in which the report was discussed. A debate ensued about whether project irrigators had been excluded or chose not to attend.

Many participants believe that both ADR Process and the Federal Court Mediation may have suffered from the lack of objective, acceptable science related to fish habitat issues. Participants debated whether or not it was possible to create a credible research process that would be acceptable to everyone. Points made during this discussion include:

- It may not be possible to develop a truly objective scientific report. One participant used the term “sticker shock” and questioned whether some irrigation interests would accept any report, no matter how objective, that concluded that current water river flows are inadequate to sustain the fish population.
- One participant stated that increased fish populations is one of his highest goals, but the narrow focus on allocation of Project water is not helping the debate move forward.
- One participant noted that the reaction of some groups to the National Resource Council’s Interim Report (which calls into question the Interior Department/Department of Justice report) creates the appearance that such groups are in fact not interested in objective science.
- Why should the conclusion that the water levels in Klamath Lake and Klamath River are inadequate, a participant asked, inevitably lead to the conclusion that irrigation interests must suffer.
- The contention, one participant stated, that the supply is inadequate is a stalking horse for those who have social and political agendas. One example cited was the Klamath Tribes’ efforts to regain their tribal lands, using water issues as negotiation leverage.

- Still another participant observed that scientific issues cannot be addressed in the abstract and that the specific issues to be investigated are dependent on water management goals. Building on this point, another participant observed that decisions about how to achieve management goals require the identification of, and making decisions about, trade-offs. One way science can help is to provide information about trade offs.
- Several participants suggested that there is a need for a scientific process that all can buy into.

F) Process Issues

1) The ADR Process:

Because the Director of Oregon's Water Resources Department is also the "Adjudicator" in the water rights adjudication, the Department was advised that it could not enter into "one on one" negotiations with the Klamath Tribes over their water rights. This advice led to the creation of the ADR Process, as a vehicle for negotiating with all parties involved in the adjudication.

Some felt that the Director's role as convenor and administrator of the ADR process left the State without an important role at the negotiating table. Perhaps use of a professional mediator would have enabled the State to take a more proactive role in the negotiations. The ADR process may have been a grand vision, without enough money to retain a mediator and other necessary process support.

Some environmental interests did not regard the ADR Process as an acceptable negotiating forum because (i) the "right people" were not at the table and (ii) the process focused on Oregon water rights. Some project irrigators objected to using the ADR Process as a forum for dealing with habit and basin restoration issues. Others saw it as an appropriate forum for comprehensive solutions. Many workshop participants speculated that the federal government did not regard or treat the ADR Process as a legitimate negotiating forum for reasons that were never articulated.

Although the Director periodically consulted California State officials, these officials did not actively participate in the ADR Process. One reason they did not was the process's focus on Oregon water issues. The absence of a similar process in California was noted as an inherent limitation of the Oregon process.

As already noted, at least one ADR participant questioned the legitimacy of redirecting the focus of negotiations from individual water rights claims to watershed restoration issues. Other participants believed that the process lacked a shared or common vision, even though the process included development of written goals and "Operating Principles".

Many workshop participants registered their belief that non-project, "above the lake" irrigation interests had sought to obstruct and delay the ADR Process, observing that "above the lake" interests are best served by maintenance of the status quo.

As discussed more fully below, reopening the *Adair* litigation by the Klamath Tribe and the federal government in early 2001 was a blow to the ADR process in the eyes of several participants. It came without warning, and at a time of productive negotiations. Others believed that the *Adair* litigation was used as an excuse for not negotiating by some who never had an intention of negotiating in the first instance.

2) *The Federal Court Mediation*

Participants in the federal court mediation had widely divergent goals. Project irrigators sought immediate resumption of water deliveries. They wanted to negotiate over such things as the legitimacy of the Biological Opinion that led to the termination of water deliveries. Tribal and environmental interests sought protection for endangered and threatened species and for ecosystem restoration. They wanted to negotiate over such things as demand reduction, commercial farming on the wildlife refuges, and habitat restoration measures. Thus one negotiating group had a short-term focus while another had a long-term focus.

It was stated by one participant that Project irrigators concluded they had little, if any, negotiating power. They decided that the best way to advance their interests was to take action "away from the negotiating table" by, for example, seeking political support from state and federal elected officials.

Some participants believed that they were making progress when negotiating against a real negotiating deadline (i.e. the April date for cut off of water deliveries). Once the deadline passed and the federal court denied the injunction, the negotiating dynamics changed and any progress made was lost.

The federal government's attitude toward the mediation seemed to change markedly as the mediation proceeded. At the outset of phase 2 of the mediation, government representatives seemed to be interested in proactively seeking solutions to negotiating problems, attempting to balance the needs of the fish and agricultural interests. Later, some workshop participants suggested, government representatives seemed to lose interest in the negotiations and made no effort to keep the negotiations "alive". Some suspected that this "paradigm shift" occurred after agricultural interests put political pressure on the administration.

Some participants felt that the inability of the irrigation community to obtain relief from the impacts of the curtailment of water deliveries during the first phase of the mediation adversely impacted negotiations during the second phase. These participants also believed that the second phase of the mediation was adversely impacted by the failure of

many mediation participants to acknowledge the extremis in which the irrigation community was operating.

Some participants expressed concern about the management of the Federal Court mediation as more parties joined the mediation. As the parties jockeyed to adjust the process to meet their differing agendas, the focus of the process became unclear. "The target and the rules moved at every meeting," observed one participant. "The feds changed the agenda on the day of the meeting," observed another. Another participant expressed the belief that the mediation sessions themselves were not well controlled and lacked definition: a broad range of interests, relevant and not, attended the meetings; the feds sat in the back of the room; the process faced the challenge of dealing with a large number of very interested people, whose presence complicated the negotiation process, but whose absence would have caused social and political unrest away from the table.

G) Federal Government's Inability to Negotiate with "One Voice"

Each federal agency has its own agenda and supports and receives support from different constituencies. Thus, the federal government can "speak with one voice" in a negotiation only if a high-level political appointee assumes responsibility for spearheading the negotiations. The federal government's neglect of the Klamath is evidence that there are not enough "high level" officials to go around

Late in the ADR Process, a high level official in the Clinton Administration did take responsibility for spearheading negotiations over the Klamath Tribes' water rights. This official participated in efforts to advance an "Agreement in Principle" that had been developed by the Klamath Tribes and project irrigators; however, neither environmental interests nor the Lower Basin Tribes were initial parties to this negotiation. Earlier in the ADR Process, the Fish & Wildlife Service's Christmas Eve letter announcing its intent to terminate farming on wildlife refuges within the project disrupted negotiations. Later the overall ADR negotiations were disrupted once again, this time by the actions of the federal government and the Klamath Tribe in seeking to reopen the long dormant *Adair* litigation in the spring of 2001. Any prospect of salvaging the negotiations following the reopening of *Adair* vanished when the Bureau of Reclamation announced that no irrigation deliveries would be made to Klamath Project water users from Upper Klamath Lake that summer.

The impact on the negotiations of the Fish and Wildlife Service's conduct, including the Christmas Eve letter, and of the reopening of *Adair* were the subject of extended discussion.

- Some felt the Fish & Wildlife Service acted like a "rogue", by taking action without regard to the impact of its action on the negotiation process. Others speculated that the action may not have occurred had environmental and Lower Basin interests been involved in the negotiations.
- Reopening *Adair* felt like a breach of trust to many. Although the Klamath Tribes and the federal government initiated the action in response to Oregon's

“Preliminary Evaluation of Claims,” published by the State in October 1999, it was difficult for other parties to recover from the shock and comprehend the legal reasoning that made the action necessary. The “above the lake” irrigation interests took advantage of the *Adair* situation to try to bring the negotiations to a halt.

Workshop participants then discussed the federal government’s attitude toward collaborative negotiations. Many believe that the federal government sends "mixed messages" about its interest in participating in stakeholder processes. On the one hand, the federal government claims it wants "locally based" solutions while on the other hand it seeks to impose solutions based on its view of the politics of the situation. However, workshop participants also acknowledged that local residents also give conflicting signals about the federal role. Local residents sometimes want the “feds” to take charge and solve problems on the one hand, and on the other hand residents resent having the reins taken away from the local community. There was discussion about the importance of locals presenting a clear proposal in a unified voice, in order to get the attention and the unified support of the federal agencies.

Workshop participants debated the appropriate role for the multiple federal agencies in a collaborative process. The agencies’ functions include regulating, providing funds, and representing the federal interests (but rarely, if ever, with a single voice). In addition, some felt that the federal agencies should be accountable for past actions that impacted irrigators and tribes, and that liability and compensation for past actions must be part of any negotiation. Project irrigators deemed it particularly unfair that they are now being asked to bear all of the costs associated with a change in social policies, especially in light of the fact that their forebears moved to the basin in reliance on previous social policies. Others deemed it particularly unfair that even earlier promises to tribes were not being met.

Many felt the federal agencies failed to support the ADR Process in several ways. Their participation was weak and scattered. The agencies were unable to speak with one voice. The level of leadership necessary for true support and decision-making was not at the table, and each administration was painted with actions of subordinates, for better or worse.

There were questions about whether or not the ADR process was the appropriate forum for federal participation. The group discussed the possibility of the federal agencies convening a process (like the Conservation Implementation Program—though some felt that this process had serious shortcomings), since they usually hold the key to the solutions. Some felt that this made sense; others warned that the feds bring more problems than solutions.

H) Multiplicity of Processes

Some workshop participants voiced concern about the multiple consensus-based processes in the Klamath. In addition to the ADR Process and the Federal Court

Mediation, there was the Klamath River Task Force, the Upper Klamath Working Group and the Federal Energy Regulatory Commission licensing of the Klamath Hydroelectric Project. How can stakeholders handle multiple processes? How do they know which is the “real” one, the one worth investing time and energy in? In the Klamath, parties are exhausted, personally and institutionally, from “chasing from one event to another,” afraid to miss out on what may turn out to be the *real* game. Participants question whether or not there is continuity from one process to another.

D) Thoughts About a New Process

Some workshop participants wanted to discuss what a new process should look like, assuming people have the energy to make still another attempt at resolving the Klamath’s water problems collaboratively. Although many participants registered their ambivalence about the idea of still another process, the group agreed to discuss the issue.

Participants made a number of suggestions about what would constitute a legitimate process and what would be necessary to enhance the prospects of success. *The following suggestions were made but no consensus was reached or even attempted.*

Any new process:

- Should be congressionally mandated and funded.
- Should have a grass roots component.
- Should include only individuals who are collaboratively inclined and willing to make a commitment to the process.
- Should include those at a level to make decisions.
- Should include the two states as equal partners.
- Should provide a small plane to accommodate the long distance travel needs of participants.
- Should have a small steering committee.
- Should establish a scientific and technical data gathering system.
- Should have strong leadership.
- Should have professional mediation.

Achieving immediate, “on the ground” results is a necessary component of any new process, one participant argued. A discussion then followed about the advantages of small-scale accomplishments versus efforts to reach global solutions. “We know what needs to be done, on the ground. Let’s start doing ‘stuff’,” commented a participant. This would involve allowing others to try things, as well as undertaking projects yourself.

A participant observed that “Many parties are not yet able to grasp that they will not get everything they want.” Furthermore, some do not want to support anything that will benefit their opponent, on general principles. Until everyone can accept the need to give up something, some said, collaboration will be impossible. “If major players hang onto the competitive approach, they will not be able to collaborate.”

Potential Models: The Conservation Implementation Plan is considered by some to be a model for a Klamath Basin process, though others expressed concerns over using this process as a model. The group is small – 7-9 people – and was called for in the Biological Opinion. Another model could be the TMDL Teams, which are administered at the state level.

FERC Re-licensing Process: Participants noted that this is an on-going process that might serve as a vehicle for addressing water management problems collaboratively.

J) Leadership

In response to a question about who showed leadership in the basin, no examples were cited other than Senator Hatfield's efforts in forming the "Upper Basin Working Group." A leader is someone who has the greater public good as a priority, offered one participant. Political leaders are reluctant to lead when faced with a local controversy, several group members observed, because politicians know they will become targets if things turn out badly. Someone asked if "ordinary" people in the Klamath showed acts of vision and courage. No one responded to this comment.

K) Foundation for Cooperation

While the facilitators purposefully did not engage workshop participants in a dialogue about the substantive issues, the intractable nature of those issues was apparent throughout the dialogue. Two examples illustrate:

- Throughout the workshop, project irrigators observed they "had done nothing wrong". The federal government had offered incentives to those who were willing to homestead and farm the lands served by the Project. Descendants of these homesteaders should not have to bear the cost of a change in social policy.
- Other participants challenged the tacit assumption that "the fish" and tribal interests are entitled only to what's left after farming interests are satisfied. One participant "took offense" when a facilitator posed the question "why, despite four years of effort in the ADR Process, were the parties unable to avoid the 2001 irrigation crisis?" To even ask such a question, the participant observed, suggested that farming interests were more important than other interests and failed to acknowledge the already existing environmental crisis and harmful impacts on commercial fishing and tribal communities.

At the conclusion of the workshop, the facilitators remarked on the participants' demeanor. The facilitators observed that workshop participants were respectful and courteous to one another. All workshop participants demonstrated their awareness of and acknowledged the different points of view of other participants. Why, the facilitators asked, were negotiations so difficult, given what appears to be productive working relationships among all workshop participants? In response, one participant observed

that, in spite of mutual respect and even affection, “we do not trust one another”. No participant took issue with this comment.

One participant summarized the dilemma they all confront. "It's difficult to cooperate when the consequences of being taken advantage of are so severe".



IV.

REPORT OF PROCEEDINGS WATER NEGOTIATORS WORKSHOP BOULDER, COLORADO JUNE 4 AND 5, 2003⁶

A) Introduction

On June 4 and 5, 2003, the Natural Resources Law Center of the University of Colorado Law School (the “NRLC”) convened a workshop of eighteen people (plus one observer) who had taken part in difficult and contentious negotiations over water allocation issues. Nine of the workshop participants had taken part as negotiators; nine had taken part as mediators. The purpose of the workshop was to identify and elaborate on the lessons learned by workshop participants from their negotiations. The participants in the workshop are identified in Part V of this report. .

This report is a summary of the major underlying themes that emerged from the workshop participants’ comments. It does not attempt to recreate the language the participants used when making their comments nor is it a record of all comments made. Consensus was not sought on any points, and none of the statements and opinions summarized below reflect the views of the entire group. This report does not attempt to evaluate, assess or make judgments about any comments made during the workshop. All workshop participants had the opportunity to comment upon this report, and this report incorporates all comments made.

B) Identification of Negotiation Challenges

At the outset of the workshop, each participant was asked to identify a major challenge he or she had confronted in a water allocation negotiation. Some of the challenges identified were:

- The need to find new water. Water allocation negotiations are inherently “win-lose” negotiations, except to the extent that more water can be “created” through construction of new storage facilities, implementation of water conservation measures and other actions. “Creating” new water in the arid and rapidly growing Western United States is becoming increasingly difficult.
- Responding to the different approaches States take when negotiating with Native American Tribes over tribal water rights claims. For example, Montana negotiates with Tribes on a “government to government” basis. Stakeholder groups (such as irrigators and environmentalists) do not participate directly in the negotiations. By way of contrast, in California the

⁶ This report of the proceedings of the Negotiators Workshop was compiled by Steve Snyder.

Tribes negotiate directly with other stakeholder groups and their sovereign status is not recognized.

- The variety and complexity of the legal issues that arise in a single negotiation. For example, a water rights negotiation might not be limited to issues arising under state water law. It might also include matters arising under the Endangered Species Act, the Clean Water Act, federal reclamation law, federal hydropower regulatory requirements and land use law.
- Finding the right mix of negotiating issues and parties. There are so many potential negotiating issues and parties to a water negotiation that productive negotiations are not possible, unless limits are imposed on the number of issues and parties.
- How to begin the negotiations. For example, should the negotiators initially focus on the “big picture” issues and run the risk of polarizing the parties? Alternatively, should the negotiators focus initially on less contentious problems and run the risk that the parties will remain in denial about the difficulties of the problems they confront?
- Getting negotiations started where there is a long history of animosity and litigation among key parties. For example, in the Flathead in Montana, relationships are strained after years of litigation between the Tribe and the irrigation community.
- The inability to assess the extent to which federal funding will be available to finance the implementation of negotiated solutions to water allocation problems. Water negotiations inevitably result in proposals that require the expenditure of significant amounts of federal money. Realistically assessing how much money might be available is next to impossible.
- Integrating scientific, technical and cultural issues into the negotiation. Water negotiations inevitably raise scientific and technical questions (such as the amount of water necessary to protect endangered fish) and cultural concerns (such as preservation of fishing for ceremonial purposes). The failure to address these issues in sensitive ways can polarize the negotiations.
- Negotiating short-term agreements that address an immediate water shortage. Unless the impacts of a pressing problem (such as the existing drought) are mitigated, people will be unwilling to talk about long run solutions to water allocation problems.
- Obtaining political support for an ongoing negotiation. Water allocation issues are politically charged, and negotiating in a highly charged political environment will be difficult unless politicians support the negotiation process.

- Dealing with unbounded stakeholder groups. In a water negotiation, there are large numbers of stakeholders with a variety of conflicting interests. It is difficult to organize a manageable negotiating group that reflects the diversity of parties and issues.

C) Convening and Managing an Effective Forum for Negotiations

The first topic the workshop participants addressed dealt with their experiences in convening and managing the negotiation process. The facilitators opened the discussion by relating two vignettes taken from a recent workshop involving stakeholders who had been involved in two unsuccessful efforts to resolve the water conflicts in the Klamath Basin.

The first vignette related to the efforts of the Oregon Water Resources Department (the “OWRD”) to convene an ADR Process to resolve the water rights claims in the Klamath Basin water rights adjudication. The OWRD acted as the convenor and manager of the Klamath Basin ADR Process even though, as the state’s water management agency, it was also responsible for both adjudicating all disputed water rights claims and for developing the state’s water management policies. Some stakeholders questioned whether the state could act as an unbiased convenor of the ADR Process while also serving as the arbiter of all unresolved water rights disputes. Others questioned whether the OWRD failed to exert leadership by proactively advancing water management proposals. The OWRD seemed to take a passive role in the negotiations out of concern that by being proactive it might compromise its role as convenor and facilitator of negotiations.

The second vignette related to the lack of funds for necessary process support. Because of the lack of funding, OWRD was unable to retain a mediator or conduct a situation assessment. Limited funds were available to pay for joint fact finding processes, such as a neutral scientific investigation of the amount of water necessary to protect endangered species.

A workshop participant familiar with the Klamath situation responded to these vignettes by stating that important stakeholders did not trust the OWRD. For example, the Klamath Tribes, after having defended their water rights claims from attack by the OWRD for decades, could not bring themselves to think of the OWRD as a neutral facilitator of the negotiation process. Another workshop participant familiar with the Klamath suggested that many process problems might have been avoided had the OWRD retained an independent consultant to conduct a situation assessment before proceeding with the ADR Process. An assessment, the participant explained, is a critical intervention since it forces the parties to think realistically about what might (or might not) be accomplished in a negotiation and about what obstacles must be addressed if a negotiation is to proceed in a positive manner.

Another workshop participant confirmed the value of a situation assessment. Each negotiation has its unique set of problems and a situation assessment is a vehicle for anticipating and responding to those problems. Another participant offered a further reason for doing an assessment. A situation assessment bolsters efforts to obtain governmental and foundation funding for mediation services and other process support.

Inherent in every assessment, a workshop participant observed, is the question of whether to convene a consensus based process in which all stakeholders (or their representatives) participate or whether to convene a more traditional negotiation in which only key stakeholders participate. The number of negotiators in a water rights negotiation, this participant observed, could quickly become unmanageable if all persons who might be impacted by a negotiation were asked to participate. For that reason, it is normally preferable to keep the negotiating group small at the outset and add members to the group as the situation warrants.

Another workshop participant seconded this view. Why, the participant asked, would people who are not parties to the underlying water rights litigation ever be invited to participate in a water rights negotiation? One might ask non-parties to participate, someone responded, if non-parties had the power (for example, by political action or litigation) to frustrate any settlement reached. Still another workshop participant proposed a formula for determining whether persons who are not parties to the litigation should be asked to participate in a negotiation: whether non-parties should participate depends on the problems underlying the litigation. If the underlying problem can be resolved by a court decision, only the parties to the litigation need be parties to the negotiation. On the other hand, if the problem will remain regardless of the outcome of the litigation, a consensus-based process where all affected stakeholders are invited to participate might be preferable. Ways can be found, this participant asserted, for dealing with the large numbers of stakeholders that might potentially be involved in such a negotiation.

A workshop participant then observed that lawyer and non-lawyer mediators tend to take different approaches to negotiations. Lawyer-mediators are more likely to start with a small negotiating group and expand the group as the situation warrants. Non-lawyer mediators tend to invite all stakeholder groups to participate and assume (rightly or wrongly) that they will be able to find ways to manage a potentially unwieldy group.

While an “all inclusive” model is a “feel good” model, a participant observed, there is no one correct answer to the question of who should participate in a negotiation. Particularly in water negotiations where the number of impacted parties is so large, creating a process for managing the negotiations can be an insuperable task.

Often a mediator is brought into an ongoing negotiation, a participant observed. In those situations, the mediator must adapt to a negotiating group that has already been formed. She must understand the strengths and limitations of the “consensus based” and “key players” models of negotiating and be prepared to deal with the problems inherent in the

model she finds herself dealing with. Another participant concurred, but observed that there are practical limits to what can be done in each type of negotiating group.

A workshop participant responded to this discussion by articulating a concern of Native American Tribes about negotiations in general and consensus based processes in particular. Many tribes are concerned that their voices will be diluted if they participate in a process where they are but one of many negotiators. Tribes are sovereign governments, so they are likely to prefer a “government to government” negotiating model, such as the one employed in Montana.

As the discussion concluded, a participant reminded the group of the value of “informal” or “off-line” negotiations. Whether the negotiating group is small or large, frequently the most progress is made when subsets of negotiators meet privately, outside of the formal negotiation process.

D) Scientific and Technical Issues

The second topic addressed by workshop participants dealt with the impact of scientific and technical disputes on the negotiation process. Once again, the workshop facilitators began the discussion by relating two vignettes taken from the Klamath stakeholders’ workshop.

The first vignette related to the Bush administration’s effort to resolve the debate over how much water was needed to protect the endangered and threatened fish inhabiting Klamath Lake and Klamath River. At the administration’s request, the National Academy of Sciences appointed an independent panel of experts to look into this question. The panel issued an interim report that concluded there was “no scientific basis” for the Bureau of Reclamation’s decision to maintain water levels in Klamath Lake and Klamath River by terminating irrigation deliveries in the summer of 2001. Irrigation interests seized on the report as proof that federal regulatory officials had been practicing “junk science” when they ordered that irrigation deliveries be terminated. It was apparent from the Klamath Workshop that the NAS report has done nothing to quell the debate over the amount of water necessary to protect the fish. In fact, at the Klamath Workshop, stakeholders continued to engage in the debate, relying on or attacking the findings of the NAS panel, depending on whether the findings supported or undermined their positions.

The second vignette related to “sticker shock”. A participant in the Klamath Workshop used this term to describe her belief about how irrigation interests would react to a “truly objective” scientific analysis of the Klamath. Whatever the amount of water necessary to protect the fish, the amount would be so large as to constitute “sticker shock” to irrigation interests and would be rejected out of hand by them because of the adverse implications for farming in the basin.

A workshop participant responded to these two vignettes by observing that the Bush administration did not ask the NAS panel the correct question. From the perspective of

the Klamath Tribe, the question was not simply what water level was necessary to maintain the fish population. The Tribe's concern for the fish population emanated from cultural and religious values. Decisions about actions necessary to protect the fish population could only be made by consideration of those values. Another workshop participant observed that policy differences, not scientific disputes, are what are at stake in a water allocation negotiation, and no scientific panel can make credible judgments about policy issues. In a negotiation, all stakeholders must be involved both in formulating the questions asked and directing the investigation of independent experts.

Several workshop participants elaborated on the concept of a joint scientific investigation conducted under the direction of all stakeholders. One of the major problems inherent in the biological opinion process mandated by the Endangered Species Act is the lack of stakeholder involvement in the development of biological opinions. As a consequence, the Fish & Wildlife Service winds up producing a document it feels forced to defend. A more productive way of proceeding would be for the effected parties to engage in a collaborative search for ways of addressing problems for which there are no known solutions. What the ESA requires, a participant observed, is not the "correct answer" but an answer based on the "best available science". Debates over what scientific answer is "correct" are unresolvable in part because no "correct" answer is possible given the present state of knowledge and in part because the "correct" answer is a policy question based on different people's tolerances for risk and uncertainty.

Answering the scientific question is not always necessary or helpful, a participant observed. What is required is that the underlying problem be addressed and that steps for addressing the problem be developed in light of the uncertainty and risks inherent in the particular situation.

Where it is necessary that an uncertain scientific question be "resolved", (for example, in the context of an ongoing lawsuit) a preferable way for doing so is through the use of a neutral panel of scientific experts. However, the procedure the panel follows should not be the traditional procedure where the parties present evidence and argument and the panel makes a decision. Rather, the panel should engage in an interactive dialogue with the parties and their experts before making a decision. By engaging in an interactive dialogue, the panel will be forced to come to grips with the more subtle aspects of the situation.

The scientific process in the Klamath was flawed, a participant observed, because the Bush administration was not looking for a solution to the water management issues in the Klamath. Rather the administration was looking for a solution to a political problem. It was looking for a way to appease the irrigation community and assumed there was a scientific answer to a question surrounded by uncertainty. Appointing an expert, purportedly objective panel was good politics. It was not a useful way for addressing the Klamath's watershed problems.

Joint fact finding, a participant observed, is the preferable (and perhaps the only) way for making progress when scientific and technical debates are at the root of water allocation disputes.

E) The Impact on Negotiations of Strategic Moves and Collateral Events

As their third topic, workshop participants discussed the impact on negotiations of the parties' strategic moves and the occurrence of collateral events. Following their established practice, the facilitators began the discussion by relating two vignettes from the Klamath Workshop.

The first event vignette related to the irrigators' decision to terminate the federal court mediation that was attempted after the irrigators commenced litigation seeking a preliminary injunction mandating that irrigation deliveries be resumed. The irrigators withdrew from the mediation shortly after the court denied their request for a preliminary injunction. They did so, in part, because they concluded that mediation offered no hope for resolving their immediate problem—the lack of irrigation water—and that environmental and tribal groups were not prepared to address ways for mitigating the harm caused by the termination of irrigation deliveries. In deciding to terminate the mediation, the irrigators concluded that they could best accomplish their goals through other actions, such as initiating “takings” litigation against the federal government and mounting a political campaign. Perhaps, a workshop facilitator suggested, environmental and tribal interests overplayed their hand in refusing to address the irrigators concerns in the mediation.

The second vignette related to the reopening of the so-called *Adair* litigation. At the same time that an effort was being made to reinvigorate negotiations in the ADR process, the Klamath Tribes instituted new litigation in the same federal court that had confirmed the priority of its water rights. Many community members (rightly or wrongly) regarded the Tribe's actions as a breach of trust. The resulting widespread hostility toward the Tribe undermined the efforts to reinvigorate negotiations. What was evident from the Klamath Workshop was the intense emotions generated by the Tribe's actions in reopening *Adair*. At that workshop, one stakeholder said she felt “betrayed and hurt” by the Tribe's action at the time and that she feels the same way today, even though she now accepts the Tribe's explanation for why it did what it did.

Workshop participants reacted to the facilitators' description of these events in a variety of ways. Two workshop participants defended the Tribe's action, observing that the Tribe reopened *Adair* to challenge (successfully, as it turned out) an extremely prejudicial decision in the Klamath water rights adjudication. In response to these comments, a workshop participant stated that the issue was not whether the Tribe's action in reopening *Adair* was justified. The issue was whether the Tribe could have accomplished its objective without disrupting the negotiations. One way of doing so might have been to inform the other parties in advance of its plans, its reasons for reopening *Adair* and of its desire to negotiate despite the reopening. Still another participant observed that the

impact of reopening *Adair* might have been different had the parties retained a mediator. A mediator might have helped the parties reach agreement on how the Tribe might reopen *Adair* without disrupting negotiations. Alternatively a mediator might have taken proactive steps to limit the impact of the reopening on the negotiation process.

A resilient negotiating process, a workshop participant observed, can absorb the impact of actions such as the reopening of *Adair*. The challenge is to create a resilient process. Contracting (i.e. the establishment of negotiating ground rules), another participant observed, is an essential ingredient to the creation of a resilient process. Through the contracting process, process rules can be agreed upon (such as the establishment of a “no surprise policy”) that will mitigate the impact of the parties’ gamesmanship. Another participant cited the example of a process rule that had served a difficult negotiation quite well. Each negotiation session began with a discussion of recent developments and the parties’ reactions to those developments.

Ground rules, a participant observed, will never prevent a party from taking action outside the negotiation process if the party believes it has nothing to gain from a negotiation. It is the mediator’s job to ensure that the mediation does not reach such a stage. One way a mediator can do so is by helping the parties understand that strategic moves are not meant as “personal affronts”; they are part and parcel of the negotiating process. Building resiliency in a water rights negotiation, a participant then observed, is a challenging task. Because negotiations go on for years, the negotiators and the principles for the key players change, and these changes often herald changes in negotiation positions.

Not just actions but also language can generate visceral reactions that undermine negotiations, a participant next observed. For example, tribal members may react negatively to negotiators who speak in terms of the “creation” of an Indian water right as opposed to the “recognition” of an already existing water right. Mediators, not just negotiators, are guilty of using inflammatory language.

A workshop participant then raised the topic of mediator neutrality. A mediator is never “neutral” in the sense of having no personal preferences and biases. What a mediator should strive to be is “multi-partial”. A successful mediator is a mediator who conceptualizes his or her role as an advocate for all parties.

Leadership is another component of a resilient negotiating process, a workshop participant later observed. Politicians can exercise leadership in a variety of ways. They might act as the convenor of a collaborative process or lend their support to an ongoing process. They might champion negotiations when their constituents advocate litigation or political action. They might sponsor legislation that implements negotiated solutions to water allocation problems. Negotiators must also exercise leadership if resilience is to become part of the negotiation process. Two examples of leadership by one of the parties to a negotiation were cited. In the Rocky Boy water rights negotiation, the Tribe exhibited leadership by making negotiating proposals that responded to the other parties concerns. In the Klamath, the attorney for the Klamath Tribe attempted to mitigate the

impact of the reopening of *Adair* by offering creative negotiating proposals immediately after the reopening.

A workshop participant questioned whether political leadership would ever be forthcoming in a high stakes water conflict. The risk of adverse political consequences is too great. Another participant disagreed. He cited the Cal-Fed process as an example of a negotiation that succeeded, in part because a politician had exhibited political courage.

Mediation, at least as it is presently practiced, is not well equipped to solve problems such as the Klamath, a workshop participant suggested. Mediation works well, even in highly emotional situations such as divorce, where there are no major institutional impediments to negotiations. But in situations such as the Klamath, institutional impediments abound. To name but two examples, scientific uncertainty and the conflicting agendas of government agencies present major institutional barriers to the achievement of negotiated solutions to water resource problems. Process design is a major issue that requires much new thinking.

Politics, a participant observed, is an ever-present ingredient of a water rights negotiation and the impact of politics might be positive or negative. For example, concern about a possible change in policy when a new administration takes power might serve as an inducement for the parties to quickly conclude negotiations. Alternatively, it might inhibit negotiations if one of the parties concludes that the new administration will be favorably disposed to its interests.

F) Jurisdictional Fragmentation and the Inability of the Federal Government to Negotiate with One Voice

As their next topic, workshop participants discussed the impact on negotiations of jurisdictional fragmentation and the consequent inability of the federal government to “negotiate with one voice”. Once again, the facilitators began the discussion with two vignettes from the Klamath Workshop. In one vignette, at a critical stage in negotiations, the Fish & Wildlife Service, without consulting with the head of the federal government’s negotiating team, announced its intent to terminate a long standing federal policy of permitting farming operations in wildlife refuges within the Klamath reclamation project. The actions of this rogue agency infuriated one of the principal stakeholder groups, namely the irrigation community, at a critical stage in the negotiations.

The second vignette related to “process fatigue.” At the Klamath Workshop, it became apparent that Klamath stakeholders have, over the years, been asked to participate in multiple collaborative events. Each of these events represents an attempted to address piecemeal a particular manifestation of an overarching problem. Over the years, stakeholders have lost their optimism about the likelihood that something might be accomplished at one of these events. While they still participate, many do so out of fear that something detrimental to their interests will happen if they fail to participate. Despite their process fatigue, stakeholders at the Klamath Workshop expressed their

willingness to participate in still another process if they had some reason to believe that it might actually produce tangible results.

A workshop participant responded to the facilitators' vignettes by describing the political dynamics that make it next to impossible for the federal government to "speak with one voice" in a negotiation. To begin with, jurisdictional fragmentation means that no single agency has overarching responsibility for all federal water allocation issues within a single agency. Depending on the specific situation, several agencies within the Department of Interior, such as the Bureau of Reclamation, the Fish & Wildlife Service and the Bureau of Indian Affairs, will have different and frequently conflicting missions. Moreover, federal agencies not part of the Department of Interior, such as the Forest Service, the Federal Power Commission and the Corps of Engineers, often have regulatory responsibilities within a river basin.

Even within the Department of Interior, developing a single negotiation position is difficult. As stated, the regulatory mandates of the agencies within the Department often conflict. Each agency is headed by a political appointee who may or may not have substantive expertise and whose ideological views may differ from those in the so-called "permanent bureaucracy". Although a senior official (i.e. an Assistant Secretary) supervises each sub-cabinet agency's activities, rarely does the same sub-cabinet official supervise the daily operations of agencies with conflicting agendas. For all of these reasons, coordination of agency action and the development of a common negotiating position are next to impossible. As a consequence, negotiating progress is possible only when a senior administration official, either directly or through a respected deputy with an unambiguous mandate, proactively works with the various agencies to develop a unified federal negotiating position.

States have, another workshop participant observed, similar problems for similar reasons in speaking with one voice in a negotiation. Another participant observed that developing a coordinated federal-state approach to water allocation problems is an essential ingredient of a successful negotiation. Unfortunately, coordination is extremely difficult given the political and organizational dynamics at work within both state and federal governments. However, examples of successful coordinated action exist. Two prominent examples are Cal-Fed and the Florida Everglade restoration effort. Both of these examples involve innovative institutional arrangements and their success suggests that such arrangements may be a necessary component of a successful approach to intractable water management issues.

At the Klamath Workshop, a facilitator observed, Klamath residents reported an ambivalent attitude toward federal government initiatives. On the one hand, local residents want to develop their own solutions to what they deem to be local problems. On the other hand, these same local residents urge the federal government to exercise leadership by proactively engaging in the problem solving process. Local residents also look to the federal government for the financing necessary to implement water management and watershed restoration initiatives. A similar ambivalent attitude towards the federal government likely exists in water basins throughout the West.

The pervasive federal role in watershed matters makes it imperative, a workshop participant observed, that the federal government exercise leadership. No other organization is positioned to do so. The Klamath is an example of what might happen when federal leadership is absent. Because of the pervasive federal role, many local Klamath residents tended to sit back and wait for the federal government to propose a “magic bullet” type solution to the basin’s water problems. Unfortunately, the various federal agencies continued to pursue their separate and conflicting agendas.

G) Other Topics of Concern

To conclude the workshop, the participants selected for discussion two topics of particular interest to them: (i) negotiating deadlines and (ii) special concerns when negotiating with Tribes.

1) Negotiating Deadlines. The discussion began with the articulation of a proposition that no workshop participant disputed: Realistic yet meaningful deadlines are a critical component of a successful negotiation. Participants then proceeded to discuss how realistic and meaningful deadlines might be imposed.

Court imposed deadlines, a participant noted, are invariably taken seriously but when a negotiation does not take place in the context of a court proceeding, setting meaningful deadlines is challenging. Agencies and foundations that provide funding for mediation services, a workshop participant suggested, can create meaningful deadlines by imposing limits on the period of time for which they are willing to provide funding. Another participant suggested that a mediator might impose a deadline by stating her intent to withdraw if satisfactory progress is not made within a specified time frame. A crisis, a participant noted, might be tantamount to a deadline if the crisis energizes the parties to seek solutions to the problems causing the crisis. However, crises do not invariably spur negotiations. For example, the hostile emotional climate triggered by the termination of irrigation deliveries in the Klamath may have contributed to the irrigator’s decision to withdraw from the federal court mediation.

Deadlines imposed by the parties themselves are possible, a participant noted, but the risk exists that the parties will not take such deadlines seriously. Nevertheless, a formal commitment by the parties to periodically review the progress of negotiations may keep the negotiations on track.

Whenever a party concludes that sufficient negotiating progress is not being made, that party should not hesitate to articulate its concerns, a participant stated, nor should the party hesitate to withdraw from negotiations and commence litigation if action is not taken to remedy the situation. The time may not be ripe for negotiations until legal uncertainty is clarified by a court decision or factual information is developed through the discovery process.

2) *Special Concerns When Negotiating with Tribes.* Tribes, a workshop participant observed, are not simply another stakeholder group. They are sovereign governments and expect to be treated as such. The participant cited an example of a negotiation in which a tribe refused to participate because its sovereignty was not acknowledged and it was treated as just one of many stakeholders.

Tribes are comfortable with Montana's process for negotiating tribal water rights, a participant observed, because the tribes negotiate on a "government to government" basis with the State and the federal government. Stakeholder groups participate in the negotiations indirectly through a variety of public participation processes convened by the State.

One workshop participant raised what he acknowledged was a sensitive issue. He wondered why, in negotiations in which he was now involved, the tribal negotiator acted "unprofessionally". For example, the tribal member did not attend regularly scheduled meetings or, when he did, did not participate in the meetings in meaningful ways. Workshop participants had a variety of reactions to this question. Tribes, one participant observed, are not monolithic organizations, so there is no single answer to the question of how to engage a tribe in the negotiation process. The behavior the questioner described may be a negotiating tactic, or perhaps tribal members need training in how to negotiate. Alternatively, the tribe may not be fully engaged in the negotiation because of discomfort with the structure of the negotiation process. Each tribe is different. They have different traditions and customs. Behavior that one tribe deems appropriate might not be condoned by another tribe. In each negotiation, the process concerns of the particular tribe must be identified and addressed if progress is to be made. The best way to do so is to solicit, in advance, the tribe's views about how the negotiation should be structured.

V.

List of Workshop Participants:

Klamath Workshop

The persons who participate in all, or a portion of, the Klamath ADR Assessment Workshop, in Portland Oregon, on March 24-25, 2003 are:

Bob Anderson
Professor, University of Washington Law
School and Former Special Assistant to
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Paul Cleary
Director, Oregon Water Resources
Department

Troy Fletcher
Executive Director, Yurok Tribe

Rodger Hamilton
Former Special Assistant to Oregon
Governor Kitzhaber

Becky Hatfield-Hyde
Williamson River, Rancher

Bob Hunter
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Steve Kandra
Klamath Irrigation District

Alice Kilham
Member, Klamath River Compact
Commission

Don Koch
Regional Manager, California Department
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Reed Marbut
Water Rights Specialist, Oregon Water
Resources Department

Jeff Mitchell
Member, Klamath Tribe

Todd Olson
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Martha Pagel
Attorney and Former Director, Oregon
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Dwight Russell
Chief Northern District, California
Department of Water Resources and
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Marshall Staunton
Member, Upper Klamath Working Group

Cindy Staunton
Resident, Tule Lake

Paul Simmons
Attorney for Klamath Project Water Users

Bud Ullman
Attorney, Klamath Tribe

Lucy Moore
Workshop Facilitator

Steve Snyder
Workshop Facilitator

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Negotiators Workshop

The persons who participated in all, or a portion of, the Water Negotiators Workshop, in Boulder Colorado on June 4 and 5, 2003 are:

Juliana E. Birkhoff
Mediator, RESOLVE

David Ceppos
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