Using the RIGHT STRATEGY to Mediate Environmental Disputes

BY JOHN BICKERMAN

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Environmental disputes present some of the most interesting, challenging, complicated, and daunting issues that a mediator may confront. These cases fall into two broad categories—statutory claims and natural resources conflicts. Statutory claims involve rights that have been established by federal law. Most often, the United States enforces these rights on behalf of the general public, in civil suits brought in federal court.

By comparison, natural resource conflicts are usually complex multiparty clashes over resources such as water, fisheries, or endangered species. These conflicts often confront the allocation of scarce resources among multiple legitimate interests. As these disputes have often simmered for decades, they tend to involve parties who are highly emotional about the issues and whose perspectives and cultural differences often polarize them from each other. It follows that the role of the mediator changes depending on the nature of the dispute. Also, the same style won't work for all types of environmental matters.

Statutory Claims

Statutory claims most often involve enforcement actions brought by the U.S. Government under the following laws:

(1) The "Superfund" statute (Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 46 U.S.C. § 9601 *et seq.* (1980)) for harm to land.

(2) The Clean Water Act (33 U.S.C. § 1251 *et seq.* (1972)), for water pollution.

(3) The Clean Air Act (42 U.S.C. § 7401 *et seq.* (1970)), for air pollution.

In addition, there is a private right of action under Superfund that potentially responsible parties (PRPs) can use to seek contribution from other PRPs, including the United States. (For example, contribution claims have been made against the United States by government contractors who performed work at certain World War II sites under the direction or control of the U.S. Government.)

A Superfund dispute has fewer "moving parts" (i.e., negotiable issues) than other environmental conflicts. Superfund defendants (including the United States) generally will agree to pay money or accept a fixed percentage of future cleanup costs in return for receiving a release or partial release of liability. Consequently, the mediator's role is to manage a fact-intensive discussion of the causes of the contamination, the cost of the remedy, and whether there are other PRPs to whom a share of liability should be allocated.

Clean Air Act enforcement cases have similar parameters. Since March 2000, the Environmental Protection Agency (EPA) has entered into 29 Clean Air Act settlements involving 106 refineries in 32 states, representing over 90% of the country's refining capacity. In most of these cases, the EPA has sought compliance with a complex set of rules requiring refineries to meet stricter standards for new sources of pollution (the New Source Review (NSR) Rules). In determining the enforcement penalty for violating these rules, the EPA considers the economic benefit (i.e., costs saved) the refinery received for operating outside the rules (the BEN model), and then compares it to costs incurred by a refinery that had appropriate clean air controls. In fact, the EPA has used the BEN model since 1984 to calculate the economic benefit from delayed and avoided compliance with EPA rules.

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The factors used in this model can be the subject of considerable negotiation by the parties to Clean Air Act cases and some of the statutory penalties can be partially avoided by having the defendant agree to undertake supplemental environmental projects (SEPs) that will benefit the local community affected by the alleged air pollution (e.g., purchasing emergency response equipment).

The BEN factors give the mediator and the parties a few more dimen-

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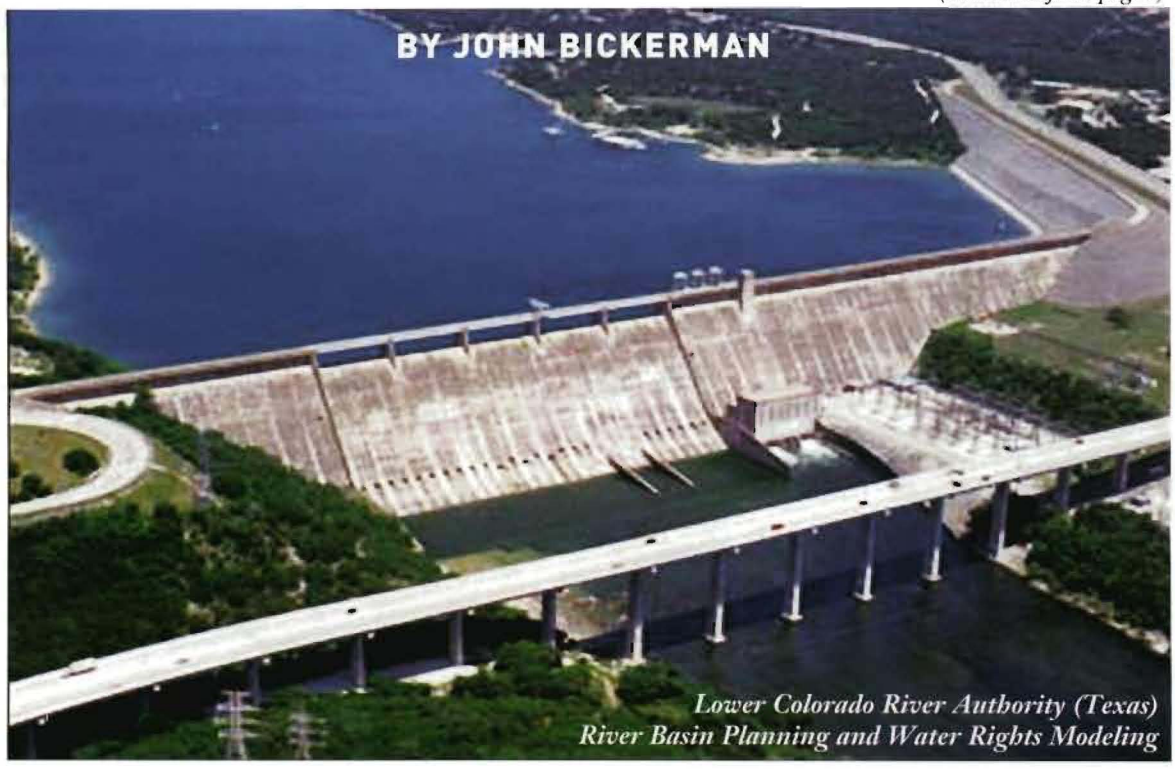

Lower Colorado River Authority (Texas) River Basin Planning and Water Rights Modeling

sions with which to craft a negotiated settlement. However, because the resolution of statutory claims pivots on how much money the defendant will pay, notwithstanding the various devices available to the parties and the mediator to manipulate that amount, the negotiation is frequently a "zero sum" game. Nevertheless, mediators can play an important role in achieving a settlement. As with many cases, they can address cognitive behavioral factors that may cause parties to overvalue their cases. For example, mediators can puncture their overconfidence and adjust litigation risk so that settlement becomes the preferred option.

Mediators who work on environmental cases must know the law, but they also must understand the facts and the differing cultures that drive the behavior of corporate parties and environmental attorneys representing the government. With this understanding, they can use directive techniques (like evaluating risk, addressing cognitive barriers, and engaging in shadow bargaining with each party) to help the parties reach a compromise and realistically consider various possibilities for settlement.

There are times when the United States may develop laws or other initiatives to effectuate sweeping change. In 1999, I mediated a Clean Air Act case under the NSR Rules. The case involved a refinery in the Midwest. The negotiations were bitter and intense. The attorneys just plain did not like each other. A settlement was achieved only after I asked the attorneys to join me in the other room to work out some scheduling issues. While this was happening, the parties' decision makers worked through a complicated solution to the dispute on their own. In this case, my request fostered an environment where creative people could craft a solution to the conflict. The resolution achieved for this dispute led to the EPA's Refinery Initiative, which has been highly successful in reducing air pollution emanating from refineries and has been cited as a significant agency accomplishment.

Natural Resource Disputes

By comparison, natural resource disputes are exponentially more complicated. They involve many more stakeholders, can be technically challenging, and may have a history of animosity between individuals and hostility to institutions that span decades. They also can have extremely complex factual and legal issues. Parties may disagree on the science and also be constrained by politics. Thus, these disputes are rarely settled rapidly.

Western water rights are a typical subject of natural resource disputes. Unless the parties are under extraordinary pressure to settle, water rights disputes may take years to resolve.

Natural resource disputes have been the most rewarding work I have done as a mediator. Because they involve broad issues of public policy and sometimes pit bitter rivals against one another, achieving a durable settlement may have a positive effect on a large community and the environment. The mediator's role in these disputes is very different than in a statutory case and requires the mediator to take much more care in starting the process. Indeed, an ill-conceived or poorly organized mediation can be fatal. Years of practice have taught me that the key to success is getting a small group of the right people to the table. If there are too many people directly participating in the mediation, the discussions will become paralyzed.

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Once the parties who may participate in the negotiations have been identified, the mediator meets with the parties separately and listens to their positions, concerns, interests, and goals for the mediation. It is good practice for the mediator to take the time during the meeting to reiterate what he or she has heard each party say. This not only serves the purpose of making sure each party feels that it has been heard, but also ensures that the mediator's understanding of what he or she heard (including the facts, the context and the sentiment) is accurate. It also builds trust in the mediator, perhaps the most important coin a mediator has. Some of my best experiences as a mediator have come from these initial meetings. For example, I once spent a frigid October morning on the not-so-calm waters of Lake Superior talking about whitefish harvest prices and gefilte fish (a traditional Jewish dish from Eastern Europe) with a tribal fisherman. Yes, tribal fishermen have learned that the price of their catch rises in New York with the beginning of the Jewish New Year (Rosh Hashonah) in the early fall. We truly have become a global economy.

In many natural resource disputes, there can be more than one stakeholder or party claiming to represent the public's interest. For example, multiple environmental organizations may assert that they are stakeholders representing the public's interest in the environment, but their positions may contradict one another. Similarly, in *United States v. Michigan*, a long-running battle over tribal fishing rights in the Northern Great Lakes, two government agencies asserted different goals for the mediation: the U.S. Fish and Wildlife Service sought to protect the threatened lake trout population, while the US. Department of Justice (DOJ), serving as the trustee for five Indian tribes, sought to vindicate 19th-century Indian treaty rights. At times, it was challenging to harmonize these two different goals.

Further complicating the negotiation of natural resource disputes, the positions of governmental parties may change, depending on which party controls the executive branch, or other factors. The bottom line is that representing the "public interest" is frequently far from obvious. However, what is almost always true is that the U.S. Congress and the Administration prefer to receive a settlement proposal that has been agreed to by the parties (or most of them), rather than have to choose between two outcomes, and thereby possibly alienate an important interest.

Getting the process started with the right people at the table is perhaps the mediator's most challenging task. With a large number of participants and an emotionally charged dispute, the first group meetings may be a test of wills and challenge the skill of the mediator in maintaining order and focus. For example, at the initial meeting of participants and stakeholders in the tribal fishing dispute, there were over 80 people in attendance, including: (1) representatives from five tribes, including their elected leaders, tribal fishermen, environmental staff and outside counsel; (2) representatives from the governor's office and the State of Michigan office of the attorney general and Department of Natural Resources

(DNR); and (3) representatives from the DOJ and the U.S. Fish and Wildlife Service.

Almost immediately after I called the meeting of this unwieldy group to order, there was a shouting match, threats of physical violence, and a walkout. But most people stayed. Then I proposed a few procedural compromises and suggested a schedule and topics for future meetings. I kept the meeting focused on the purpose of the mediation and away from distractions meant to derail the process. I made clear to everyone that a federal judge might impose a solution that they might not like if they didn't get to work. This provided a strong incentive for the parties to stay engaged in the process.

Subsequent meetings were much less cantankerous and, after a year of tough negotiations, led to an historic settlement that shifted much of the fishing in the lakes to tribal fishermen, while also reducing the tribe's use of gill nets—a method of fishing that indiscriminately killed the lake trout. The settlement ultimately led to greater cooperation between the tribes and the State of Michigan's DNR. The federal government paid a little money toward the settlement for which it achieved the environmental protections it had sought while discharging its trust responsibility to the tribes. The non-Indian sport fishermen—who had been represented by the State—were pleased because their livelihood had been preserved. Everybody won.

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Once the parties to a natural resources mediation are assembled and the path for negotiations established, the mediator's tasks include organizing meetings, setting agendas, and reporting on the negotiations. These tasks may require a light touch. But there may also come a time when the mediator will have to offer suggestions on how to make compromises and come up with proposed solutions. The mediator's understanding of the science, the facts, the history, the negotiators' personalities, and the political environment is key to shepherding the parties through difficult stretches when settlement looks impossible. The mediator also must adjust his or her style to the needs of the parties, depending on the circumstances at the time. Most importantly, the parties must believe that the mediator is an honest broker who can be trusted.

In the lengthy Colorado water mediation that started five years ago, my skills as a mediator were severely tested. It brought to mind Mark Twain's observation in the early days of California: "Whiskey is for drinking and water is for fighting." This was also a true statement about water rights in Colorado.

The dispute was technically complicated, politically complex, and involved huge legal uncertainties and ramifications for populations on both sides of the Rockies that would affect economic development for decades. The parties were fighting over the last drops of unappropriated water in the State of Colorado and, perhaps, in the entire historic Colorado River. There was distrust of the federal government dating back decades, coloring the behavior of the parties. The negotiations took many twists and turns. Although I learned much about the hydrology of the Colorado River and its tributaries, the operation of the many reservoirs, the historic agreements, and the law, I was never as expert as the parties. My role was to break the dispute into manageable pieces and assist the parties in the negotiations. At times, I would learn enough about a specific issue to be able to propose compromises that helped them solve a problem.

On a few occasions, I suggested that the parties give up on the mediation because they were not making any progress. My purpose was to force them to confront what failure would mean. As I hoped, they always returned to the bargaining table to try again. Last year, Gov. John Hickenlooper (D. Colo.) announced the Colorado River Cooperative Agreement, a product of the mediation. The agreement has many conditions precedent that are either being satisfied or addressed now. Two more headwater counties on the West Slope signed the agreement in May and the remaining parties are expected to sign shortly.

With the right mix of optimism, cheerleading, frank analysis of the risks of not reaching a deal, and consideration of both legal and political ramifications, skilled mediators can help the parties persevere through the difficult challenge of mediating natural resource disputes, and enable them to reach a mutually acceptable agreement. Resolving these disputes can dramatically improve people's lives and therefore be enormously satisfying. ■