MEDIATION OF THE SNAKE RIVER BASIN ADJUDICATION

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I. INTRODUCTION

The Snake River Basin Adjudication (SRBA) was commenced in 1987 to quantify all claims to water rights in the Snake River in Idaho.[1] The Idaho Supreme Court selected a single district judge to

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* Professor of Law, Duke University School of Law, and Mediator in the Snake River Basin Adjudication. The SRBA negotiations involved over one hundred persons who participated in direct negotiations and thousands of people who were involved indirectly. The contents of this paper are the responsibility solely of the author. The success of the mediation was due to the parties. In particular, the mediator would like to thank the following for their willingness and persistence during the six-year mediation:

Nez Perce: Jean Baldridge, Rebecca Craven, K. Heidi Gudgell, Don B. Miller, Steven C. Moore, Geoff Whiting

Shoshone-Bannock: Candy L. Jackson, Lary C. Walker

Idaho governmental officials: Laurence Michael Bogert, Honorable Roger Burdick, Senator Don Burtenshaw, Stan Clark, Senator Larry Craig, Senator Mike Crapo, Honorable Daniel Hurlbutt, Joe Jordon, Govenor Dirk Kempthorne, Honorable John Melanson, Representative Bruce Newcomb, Senator Laird Noh, Representative C.L. Otter, Representative Dell Raybould, Don Roberts, Representative Mike Simpson, Steven W. Strack, Clive Strong, Honorable Barry Wood

Idaho lawyers: Albert P. Barker, Josephine P. Beeman, Scott L. Campbell, Michael C. Creamer, Jeffrey C. Fereday, W. Kent Fletcher, Dana L. Hofstetter, Roger D. Ling, Michael Mirande, Jerry R. Rigby, Ray W. Rigby, Jim Riley, John A. Rosholt, John Simpson, Bruce M. Smith, James C. Tucker, Terry Uhling

U.S. Government: Robert Anderson, Secretary Bruce Babbitt, Robert Evans, David Hayes, John Keys, Ann Klee, Robert Lohn, William McDonald, Duane Mecham, Peter Monson, Secretary Gail Norton, Rich Rigby, Frank Wilson

The task of the mediator is oftentimes best performed by benign neglect, particularly if the lawyers are as competent as those in this case. Both thanks and apologies are due to the lead negotiators who eventually reached agreement by themselves.

1. *See* IDAHO CODE ANN. § 42-1406 (2003). *See also In re* the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, Case No.

manage the litigation and to rule in the first instance on any disputes that could not be settled.[2] One of the more difficult issues in the SRBA involved an effort to quantify federal reserved water claims on behalf of the Nez Perce Indian Tribe arising out of the Treaties of 1855 and 1863.[3] In 1998, after failed attempts by the parties to settle the dispute, the SRBA judge appointed a mediator to attempt to resolve the reserved water rights issue.[4] The mediation culminated in 2004 with the acceptance by the parties of the Mediator's Term Sheet and its eventual implementation by the United States Congress, the Idaho legislature, and the Nez Perce Tribal Executive Committee.[5]

This paper is designed to describe that mediation process. Part II provides the conceptual framework of the mediation and Part III discusses the mediation variables as they existed at the beginning of the mediation. Part IV is an analysis of the mediation itself.

II. CONCEPTUAL FRAMEWORK

The SRBA mediation involved a complex, multi-party, public policy dispute. The issue of whether rights created by various Indian treaties reserved water for the Nez Perce Tribe that predated other water rights created under state law was of significant importance to

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39576 (Nov. 19, 1987) (commencement order) (Judge Hurlbutt establishing the SRBA); Memorandum Opinion on Commencement of Adjudication at 2, *In re* Snake River Basin Adjudication (*In re* SRBA), No. 39576 (Idaho 5th Dist. Ct., Twin Falls County, Oct. 14, 1987).

2. "The Idaho Supreme Court originally appointed District Judge Daniel C. Hurbutt, Jr., as Presiding Judge for the SRBA and designated Twin Falls as the county of venue." IDAHO DEP'T OF WATER RES., INFORMATIONAL BROCHURE, http://www.srba.state.id.us/DOC/BROCH1.htm (last visited May 11, 2006) (under the subheading "Background Information on the Snake River Basin Adjudication") *See also In re* Snake River Basin Adjudication (*In re* SRBA), No. 39576 (Idaho 5th Dist. Ct., Twin Falls County, Oct. 14, 1987) (Scheduling Order of April 22, 1997), *in* COMPENDIUM, DOCUMENTS RELATED TO THE SNAKE RIVER BASIC ADJUDICATION AND THE NEZ PERCE WATER RIGHTS SETTLEMENT (2005) (on file with author).

3. Treaty between the United States of America and the Nez Perce Indians, June 11, 1855, 12 Stat. 957; Treaty between the United States of America and the Nez Perce Tribe of Indians, June 9, 1863, 14 Stat. 647.

The Nez Perce made claims for in-stream flows of water, consumptive use of water, and springs and fountains. In-stream flow claims made by the Shoshone-Bannock Tribes and the Northwestern Band of the Shoshone Nation were dismissed by the SRBA court. Various representatives of the Shoshone-Bannock Tribes remained active in much of the SRBA mediation process.

4. The court appointed Francis McGovern as mediator. *See In re* SRBA, No. 39576, Consolidated Subcase No. 03-10022 (Idaho 5th Dist. Ct., Twin Falls County, Dec. 22, 1998) (Order of Mediation and Appointment at 1).

5. Mediator's Term Sheet with Appendices (Apr. 20, 2004), *available at* http://www.idwr.idaho.gov/nezperce/pdf_files/complete-agreement.pdf (hereinafter Term Sheet).

virtually every citizen of Idaho and to many citizens of neighboring states. These claims would thereby mandate the reallocation of millions of acre-feet of water from the Snake River, Salmon River, and Clearwater River water. The amount of money in controversy is difficult to estimate but the estimated $200 million price tag on the eventual settlement provides at least one yardstick. The legal issues implicated by the dispute involved treaty and statutory interpretation, issues of federalism, and constitutional concerns. The factual issues addressed two hundred years of historical, anthropological, ecological, and sociological analysis of life in Idaho.

There is a standard model of mediation. This model accepts the litigants in a lawsuit as the parties to the mediation, the legal issues in the complaint as the issues to be resolved in the mediation, the information obtained through discovery as the necessary facts for the mediation, and a standard mediation procedure—a joint session with the litigants to share perspectives on the dispute and shuttle diplomacy by the mediator.[6] Although this model may be appropriate for normal litigation, it can lead to in failure in a complex case. The necessary parties may not be the litigants, others may be required to achieve resolution; the legal issues may be too many or too few for a consensual outcome; the discovery in litigation may be excessive or inadequate; and the procedure may be either more or less formal than the situation requires.

The conceptual framework for the SRBA mediation suggested that the standard model would not be appropriate. The litigants did not constitute all the parties who were necessary to resolve the case. The legal issues were far too narrow to provide the structure for a settlement. The pre-trial discovery was both irrelevant in certain respects and inadequate in others. The standard model of mediation practice simply was not a viable alternative. This dispute, like many other complex cases, called for a mediation process tailored to its own specific needs. The conceptual framework was "strategic mediation," the development of a strategy by the mediator, not to affect the precise outcome of the dispute, but to enhance the parties' chances of finding an acceptable settlement.[7] Even if there is a theoretical solu-

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6. Francis E. McGovern, *Strategic Mediation in Large Lawsuits*, *in* THE UTTON CENTER: TRANSBOUNDARY RESOURCES, TRANSBOUNDARY WATERS: CROSSING CULTURAL BOUNDARIES FOR SUSTAINABLE SOLUTIONS: A MULTICULTURAL APPROACH 54 (2004) (hereinafter McGovern, *Large Lawsuits*), *available at* http://uttoncenter.unm.edu/pdfs/Tamaya_proceedings.pdf; Francis E. McGovern, *Strategic Mediation*, DISPUTE RESOLUTION MAGAZINE, Summer 1999, at 4.

7. McGovern, *Large Lawsuits*, *supra* note 6; McGovern, *supra* note 6.

tion for resolving a dispute consensually, there are myriad barriers—behavioral, communicative, economic, conceptual—that can arise to thwart that resolution. There needs to be a mediation approach that can surmount those barriers without creating new ones. The concept of "strategic" mediation suggests both that the choice of any mediation process is indeed a choice and that there can be a superior mediation process in a complex case rather than the standard model. The role of the mediator in a complex case—aside from the mere activity of mediation—is to design and implement a mediation process that enhances the chances of successful resolution.

The mediator facing a complex public dispute has the inevitable and unavoidable problem of selecting an appropriate mediation process after a review of all the parties, issues, and information. The overriding concern for the mediator is to do no harm; that is, not to engage in a mediation that will put the parties in a worse position vis-à-vis each other than they faced in their initial posture. Yet, any engagement has its risks; the evolution of positions is inherently risky. In a high profile dispute with the volatility of the SRBA, the downside of mistakes is steep. The natural tendency of the mediator is to select the least risky alternative—the standard model—even though it may not be the best approach for achieving a consensual resolution to a dispute.

Mediation strategy-making involves at least seven discrete steps: (1) understanding all the relevant factors that may affect the issues in dispute; (2) making assumptions about uncertainties that exist; (3) identifying and disaggregating the variables that may affect the dispute; (4) identifying the actors and their preferences; (5) selecting short- and long-term goals to be achieved; (6) devising a plan and an endgame; (7) anticipating resistance; and (8) revising the plan and adding continuous feedback loops.

One of the first decisions in developing a mediation strategy is to choose a problem-solving model or a consensus-building model. Under the problem-solving model of dispute resolution, there is a defined problem or problems and the parties focus on an approach or approaches to deal with that problem in a manner acceptable to all. This model works best when there is a shared perception of the problem, a manageable number of parties, and a shared desire to reach a resolution.

The consensus-building model, on the other hand, does not require that all the parties agree on the definition of the problem. It contemplates, however, a shared solution to whatever the problem may be perceived to be. This model allows large numbers of parties to discuss their perceptions so that a consensus approach or approaches

can be identified, notwithstanding residual disagreements about the nature of the problem.

Once the appropriate model of dispute resolution can be selected, it becomes worthwhile to focus on the endgame that may be achieved to resolve a dispute and the pathways to alternative negotiation outcomes. If there can be a vision of the general outlines of an ultimate consensual resolution, it may be possible to design a mediation pathway that will enhance the chances of getting there. This process of reverse engineering or reverse induction contemplates envisioning an outcome and back-tracking from that outcome to the present. It may be possible through an understanding of the intricacies of the various moving parts in the negotiations and the interests of the parties to discern potentially mutually acceptable outcomes that the parties do not see themselves. In most mediations, the mediator engages in dialectical reasoning, attempting to reconcile the conflicting thesis and antithesis of the disputing parties into a synthesis that would be universally acceptable. If a mediator can visualize a synthesis that would be acceptable to both sides and visualize, as well, the pathways to reaching that synthesis, there is a potential endgame for a negotiated outcome. The mental process of the mediator can be termed a combination of the dialectic and reverse induction.

Once it is recognized in a complex case that the mediator can select a model other than the standard model, and that the mediator can be active in assisting the parties to select pathways to a successful resolution, the mediator strategy can then focus at the detail level on the variables at issue in the dispute.

Parties. The mediator must be able to stand in the shoes of each party and to appreciate their preferences, economic interests, behavioral concerns, institutional constraints and assets, cultural values, differences, bargaining environment, and overall-bargaining strengths and weaknesses. The mediator must also appreciate the interaction among the parties and how their individual characteristics may affect each other.

Issues. Strategic mediation contemplates that the mediator will look beyond the legal issues in the pleadings in order to discern what issues need to be resolved in order for there to be an agreement. Any analysis of issues is derivative of an understanding of each party's positions in regard to those issues, both legal and factual.

Information. Likewise with the factual information available publicly or through discovery, the mediator must insure that each party has access to and a sufficient understanding of the facts in order to make any settlement decision. If a party does not feel comfortable with the factual environment or that making any decision be-

comes difficult, it will be harder to achieve agreement. Sometimes that information is readily available or can be obtained in a collaborative manner.

Procedure. The mediator has virtually unlimited options concerning procedure: formal, informal; defined, flexible; in groups or with individual parties, lawyers, experts; in courtrooms, hotel rooms, any other kind of room. The procedure should match the needs of the case and may vary over time.

Litigation. Although the mediator will ordinarily have little control over the litigation, there must be an appreciation of the effects of the litigation on the bargaining power of the parties and the timing of the negotiations. Oftentimes there will be a need to coordinate these two dispute resolution techniques to make sure that one is not adversely affecting the other. Particularly important in this regard is confidentiality. Can and should a court provide a protective order to insure that the negotiators' discussions remain private or is it more important that the public participate in an ongoing manner?

Mediation Style. Mediators have a variety of approaches that they can take: facilitative, evaluative, assertive, empathetic, and many others. Like procedure, the style that a mediator uses in any given circumstance should match the needs of that circumstance.

Mediation Tools. The mediator has any number of tools to assist the parties: persuasion, rhetoric, bargaining, and communication. A mediator can persuade using economic arguments of interests, relative values, joint gains, and differences in orientation. There is psychological and cultural persuasion looking at the parties' various tendencies and receptivity to alternative communication approaches. There are bargaining tools: opportunistic, deliberative, narrative, and many others. The institutional attributes of the parties can provide fertile ground for persuasion involving incentives and communication. Rhetorical tools of ethos, pathos, and logos are also available. Then there are the behavioral tendencies that can become tools for the mediator: reciprocity, commitment, consistency, liking, association, clarity, expertise, authority, and others. These tools are available to assist the parties in their deliberations, to overcome barriers to a negotiated outcome, and to raise comfort level conducive to settlements. They are in no manner to be used to affect the interests of the parties or to force a settlement that is inappropriate.

III. SRBA MEDIATION VARIABLES

A. Parties[8]

There were over 150,000 water rights claims in the Snake River Basin Adjudication. The list of parties includes virtually every city in Idaho, every irrigation district, reservoir company, canal company, and water company. Most major Idaho companies were parties as well as Idaho Power Company, the State of Idaho, and a number of farms and ranches. The litigation was conducted in state court under the provisions of the McCarran Amendment,[9] thus the U.S. was in-

8. 1994 INTERIM LEGIS. COUNCIL COMM., 1994 INTERIM LEGIS. COUNCIL COMM. ON THE SNAKE RIVER BASIN ADJUDICATION 20, 23 (1994). The parties in the SRBA are: U.S. Department Of Justice, Nez Perce Tribal Executive Committee, Native American Rights Fund, Bogus Basin Recreation Association, Lake Reservoir Company, Little Salmon Water Users, Newfoundland Partners, Payette River Water Users, Pioneer Irrigation District, Settlers Irrigation District, Sinclair Oil Corporation, Thousand Springs Ranch, State of Idaho, Black Canyon Irrigation District, Potlatch Corporation, Idaho Power Company Amalgamated Sugar Company, Basic American Inc., Eastern Western Corporation, Konkolville Lumber Company, Lamb-Weston, Lewiston Orchards Irrigation, Ore-Ida Foods, Inc., Port of Lewiston, Riverside Independent Water, Shearer Lumber Products, Weyerhaeuser, City of Ashton, City of Bliss, City of Bovill, City of Buhl, City of Burley, City of Cascade, City of Challis City of Chubbuck, City of Cottonwood, City of Council, City of Culdesac, City of Deary, City of Declo, City of Donnelly, City of Eden, City of Elk River, City of Emmett, City of Fairfield, City of Fruitland, Garden City, City of Glenns Ferry, City of Grandview, City of Grangeville, City of Hailey, City of Heyburn, City of Inkom, City of Juliaetta, City of Kamiah, City of Kendrick, City of Kooskia, City of Kuna, City of Lapwai, City of Lewiston, City of Mackay, City of Meridian, City of Middleton, City of Minidoka, City of Mountain Home, City of Mud Lake, City of Nampa, City of New Plymouth, City of Nez Perce, City of Oakley, City of Orofino, City of Parma, City of Paul, City of Payette, City of Peck, City of Pierce, City of Pocatello, City of Rigby , City of Ririe, City of Roberts, City of Rupert, Sugar City, City of Salmon, City of St. Anthony, City of Stites, City of Troy, City of Ucon, City of Weiser, Allen Noble Farms, Inc., Allen T. Noble, Jeff Blanksma, C & T Ranches, Cottonwood Canal Company, Farm Development Corporation, Grindstone Butte Mutual Canal Co., G. Patrick Morris, Nampa & Meridian Irrigation District, Sailor Creek Water Company, West End Project, Hecla Mining Company, Boise Cascade Corporation, A & B Irrigation District, Aberdeen-Springfield Canal Co., Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Win Falls Canal Company, Farmers Co-op Ditch Company, Ltd., Burgess Canal & Irrigation, Egen Bench Canal, Inc., Enterprise Irrigation District, Idaho Irrigation District, New Sweden Irrigation District, North Fremont Canal & Irrigation, Peoples Canal & Irrigation, Progressive Irrigation District, Snake River Valley Irrigation, Minidoka Irrigation District, J.R. Simplot Company, Agland, Inc., Agwild, Inc., Bar-U-Inc., Buck Creek Ranch, Inc., Glen Dale Farms, Inc., ML Investment Company, Potato Storage, Inc., Simplot Cattle Company, Simplot Dairy Products, Inc., Simplot Meat Products, Inc., SSI Food Services, Inc., SSI Foods, Inc., Sunnyslope Orchards, TM Ranch Company, Big Bend Irrigation District, Boise-Kuna Irrigation District, City of Ketchum, New York Irrigation District, Wilder Irrigation District, Sunnyside Ditch Company, Weiser Irrigation District, Shoshone-Bannock Tribes.

9. 43 U.S.C. § 666(a) (2000).

volved. The potentially interested federal entities included: the Department of Interior ("DOI"), the Department of Agriculture ("DOA"), the Department of Commerce ("DOC"), the Department of Energy ("DOE"), the Office of Management and Budget ("OMB"), the Council on Environmental Quality ("CEQ"), the Bureau of Indian Affairs ("BIA"), the Bureau of Land Management ("BLM"), the Corps of Engineers ("COE"), the Bureau of Reclamation ("BOR"), the Fish and Wildlife Service ("FWS"), the Forestry Service ("FS"), the National Oceanic and Atmospheric Administration ("NOAA"), the Federal Energy Regulatory Commission ("FERC"), and the Bonneville Power Administration ("BPA"). Other interested parties included the states of Montana, Oregon, and Washington, virtually every environmental group in the Pacific Northwest, and many other Indian Tribes.

B. Issues[10]

The factual issues involved extensive historical, cultural, anthropological, and economic analyses of the entire Snake River Basin, from the Weiser River to the Palouse River, the Salmon River, and the Clearwater River as well as the Minam, Wallowa, Grande Ronde, Imnaha, Weiser, Selway, Tucannon, and Lochsa. The focus was on fishing in general and salmon—sockeye, chinook, and steelhead— in particular. Other species of fish included cutthroat trout, Waha lake trout, sturgeon, suckers, and lamprey eel. The anadromous species were the subject of most of the factual disputes concerning their spring, summer, and fall runs.

The biological factual issues involved fish passage, water flows, spawning habitat, fish rearing and maintenance, diversions, culverts, and hatcheries. The hydrological issues, many related to the fishery, were water quality, channel maintenance, water temperature, water passage, sediment, wetlands, riparian buffers, irrigation efficiency, water conservation, and flood control. Mining practices, timber practices, industrial pollution, and municipal pollution were also implicated. Recreational uses of the rivers by fishers, jet boaters, rafters, and others were considered. There were also the storage and power generation dams that were the subject of factual inquiries.

Outside of Idaho, there were issues concerning the four dams on the Lower Snake River, non-Idaho commercial fishing, non-Idaho recreational fishing, Pacific Ocean conditions, use of barges and fish friendly turbines, and a host of other Columbia River Basin factual issues. In the event that any agreement would contemplate funding and management, there would also be issues about money, enforcement,

10. See other articles in this issue for a more complete examination of the issues faced in the SRBA adjudication.

management control, land acquisition, aquifer recharge, and many others.

On the legal side, the issues included Treaties of 1855, 1863, and 1893, as well as a host of legal opinions interpreting those and related treaties. There were a variety of federal statutes—The Endangered Species Act ("ESA"),[11] the Clean Water Act ("CWA"),[12] Federal Power Act,[13] and others. The state statutes included in-stream rights, pumping rights, water quality standards, water markets, and many more.

There were a number of judicial opinions both in the SRBA and in related cases that were issued during the mediation that affected the negotiations. Most notably, the SRBA judge granted a motion for summary judgment for the State of Idaho on the Nez Perce reserved water right claim, a federal district judge rejected a federal biological opinion related to the Columbia Basin, and there were several other federal opinions that impacted the bargaining power of the parties.

There were also pragmatic legal issues that emerged. How could there be enforcement if resources were shared? What would happen if the resource changed? What would happen if a sovereign changed its mind and altered the necessary implementing legislation? How could a waiver of rights be consummated? What would happen if all the conditions to the agreement were not met?

Overriding these legal issues was the more fundamental concern about sovereignty—the relationship among the federal government, the Indian tribes, and the states. As is the case with any shared resource, there are always issues of control: Who has the right to manage the resource? Federalism provides an approach, but the devil is oftentimes in the details.

C. Information[14]

Attempts at negotiating a settlement had begun as early at 1993. There had been public meetings, private meetings, expert meetings, seminars, and a variety of exchanges of information. By 1998 there had been a significant sharing of interests and concerns by the parties and the experts had been able to develop relationships and methods of communication. Probably the most important information—the political environment—was, however, constantly changing. The presidential election of 2000 was one of those critical changes. There were also

11. 16 U.S.C. §§ 1533–1544 (2000).
12. 33 U.S.C. §§ 1251–1387 (2000).
13. 16 U.S.C. §§ 791–828 (2000).
14. COMPENDIUM, DOCUMENTS RELATED TO THE SNAKE RIVER BASIC ADJUDICATION AND THE NEZ PERCE WATER RIGHTS SETTLEMENT (2005) (on file with author).

significant changes internally to virtually every constituency. New leaders emerged, personnel shifted, and coalitions evolved. There were, for example, three different district judges involved in the SRBA during the six-year mediation. All of these factors constituted information that affected the bargaining positions of the parties.

There was also necessary information concerning monetary issues. The economic well-being of private and public entities can vary and have an enormous impact on the bargaining of the parties. Other settlements of a similar nature can also affect the expectations of the negotiators. Likewise, the timing of any financial consideration can impact outcomes.

D. Procedure[15]

The threshold procedural issues involved the relationship of the mediation to the litigation and relationship of the mediator to the court. There should be predictability on both of these interactions or the lawyers can become quite nervous. At the same time, the political leaders of all the parties needed to know if there would be parallel or sequential litigation and mediation tracks.

As for the mediation process itself, another initial issue related to a "mediation assessment;" that is, a brief evaluation by the mediator to determine whether or not the mediation process appears to be worthwhile. There are a series of issues that arise during an assessment phase relating to cost, time, information transfer, and the anticipated mediation process.

Regardless of the mediation procedure, it is always necessary to insure that the decision-makers are in the loop, either personally or through their surrogates or representatives. In a complex case like the SRBA, there will generally be a need to establish committees and subcommittees of negotiators both to cover all the necessary subject matter and to insure that everyone feels like they are participating in the process.

The procedural options for interaction among the parties include: joint and separate meetings; meetings of experts, lawyers, principals, or all three; meetings with the mediator or without; in or out of the court, public, or private. Choosing a mediation style and deciding when to become involved are two of the most difficult areas for a mediator. On the one hand, there needs to be leadership in a procedure; on the other hand, the parties may prefer to do it themselves. Sometimes, however, a party is reluctant to present a particular option, even though it agrees. The mediator can do it for them; but, prema-

15. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE (3d ed. 2004).

ture presentation of options can be disastrous. Timing is almost as important as substance.

III. THE MEDIATION

The first task was to make a mediation assessment of the SRBA, an assessment by the mediator to gauge the chances of success and an assessment by the parties that the mediation would meet their needs and expectations. The mediation process commenced with a large meeting with all interested parties and their counsel interviewing the mediator. The district judge had initiated the mediation process, but it was contingent on rough agreement by the parties. There was a felt need on the part of both the parties and the mediator that the initial activities create an atmosphere of trust and well-being. The mediator also met with the parties separately, including an airplane tour of the entire length of the Snake River hosted by the Idaho water users. The Nez Perce Tribe arranged a helicopter flight of the Clearwater and Salmon basins and a tour of historic tribal lands.

Once it was determined that the mediation could proceed, one of the first issues to be resolved concerned the selection of a mediation model—problem-solving or consensus-building. Given the large number of parties in the SRBA, it was mechanically impossible to have them all attend a negotiation. Likewise, a consensus-building model would have been unsuccessful both because of the organizational difficulties associated with the multiple meetings necessary to negotiate an outcome, and the anticipated time that would need to be devoted in order to achieve a settlement. It would have been impossible to maintain the attention of all the participants during the life of the mediation.

The problem-solving approach seemed more appropriate. Because of the extreme public interest in the SRBA, however, there were the conflicting goals of keeping the negotiations confidential until the outlines of an agreement were reached and making sure that all the parties necessary for an ultimate settlement felt a part of the process. The negotiations were designed to proceed in concentric circles with a core of participants reaching a tentative understanding and then the universe of participants would be expanded to include the next circle of parties and issues. Using the concentric circle approach is fraught with danger because of the potential for alienating critical stakeholders before reaching their circle of involvement. The task was particularly tricky because of the protective order assuring the confidentiality of the discussions. The parties were, however, up to the task. They were able to comply with the order while keeping their extended

constituencies sufficiently apprised of negotiation developments that they did not become an eventual blocking force.

Another threshold issue related to the relationship of the mediation to the litigation and the mediator to the court. The parties were comfortable that the two dispute resolution processes should proceed on parallel tracks and that communications between the mediator and the judge should be in open court, although ex parte status reports on logistics were allowed. The continued pursuit of the litigation track was particularly important in keeping the parties who were not receptive to the mediation from vetoing it ab initio. As is indicated in the other articles contained in this issue, there were decisions by the SRBA court that impacted the various parties' perceptions during the negotiations.

The early stages of the mediation did not reveal an obvious endgame. The parties were focused on issues of principle, like sovereignty, that were not generally amenable to compromise. There were, however, a sufficient number of variables subject to dispute that provided many opportunities for an overall agreement. The alternative—litigation to the U.S. Supreme Court and a myriad unsolved remaining issues—was sufficiently unattractive that the effort to find a consensual agreement seemed worthwhile.

The issue of who should be in the mediation was resolved in no small part because Idaho has a small population and an even smaller number of lawyers. By placing ten to fifteen Idaho lawyers—both private and public—in the role of negotiators in the problem-solving model, all the Idaho parties in the SRBA could be represented. Likewise, the tribes and the federal government had no more than ten lawyers at any given time, so all their interests could also be represented. At the same time, lawyers are particularly adept at involving their respective constituencies, particularly if there was a need for specific expertise. The federal lawyers, led by Ann Klee, were skilled at making sure that all the relevant federal agencies were participants in the mediation. Likewise, Clive Strong played a similar role for the State of Idaho. The Nez Perce contingent, led by Steven Moore, was similarly capable of involving the tribal lawyers and members, even if they were not present at any given mediation session. The private Idaho lawyers were not so centralized, but they had worked together many times, so they were extremely familiar with each other.

One of the early critical decisions concerned the scope of the mediation. Because of the desired protective order, the lack of ability to implement changes outside Idaho, and the sheer unmanageability of negotiations that involved parties outside of Idaho, the decision was made to keep the mediation Idaho-only. Non-Idaho parties were ex-

cluded except for the federal family. Likewise, with the issues that were the subject of the mediation; they were limited to Idaho issues.

On the other hand, the issues were not limited to those raised in the SRBA pleadings. It soon became apparent that a consensual resolution would not be possible unless the issues were enlarged; if you cannot solve a problem, enlarge it. The Idaho participants were concerned there were other legal vehicles than the reserved water right that could be used to put additional demands on Snake River water. They were aware that the parties who could resolve those issues were already at the table and that the resolution of these issues would probably involve non-litigation remedies.

There were, therefore, non-SRBA issues that needed to be added. The fundamental concern of how much water should be devoted to salmon arose not only in the context of the federal reserved water right but also under the ESA[16] and the CWA.[17] The Idaho water users were not interested in settling the federal reserve water issue for defined additional flows from the Snake River only to discover that the federal government wanted yet more water to satisfy the ESA and Environmental Protection Agency ("EPA"). The resolution of all of these different demands on the water supply also required consideration of solutions that were far beyond the realm of remedies available to the SRBA court. There were other water-related management and financial issues that fell in the same category: springs and fountains as well as consumptive use, hatcheries, habitat, water quality, land transfers, and others. The issues in the mediation were, therefore, expanded considerably to encompass virtually every conceivable aspect of water as it affected the Nez Perce.

Ultimately the settlement included federal legislation, state legislation, water resources board resolutions, tribal resolutions, on reservation water rights, in-stream water rights, management agreements, various hatcheries, other cooperative agreements, land transfers, springs and fountains allocations, Salmon-Clearwater flows and basin work plans, biological assessments, and opinions, Snake River flows, and a motion to remand from the Idaho Supreme Court to the SRBA district court.

The mediation procedure involved multiple separate meetings with parties and their lawyers, all elected federal officials from Idaho, the relevant state legislators, the governor, the relevant federal agency and department officials, experts, and other interested parties. The meetings were held in Boise, Twin Falls, Lapwai, Lewiston, Port-

16. 16 U.S.C. §§ 1533–1544 (2000).
17. 33 U.S.C. §§ 1251–1387 (2000).

land, Seattle, San Francisco, and Washington, D.C. Altogether there were more than twenty-five general meetings and hundreds of smaller meetings. Telephone discussions were frequently used both for private discussions and for conference call status meetings. The bulk of the mediation involved interaction by committees or subcommittees to produce a draft written agreement of the four components of the negotiations: a Nez Perce component, a Salmon-Clearwater component, an Upper Snake River Flow Component, and General Conditions. The decision was made to structure the negotiations around a mediator's term sheet, a term sheet that would not be available for approval until all of its provisions had been completed. The term sheet soon became a virtual agreement in itself because of the level of detail demanded by the parties. When ultimately achieved, the agreement on the mediator's term sheet provided a clear roadmap for consummation.

The key to the overall settlement was to create a package of multiple components that could, in its entirety, satisfy the interested parties. Every conceivable option was on the table. The agreement was driven by the needs of the resource and the needs of the political bodies, not the needs of the litigation.

One of the most problematic aspects of the mediation was the necessity need for a clear signal that the final hour of negotiations had arrived. The lack of an "end of the day" scenario made the closing of any agreement difficult. There was a window of opportunity to reach agreement at the end of the Clinton administration, but the election of 2000 inhibited final decisions by some of the parties in anticipation of a more favorable political climate. Fortunately, the new administration assigned a point person who was familiar with Idaho and had the confidence of the Idaho negotiators. Ultimately, the "end of the day" occurred when the federal team leading the negotiations was on the verge of being altered because of personnel changes.

The critical prerequisite for reaching the ultimate settlement was to satisfy sufficient concerns from each of the parties to warrant agreement without creating new concerns. The original tribal goals had been the full rejuvenation of all the salmon runs. This goal also encompassed the removal of four dams on the Lower Snake in the State of Washington. Idaho and its water users wanted to maintain state control of the resource and incur the least possible impact on their agricultural activities, industrial expansion, and municipal users. The federal entities desired to uphold their legal responsibilities in accordance with the various statutes involving tribal trust responsibilities, endangered species protection, water quality, water availability, and others.

The ultimate vision of a settlement involved focusing on the future rather than the past and focusing on the doable rather than the aspirational. For the tribes, rehabilitation of the salmon simply could not be accomplished within the boundaries of Idaho. The effects of the dams on the Lower Snake and Columbia Rivers, the conditions on those rivers, the conditions in the Pacific Ocean, the non-Idaho fishing impact, the predator impact and many other factors were all beyond the scope of the SRBA. The variables that could be controlled were in Idaho. If Idaho issues could be resolved, even though the salmon migration was not complete, then the remaining non-Idaho variables could become even more of a target in the future. The mantra was: change what you can now and that will increase the pressure on the other variables that may be necessary to change in the future. Secondly, save what you can now. The Salmon-Clearwater aspects of the settlement and the innovative use of Section 6 of the ESA provided for the protection of those pristine areas for the future. The focus was on the future, not the past.

The water users and the state valued predictability, but only if they believed that their prerogatives were not being diminished. They were reluctant to reveal their bottom line proposals for fear that the changing political climate would force them to revise their position, in effect, bidding against themselves. At the same time there was a genuine belief that the demands that were being made on their water resources were fundamentally unfair; that they had relied upon representation by the federal government concerning access to water for agriculture and other commercial uses. From this perspective the federal government was reneging to the economic and cultural detriment of Idaho in order to satisfy the economic and cultural demands of another constituency. Exacerbating the situation was a feeling of parity among the water users; there was no dominant force to provide leadership. Ultimately, the specter of long-term unpredictability and the feeling that the political climate was appropriate for settlement led the water users and the state to acquiesce to maintain a long-term status quo.

The United States government had equal difficulty in reaching a consensus. The multiple agencies—DOA, CEQ, DOI, BIA, NOAA, FWS, BLM, BOR, COE, OMB, EPA, and others—were all affected by the SRBA.[18] History had not provided a model for administrative cooperation when statutory and internal goals were in conflict. Fortunately, there was leadership from the Department of Interior that melded and molded a compromise. In addition, the Idaho delegation

18. *See supra* Part III.A.

provided essential leadership in Congress to fund the aspects of the settlement that required additional financial support.

IV. CONCLUSION

The mediation of the Snake River Basin Adjudication was a six-year process of engagement and interaction that resulted in a settlement encompassing water flows, endangered species, resource allocation and management, and governmental cooperation. This settlement was reached through a series of deliberate decisions to define the appropriate parties, issues, information, and procedure in order to maximize the chances of reaching agreement. That agreement began as a problem-solving enterprise with a small number of lawyers and then proceeded through increasingly expanding concentric circles until all affected constituencies were included. The settlement included elements—for example, federal funding of approximately $200 million and an agreement of a cooperative management process for maintaining water quality and flows of creeks and streams—that could never have been ordered in any adjudication and that provided the glue to hold together the compromises on the issues subject to litigation. At the same time these settlement elements avoided the intractable issues of principle that had inhibited earlier attempts at agreement. Ultimately, the three nations—tribal, state, and federal—were able to reconcile their philosophical and cultural differences in the context of a pragmatic allocation of resources and management that satisfied their respective needs. By looking forward, not backward, they were able to find a common ground for insuring predictability and cooperation.