Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem-Solving Across Cultures

Michael Mirande*

I. INTRODUCTION

Indigenous peoples pursuing a subsistence lifestyle, and natural resource development companies intent on exploiting the natural resources integral to indigenous subsistence, are not comfortable neighbors. Unless countries forego the opportunity to realize the potentials of natural resources, such as water, hydro-power, and timber, or indigenous peoples disappear, it is inevitable that they will continue to confront one another. Indeed, as resources available for exploitation become more scarce, the importance of developing the resources found on the more remote lands where aboriginal peoples subsist grows. Certainly, there are substantial resources to be found in and on the lands aboriginal peoples use for their subsistence. Whether it be the Indian reservations of the United States, or parts of Amazonia, the Australian outback, the Andes, the Northern Subarctic, South-Central Asia, or the Russian Far East, there is a distinct overlap between resources and aboriginal activities and territory.[1]

When natural resource development companies confront indigenous cultures, the result is frequently legal conflict over resource use that

 Member, Bogle & Gates, P.L.L.C., Seattle, Washington. B.A. 1975, Boston College; J.D. 1980, Duke University School of Law.

1. *See* ALAN THEIN DURNING, GUARDIANS OF THE LAND: INDIGENOUS PEOPLES AND THE HEALTH OF THE EARTH 42 (1992).

perpetuates cultural antagonisms, saps economic efficiency, and erodes the incentives to plan and maintain long-term projects.[2] Under these conditions, sustainable development is not likely. The development that occurs will most often be expedient resource exploitation—quick strikes in which resources are extracted and investment and risk are minimized. If development occurs over the long-term, it will be the subject of perpetual dispute that serves as a constant drain on the parties' resources.

Such developments are not socially acceptable because they represent a net social loss. Indigenous peoples do not benefit from the infrastructure development and economic diversification that can come with sustainable development. Also, resource development companies lose the opportunity for the economic efficiencies that can arise from enduring presence and relationships. Given the tenacity of indigenous cultures that have survived despite the often harshly assimilationist regimes under which they have lived, this net social loss could turn into a constant with which we are forced to live for the foreseeable future. If the net social loss is to change, proponents of sustainable development must find a way to transform this legal conflict, which often takes the form of acrimonious litigation, into an effort to achieve a mutually productive accommodation.

Now, it is a truth universally acknowledged that every lawsuit must be in search of an alternative dispute resolution model. I believe this to be particularly appropriate for aboriginal disputes. I have helped to implement a process that might point to one such alternative. That process is a work in progress more than a hypothesis, but still shares many of the attributes of an experiment. Nevertheless, this process has produced some results worth weighing, and I wish to discuss it here.[3]

I will start with my principal reasons for believing that traditional litigation is not an adequate method for addressing the legal conflict between developers and indigenous peoples. I will then describe the subject case—a dispute between a large hydroelectric utility, Idaho Power Company, and an American Indian Tribe, the Nez Perce—and the method we used to address that dispute. Finally, I will add a few observations, more like practitioner's points, that I hope will be useful to others trying to accomplish a similar result.

---

2. *See id.*

3. This Article is an adaptation of a presentation I made on March 6, 1997, in Buenos Aires, Argentina, at the American Bar Association/Inter-American Bar Association conference entitled *The Environment & Dispute Resolution in the Americas: New Directions for the Private Sector*.

This Article is meant to be a simple, fundamental treatment, short on the nuances of theory, about how a traditional form of alternative dispute resolution can be adapted to conflicts involving indigenous peoples. I want to reach and generate discussion among the pragmatic businessmen and lawyers who are aware of this area of difficulty and are earnest about exploring potential solutions.

II. THE INEFFICACY OF LITIGATION ABOUT ABORIGINAL ENTITLEMENTS

The starting point is my belief that conflicts between indigenous peoples and natural resource development companies are particularly ill-suited to litigated resolution. There are a number of factors to be cited in support of this proposition.

First is the obvious and significant difference in cultures. From fundamental world views and values to simple questions of courtesy, the differences are striking and pose obstacles to understanding and communication. It does not take long to observe this in meetings where lawyers, engineers, investment bankers, and chief financial officers, agendas in-hand, are sitting across from a group of Indians preoccupied with maintaining the integrity of their seasonal round of subsistence harvesting. It is more evident when this exchange is occurring in a deposition or trial.

If the cultural divide was merely a question of different styles of communication, it would not be so troublesome. Pragmatic people of good will can, with sufficient effort, handle the problems of understanding that arise from these differences, especially when the aboriginal peoples have experienced some assimilation, as is invariably the case in the United States. It is a mistake, however, to assume that the cultural differences are only matters of communication style. Often the conflicts that arise have their source in fundamental cultural considerations, for example, in diametrically opposed visions of a community's relationship to the environment. For instance, a developer sees a river as a source of power to be harnessed and released at will, and a tribal fisher views the same river as the free-flowing habitat of subsistence.

If cultural divides are at the heart of a dispute, it should follow that full exploration of the cultural differences is necessary for a sustainable resolution, that is, one in which the cultures find a mutual accommodation over time. Litigation, however, does not provide a sufficient opportunity

for this to occur.[4] The adversarial, arbitral, or prosecutorial litigation models force the parties into a rigid problem-solving structure largely unresponsive to cultural differences and do not provide remedies that speak to the relevant issues. For example, the kind of social harms indigenous peoples often complain of—the erosion of traditional lifeways and the intrusive influence of the dominant society's vision of progress—cannot be remedied in traditional litigation. Courts are ill-equipped to identify or assess alleged "cultural harms" and have, in the United States at least, rejected claims for their redress.[5] Litigation does not facilitate aboriginal understanding of, and adaptation to, the presence of the dominant society; nor does it give developers the tools to work productively alongside aboriginal cultures. Litigation gives data and "rights" that serve as leverage or the focal points of further dispute. If anything, the adversarial character of litigation tends to harden the cultural conflict through institutionalizing the parties' roles as opponents.

Cultural differences aside, litigation of aboriginal questions is too risky for developers.[6] While history shows that indigenous peoples have been treated appallingly, the law has nevertheless accorded them many broad and surprising prerogatives.[7] These prerogatives make legal conflicts with indigenous peoples seem intractable. The entitlements are often sweeping and, although long dormant, can spring back into being despite what for others would constitute desuetude.[8] In aboriginal territory in the United States, such prerogatives include things as the right to tax[9] and regulate certain on-reservation activity,[10] and the right to conduct independent judicial proceedings.[11] The precise nature and extent of these powers are controversial and disputed, and there is an unusual degree of uncertainty surrounding the controlling legal doctrine.[12]

---

4. *See* P.H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 8 (1979).

5. *See, e.g.*, Alaska Native Class v. Exxon Corp., 104 F.3d 1196, 1198 (9th Cir. 1997); Begay v. United States, 16 Cl. Ct. 107 (1987), *aff'd*, 865 F.2d 230, 231-32 (Fed. Cir. 1988); Duncan v. United States, 667 F.2d 36, 48-49 (Cl. Ct. 1981).

6. *See infra* notes 8-20.

7. *See id.*

8. *Cf.* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 (1985) (holding that Oneida Tribe had common law right to sue for unlawful possession of land because 1795 Agreement conveying land from Tribe to State of New York violated 1793 Trade & Intercourse Act and was thus invalid).

9. *See Merrion*, 455 U.S. at 137.

10. *See* Montana v. United States, 450 U.S. 544, 557 (1981).

11. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985).

12. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). Justice White, joined by Chief Justice Rehnquist and Justices Scalia and

However, the threat of the full application of tribal authority is real. One simply cannot guess with any degree of assurance what a court will do if faced with such a question.

The reach of these prerogatives should not be underestimated. For example, tribal entitlements can extend into former aboriginal territory that was ceded generations ago.[13] Thus, such entitlements can pose a threat to well-established activities conducted far beyond a tribe's territorial jurisdiction. For example, certain tribes in the Pacific Northwest of the United States possess and can enforce a right to take up to fifty percent of the anadromous fish subject to harvest from the public domain.[14] Some tribes have used this right to attempt to impose an environmental servitude foreclosing much development in the region from which they traditionally harvested fish.[15] Tribes have also used off-reservation hunting, fishing, and gathering rights as a basis for threatening to preempt the beneficial uses of entire river systems that for generations have been used to support irrigation and hydropower.[16] While these threats are sometimes predicated on extreme interpretations of aboriginal entitlements, courts have been reluctant to reject them out-of-hand.[17]

Examples of such threats can be found all over the world. Aboriginal peoples in Australia could hold title to, or have harvesting rights over, huge tracts of land,[18] aboriginal peoples in Canada enjoy special entitlements related to fishing and hunting, and also may establish

---

Kennedy, delivered an opinion announcing the judgment of the Court in Nos. 87-1697 and 87-1711 and dissenting in No. 87-1622. Justice Stevens, joined by Justice O'Connor, delivered an opinion announcing the judgment of the Court in No. 87-1622 and concurring in the judgment in Nos. 87-1697 and 87-1711, post, p. 433. Justice Blackmun, joined by Justices Brennan and Marshall, filed an opinion concurring in the judgment in No. 87-1622 and dissenting in Nos. 87-1697 and 87-1711, post, p. 448.

13. *See, e.g.*, Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) (holding that the Treaty at issue guaranteed Indians a greater right to harvest a share of the fish that passes through their tribal fishing areas).

14. *See id.*

15. *See* United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980), *aff'd in part*, 759 F.2d 1353 (9th Cir. 1985); Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1506 (W.D. Wash. 1988).

16. *See, e.g.*, Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259, 278-81 (1996) (discussing the asserted water and fishing rights of the Confederated Tribes of the Umatilla Reservation in the Umatilla River adjudication); United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983) (discussing the Klamath Indian Tribe's aboriginal title to the use of the waters on its land to support its hunting, fishing, and gathering lifestyle).

17. *See Adair*, 723 F.2d at 1407.

18. *See, e.g.*, Mabo v. Queensland, (1992) 107 A.L.R. 1; The Wik Peoples v. Queensland, slip op., FC 96/044 (Feb. 3, 1997).

aboriginal title to ancestral lands,[19] and the Maori peoples of New Zealand have recourse to a special tribunal to vindicate their entitlements.[20] With real threats such as these, litigation does not seem a wise option.

Similar risks exist for aborigines. Every time an aboriginal entitlement is litigated, there is a real risk that the court system will reject it and affect a radical curtailment of aboriginal rights. One has only to consult the United States Supreme Court's most recent Indian law decisions to appreciate the possibilities.[21]

Then there is the question of the attention the prerogatives of indigenous peoples command on the world stage. This can make even successful litigation useless. Indigenous peoples are a recurring object of international interest, fascination, and sympathy. International organizations have made important pronouncements about aboriginal peoples and their entitlements.[22] The popular media has had an even greater impact. From romanticized cinematic treatments to journalistic exposés and the world music scene, the media has given a decided cachet to aboriginal questions.[23] This attention necessarily has implications for development. Much natural resource development is big business, backed by publicly traded securities, and financed internationally. Such development is sensitive to public scrutiny and the enhanced governmental regulation that frequently comes with adverse publicity.[24]

Even if courts in some countries are inclined to insulate private developers from the entitlements of indigenous peoples, they can do little to prevent international bodies and the media from generating the social pressure to deal with indigenous peoples in an accommodative way. Royal Dutch Shell's experience in the Ogoni region of Nigeria is a prime example of this kind of public scrutiny and outrage.[25] Such attention has implications for the investment decisions of institutional and commercial

---

19. *See, e.g.*, Regina v. Sparrow, [1990] D.L.R. 385 (harvesting); Delgamuukw v. British Columbia, No. 23799 [1997] Supreme Court of Canada (aboriginal title).

20. *See* P.G. McHugh, *The Constitutional Role of the Waitangi Tribunal*, NEW ZEALAND L.J. 224 (1985).

21. *See, e.g.*, Strate v. A-1 Contractors, 117 S. Ct. 1404, 1415-16 (1997) (holding tribal court could not entertain civil action against nontribal individuals for an accident that occurred on public highway crossing reservation).

22. *See, e.g.*, Inter-American Commission on Human Rights of the Organization of American States draft Declaration on the Rights of Indigenous Peoples (Sept. 18, 1995); U.N. Draft Declaration on the Rights of Indigenous Peoples (Aug. 23, 1993).

23. *See* Paul Lewis, *Blood and Oil: After Nigeria Represses, Shell Defends Its Record*, N.Y. TIMES, Feb. 13, 1996, at A-1.

24. *See id.*

25. *See id.*

investors, as well as for the permitting and regulatory decisions of governments. All this is serious cause for treating the conflict between natural resource developers and indigenous cultures as warranting special attention, and for seeking a better approach than litigation offers to resolving the disputes between these two constituencies.

III. A CASE IN POINT: IDAHO POWER COMPANY AND THE NEZ PERCE TRIBE

In late 1991, the largest electric utility in the State of Idaho, Idaho Power Company (IPCo),[26] found itself at the center of a legal dispute whose focal point was the tension between indigenous entitlements and natural resource development.[27] IPCo is a private, investor-owned utility formed in 1916.[28] It supplies electricity to over 300,000 customers in a 20,000 square-mile area that includes southern Idaho, eastern Oregon, and northern Nevada.[29] Much of its electricity is generated through the company's sixteen dams on the Snake River and its tributaries.[30] The rivers and streams that drive the company's hydro plants are components of the Columbia River Basin, a congeries of streams and rivers running from southern British Columbia through Montana, Idaho, Wyoming, Washington, and Oregon to the Pacific Coast.[31] Today, IPCo's monumental three-dam Hells Canyon Complex on the Snake River sits astride the deepest canyon in North America, and IPCo is a dominating presence in the region. That, however, was not always the case.

From time immemorial, the Nez Perce Tribe had occupied parts of the region in which IPCo now operates. The Nez Perce were an indigenous presence in the plateau region consisting of present-day southern and western Idaho and the eastern halves of Oregon and Washington.[32] Its aboriginal territory consisted of some approximately fourteen million acres.

---

26. For a good history of IPCo, see CONSTANCE SULLIVAN & GRETEL EHRLICH, LEGACY OF LIGHT (1987).

27. This legal dispute is the subject of a reported decision, *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994). Along with John D. Lowery, I served as counsel for Idaho Power Company in this litigation and the mediation process discussed in this essay. Everything that appears here is solely my opinion, and should not be attributed to Idaho Power Company or Mr. Lowery.

28. *See* 1 MOODY'S PUBLIC UTILITY MANUAL 555 (Moody's Investors Serv., Inc. 1996).

29. *See id.*

30. *See id.* at 557.

31. *See* Michael C. Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 212-13 (1981).

32. *See* United States v. Oregon, 787 F. Supp. 1557, 1559 (D. Or. 1992).

The Nez Perce traditionally lived a subsistence lifestyle consisting of a seasonal round of hunting, fishing, and gathering. The Tribe and the anthropologists working with the Tribe assert that as part of this round, its members traditionally harvested salmon and other fish from vast portions of the Snake and greater Columbia River Basin, and used these fish for subsistence, commercial, and ceremonial purposes. Some anthropologists have opined that up to fifty percent of the Nez Perce diet traditionally consisted of salmonids.[33]

By the 1850s, the Nez Perce, along with such other tribes as the Blackfeet, Cayuse, Yakama, and Umatilla, found themselves in the path of the United States expansion into the Pacific Northwest.[34] The United States was very eager to get the tribes out of the way, and thus facilitate the pacification and settlement of territory.[35] To that end, and in conformance with the United States recognition of aboriginal tribes as sovereign entities possessing "Indian title" to their aboriginal lands,[36] the United States began to negotiate treaties in the region to obtain the formal cession of tribal territory.[37] In 1855, the United States entered into a treaty with the Nez Perce, under which the Tribe ceded some seven million acres of territory and agreed to retain a reservation of about 7.7 million acres in what is today central Idaho.[38] That treaty stated that "[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory . . . ."[39] This provision, or its functional equivalent, is found in most of the treaties the United States negotiated with the Pacific Northwest tribes in the 1850s.[40]

As is true throughout the course of the United States relations with indigenous peoples during westward expansion, the 1855 treaty with the Nez Perce was honored in the breach. A mere few years later, gold was

---

33. *See* D. Walker, *Mutual Cross-Utilization Of Economic Resources in the Plateau: An Example from Aboriginal Nez Perce Fishery Practices*, Laboratory of Anthropology, Rpt. of Investigations No. 41, Wash. State Univ., Pullman, WA (1967).

34. *See generally* DAVID LAVENDER, LET ME BE FREE: THE NEZ PERCE TRAGEDY (1992) (discussing United States western advancement and how Nez Perce's possession over land quickly diminished as a result of various treaties).

35. *See* United States v. Oregon, 29 F.3d 481, 484 (9th Cir. 1994), *amended by* 43 F.3d 1284 (9th Cir. 1994).

36. *See, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 568 (1823).

37. *See, e.g.*, Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 805-06 (D. Idaho 1994).

38. Treaty with the Nez Perces, 12 Stat. 957 (1855).

39. *Id.* at art. III.

40. *See Nez Perce Tribe*, 847 F. Supp. at 806.

discovered on Nez Perce lands and settlers began illegally invading the reservation in search of profitable stakes.[41] This generated tremendous friction. The United States, therefore, reinitiated treaty discussions with the Nez Perce.[42] In 1863, the United States entered into another treaty with the Nez Perce in which the original reservation was diminished by over 6.9 million acres, leaving the Nez Perce about 750,000 acres.[43] This treaty did not have the support of the whole Tribe.[44] Disagreements about its enforcement eventually lead to the Nez Perce War of 1877, which culminated in the famous flight of Chief Joseph and the United States successful pursuit, capture, and internment of the rebellious portions of the Nez Perce.[45] The Tribe was effectively rendered in two—the descendants of those who refused the terms of the 1863 treaty, and those who remained on the diminished reservation.[46]

In 1893, the United States entered into an agreement with the Tribe in which Tribal members were allotted plots on the reservation for homesteads,[47] and the remainder of the reservation, some 549,559 acres, was opened to public settlement.[48] This agreement was part of the United States continuing desire for land for settlement, and in furtherance of the assimilationist policies of the 1800s. Thus, by the turn of the century, the Nez Perce Tribe possessed a very different stature in the region than it had less than fifty years earlier.

The resources of the region had suffered a similar fate. Commercial fishing in the Columbia Basin and the advent of the fish-canning industry had caused the beginning of a decline in the fisheries.[49] While the Nez Perce and Columbia Basin tribes still exercised their rights to fish at their "usual and accustomed" off-reservation fishing places "in common with citizens of the territory," there were increasing conflicts as White fishers,

---

41. *See generally* LAVENDER, *supra* note 34, at 169.
42. *See id.* at 173.
43. Treaty with the Nez Perces, 14 Stat. 647 (1863).
44. *See* LAVENDER, *supra* note 34, at 337.
45. *See id*. at 326-27.
46. *See id.* Generally speaking, those members of the Nez Perce Tribe who remained on the diminished reservation are the ancestors of the current tribal membership; most of those who refused to acquiesce are still dispersed, and are not legally entitled to any of the treaty rights still enjoyed by those who accepted the United States terms. *See* United States v. Oregon, 29 F.3d 481 (9th Cir. 1994), *amended by* 43 F.3d 1284 (9th Cir. 1994).
47. Agreement with the Nez Perce Indians in Idaho, May 1, 1893, 28 Stat. 327.
48. For the best sources computing land loss, see Nez Perce Tribe v. United States, 18 Ind. Claims Comm. 1 (1967) (1855 territory and original reservation); Nez Perce Tribe v. United States, 8 Ind. Claims Comm. 22 (1959) (1863 cession); Nez Perce Tribe v. United States, 13 Ind. Claims Comm. 184 (1964).
49. *See* Blumm, *supra* note 31, at 211, 214-15.

using enhanced techniques such as fish wheels, began to dominate the fishery.[50]

The various treaty tribes resisted total exclusion from the fisheries.[51] There followed a period of about seventy years of intermittent and now well-known legal battles between tribes and either private landowners or State regulatory authorities concerning the extent of the tribes' treaty fishing right.[52] Ultimately, courts recognized that the treaty tribes had a legally protectable right to take up to fifty percent of the harvestable fish from the public domain.[53]

During this period, there was a constant decline in the fisheries.[54] The United States decision to develop comprehensively the Basin's water resources for, among other things, irrigation, hydro-power, and transportation hastened this decline.[55] The United States made a conscious decision to use the Columbia Basin's water resources to further its vision of progress and development in the region.[56] As orchestrated and directed by the United States, this development entailed the building of more than thirty federal dams on the Columbia and Snake Rivers and their tributaries, as well as the licensing of numerous private and municipal dams in the same watershed.[57]

The story of the development of the Columbia Basin's water resources is of almost mythic stature, filled with grandiose engineering marvels such as the Grand Coulee dam. It has largely passed into a Guthrie-esque folklore of American progress. The contemporary result is that the Columbia Basin generates some eighty percent of the Pacific Northwest's electricity,[58] irrigates seven million acres of land east of the Cascade Mountains,[59] and the region's water resources support large-scale mining and timbering, while the fisheries are devastated. Currently, the steelhead trout and the sockeye and chinook salmon in portions of the

---

50. *See, e.g.*, United States v. Winans, 198 U.S. 371, 380-81 (1905).

51. *See* Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 (1979).

52. For examples of such well-known legal battles, see *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 658; *Winans*, 198 U.S. at 371.

53. *See Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. at 685.

54. *See* Blumm, *supra* note 31, at 214-15.

55. *See id.* at 229-30.

56. *See id.* at 217.

57. *See generally id.* at 223-48 (detailing the legislative history of the development of the Federal Columbia River Power System).

58. *See id.* at 212-13.

59. *See id.*

Basin have been declared to be either in imminent danger of extinction, or threatened with that status.[60]

IPCo's dams on the Snake River fit securely into the federal government's plan for the comprehensive development of the Basin. Indeed, the federal government originally planned to construct and operate a huge dam at Hells Canyon, but the election of Eisenhower as President caused an administrative shift toward private enterprise, and resulted in the Federal Power Commission (now the Federal Energy Regulatory Commission) entertaining favorably a license application from IPCo to construct its three-dam project.[61] In 1955, one hundred years after its original treaty with the Nez Perce, the United States issued that license to IPCo.[62]

Thirty-seven years later, the Nez Perce Tribe filed a lawsuit against IPCo.[63] It asserted that IPCo's Hells Canyon Complex was, through its allegedly negligent construction, operation, and maintenance, responsible for a large part of the decline in the fisheries of the Snake River.[64] The Tribe demanded $150,000,000 in damages as compensation for the alleged impairment of its right to harvest fish from its "usual and accustomed" fishing places.[65]

It is not difficult to imagine the incredulity with which the company might greet such an action. IPCo is a cornerstone of the regional economy. Its dams are licensed directly by the United States government.[66] As a part of that license regime, the company is required to provide extensive mitigation measures for the impacts its operations have on the fisheries,[67] and the company believed it was in full compliance with the mitigation requirements the federal government had imposed.[68]

Certain other facts were similarly striking. The Nez Perce Reservation is more than fifty miles away from the Hells Canyon Complex, and the Tribe had not used the region in proximity to the dams

---

60. *See* 50 C.F.R. § 17.11 (1996); Endangered and Threatened Species, 62 Fed. Reg. 43937, 43950 (1997) (to be codified at 50 C.F.R. pts. 222 and 227). *See also* American Rivers v. National Marine Fisheries Serv., 109 F.3d 1484, 1486-88 (9th Cir. 1997) (holding that the dams contributed to the grave mortality rate problem of the already endangered and threatened salmon species living in the Snake and Columbia River migratory corridor).

61. *See* Blumm, *supra* note 31, at 238-39.

62. *See In re* Idaho Power Co., 14 F.P.C. 55, 71 (1955), *aff'd*, National Hells Canyon Ass'n v. Federal Power Comm'n, 237 F.2d 777 (D.C. Cir. 1956).

63. *See* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 794 (D. Idaho 1994).

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.* at 816-17.

68. *See id.* at 800-01.

for more than 150 years. According to some scholars, the Tribe had lost its sway over that region prior to the 1855 treaty.[69] The dams were licensed more than thirty-five years before the lawsuit, and the licensing process allowed for the participation of the Tribe as well as other potentially interested parties.[70] The regulatory agency also entertained post-licensing petitions regarding IPCo's operations, and the Nez Perce had previously utilized this procedure to obtain extensive fisheries mitigation measures.[71] In the larger sense, the dams were wholly consistent with the region's history and the federal orchestration of the development of the Basin's resources. In IPCo's eyes, to equate the construction and operation of the Hells Canyon Complex with tortious conduct requiring damages is little different than seeking reparations for the course of history. IPCo felt itself a scapegoat for federal policy decisions and the lightning rod for the Tribe's historical grievances.

What was clear, however, was that IPCo had to take the Tribe's action with the utmost seriousness. Despite the fact that the Tribe's damage claim was inflated, it still posed a serious risk for the company. The theory upon which the Tribe's damage theory rested was attenuated and not directly supported, but cogent and beguiling. According to the Tribe's theory, the federal government had guaranteed in the 1855 treaty, the Tribe's right to take fish from the usual and accustomed fishing places.[72] Since then, the courts had determined that this fishing right was a property interest deserving of legal protection.[73] Interference with similar rights to take fish, such as those provided in state fishing permits, have resulted in common law damages awards when, for example, an oil spill occurs and prevents fishermen from harvesting.[74] The Federal Power Act provides that licensees such as IPCo, can be liable for certain types of trespasses,[75] although the statute had not been construed to embrace wrongs such as the Tribe alleged.[76]

The facts showed that, as with even the best operated dams, IPCo's Hells Canyon Complex did have an impact on the fisheries, albeit one

---

69. *See* D. Walker, *Lemhi Shoshone-Bannock Reliance on Anadromous and Other Fish Resources*, 26 NORTHWEST ANTHROPOLOGICAL RESEARCH NOTES 123 (1992) (discussing the aboriginal use of the region).

70. *See Nez Perce Tribe*, 847 F. Supp. at 816.

71. *See id.* at 794.

72. *See id.*

73. *See* Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1511-12 (W.D. Wash. 1988).

74. *See* Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974).

75. *See* 16 U.S.C. § 803(c) (1994).

76. *See Nez Perce Tribe*, 847 F. Supp. at 817.

that the federal government contemplated and the mandated mitigation measures had addressed.[77] The Tribe asserted that the mitigation was ineffective and thus that damages should follow.[78] Attenuated or not, there was risk inherent in the Tribe's contentions.

As the court decision in *Nez Perce Tribe* illustrates, there are many substantial, and several dispositive, arguments undermining the Tribe's position.[79] One of the principal arguments concerned the preemptive character of the federal licensing scheme.[80] The second proposition was that the Tribe's fishing right did not provide the basis for imposing an environmental servitude on a publicly managed water resource essential to the livelihood of a substantial portion of the Pacific Northwest.[81] However, the downside risk was very great: to be assigned liability for the destruction of a fishery would entail significant economic, regulatory, and operational implications, as well as a large public relations difficulty.

This damages case standing alone was sufficient grounds for the company to assess whether there was an accommodative means to handle the conflict with the Tribe. The damages case did not, however, stand alone. The lawsuit foreshadowed the even more significant disputes that could potentially follow. Coupled with the damages action, these other disputes took triangular form, with the Snake River's fishery at the center.

The second side of the triangle was a Federal Energy Regulatory Commission (FERC) re-licensing proceeding. IPCo's license for the Hells Canyon Complex is for a term of fifty years and is up for renewal in 2005.[82] Under the Federal Power Act, the renewal of a license turns in part on the impact the facilities have upon the fisheries.[83] In IPCo's case, renewal could in all likelihood be dependent upon the company undertaking fisheries mitigation measures in addition to those it undertook during the first license term. Depending on FERC's determinations, which would turn on its assessment in light of the contributions of interested parties, those could be extensive and expensive. Under the Federal Power Act, Indian tribes with natural resource harvesting rights affected by a facility have an enhanced status; they must be consulted concerning a facilities' impacts, and their

77. *See id.* at 800.
78. *See id.* at 795.
79. *See id.* at 791.
80. *See id.* at 812.
81. *See id.* at 809-10.
82. *See In re* Idaho Power Co., 14 F.P.C. 55 (1955), *aff'd*, National Hells Canyon Ass'n v. Federal Power Commission, 237 F.2d 777 (D.C. Cir. 1956).
83. *See* 16 U.S.C. § 811 (1994).

comments carry weight with the Commission.[84] The Nez Perce Tribe could therefore be a significant actor in the company's relicensing efforts. If IPCo and the Tribe, already adversaries in the litigation, remained adverse in the relicensing process, the company would likely face a very contentious, extremely lengthy, costly, and perhaps only marginally successful re-licensing proceeding.

The third side of the triangle was the dispute over the waters of the Snake River. The Idaho State Court was, and still is, in the midst of adjudicating rights to the waters of the entire Snake River.[85] This adjudication includes thousands of claims and will have an impact on virtually every water user in south and central Idaho. IPCo is one of those claimants.[86] IPCo's ability to generate power turns on its rights to Snake River water: the water is its fuel, which when stored in the company's reservoirs, and when released to flow through the company's turbines, is central to IPCo's ability to supply its customers. For example, without the right to store water during certain periods, the company would not thereafter have the water to generate power to meet its needs during periods of peak demand for electricity.

The Tribe is also a claimant in the Snake River Basin Adjudication.[87] The Tribe asserts that when the federal government executed its 1855 treaty with it, and reserved to the Tribe the right to take fish, the United States also reserved to the Tribe the right to enough water in the Snake River to sustain its traditional fishery. Again, the Tribe's legal theory is attenuated and controversial. But, at least one court has accepted such reasoning.[88] If so adjudicated, this right could be very large. It could also be senior to all other water users. Water rights in Idaho, as in much of the Western United States, are based on prior appropriation—first in time is first in right. The Tribe asserts that because its right to water is aboriginal in character, it has a priority date of time immemorial.[89] Therefore, the water right the Tribe claims might, during periods of fish migration, preempt all other water users, including IPCo.

Thus, the stage was set for a conflict of unusual dimensions and implications that could become a constant in the company's planning for the foreseeable future. In many ways it was a paradigm of the intractable

---

84. *See* 16 U.S.C. §§ 797(e), 803(a)(2)(B) (1994).

85. *See* Snake River Basin Adjudication, No. 39576 (5th Judicial Dist., Co. of Twin Falls, Idaho).

86. *See id.*

87. *See id.*

88. *See* United States v. Adair, 723 F.2d 1394, 1410-11 (9th Cir. 1983).

89. *See* United States v. Winans, 198 U.S. 371 (1905); Winters v. United States, 207 U.S. 564 (1908) (recognizing the Tribe's claim that right to water is aboriginal).

disputes that arise between natural resource development companies and aboriginal peoples. There were broad native entitlements that were threatening to come forcefully to life after years of history. There was great uncertainty concerning how the law would respond. The entitlements potentially had very far reaching implications. Despite the various fora and legal regimes, the dispute was really about cultural priorities. An artful dovetailing of the story of the Tribe and the story of the decline in the salmon fishery would generate public sympathy for a re-writing of history.

Moreover, the current conflict reflected the potential for repeated dispute, and underlined the need for solutions beyond the traditional. It was in essence a repeat, on a grander scale, of the conflict the Tribe and the company experienced about twelve years previously, and which the company thought had resulted in a conclusion of the dispute.[90]

In the 1970s, pursuant to the Federal Power Act, which allows interested parties to petition the Commission to impose added fisheries mitigation responsibilities on a licensee, the Nez Perce Tribe, as well as the federal government and the States of Washington and Oregon, sought such relief against IPCo for the alleged impact of its operations on the Basin's fisheries.[91] Those proceedings lasted years and resulted in a settlement that all parties but the Tribe signed, and which the Commission entered as an enforceable order.[92] This order was not appealed; the Tribe thereby acquiesced, and the company thought the issue was settled.[93] But, as the Tribe's current aggressive stance illustrates, acquiescence after litigation, and acceptance after sustainable (as opposed to merely enforceable) problem-solving can be very different things; the former can merely be a time-out prior to renewed conflict.

IV. THE APPROACH

The company could have decided to use a traditional approach and litigate each of these disputes discretely. However, IPCo chose a different course. In retrospect, many of the things the company did now appear to represent simple common sense. On the other hand, there are not that many natural resource companies that can point to their past handling of an aboriginal dispute and say the same thing.

---

90. *See* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 794 (D. Idaho 1994).
91. *See id.*
92. *See id.*
93. *See id.* at 800.

First, the company brought the lawyers in the Basin adjudication, FERC re-licensing, and damages litigation together for a comprehensive exchange of information about the various fora, disputes, and important legal issues. Thereafter, it became apparent that in one guise or another each of the disputes concerned the same fish, the same water, and the same tribe. This made the risk clearer: the company had to prevail in all three disputes to win. It would do little good, for example, to avoid paying damages for fish losses and then, due to tribal advocacy, pay for fisheries mitigation measures at FERC that included compensatory mitigation for the restoration of prior fisheries. Likewise, it would not be beneficial for IPCo to see the Tribe succeed in its efforts to preempt IPCo's Snake River water rights and devote them to restoration of the prior fishery. The possibilities also became clearer: the three proceedings were really three different ways to address the Tribe's interest in the fishery, and thus a real solution to the Tribe's concerns should address each dispute. Finally, the company came to an understanding of the potentially perpetual character of the conflict. These three proceedings now predominated, but just as they had followed the 1980 settlement at FERC, others would arise. The Tribe's rights and its interest in fisheries were a constant, as was IPCo's interest in the Basin's resources. The company and the Tribe are permanent neighbors, and if business proceeded as usual, they would be permanent adversaries. The company realized that there must be some vehicle in place for sustaining a long-term relationship among the parties, a vehicle that keeps the door open to continuous, joint, peaceful problem-solving in the Basin. A process, in other words, that provides the basis for sustaining the presence and activities of both the Tribe and the company in the Basin. Because it was furthest along, the damages action became the vehicle for the company's effort.

Ironic as it may sound in a piece advocating alternative means for resolving disputes, the next important thing the company did was press the litigation of the key legal issues. This sharpened each side's awareness of risks and lead to an enhanced appreciation of the relief accommodative measures could bring. Indeed, it was the company's grappling with the legal issues that served as the first round of self-education that lead to its willingness to explore diligently alternative dispute resolution measures. The issues being joined in the litigation, the company turned to alternatives.

The company was aware that the first step had to be to find an independent person with cross-cultural expertise who could facilitate problem-solving. From prior, albeit limited negotiations with the Tribe, IPCo perceived that the Tribe saw the company not as an individual entity

with its own history and values, but as the embodiment of the juggernaut of American westward expansion and the philosophy of progress that had marginalized the Tribe. The accreted weight of historical grievance created an obstacle that was too much for IPCo to overcome on its own. Through its counsel, the company was able to identify a suitable candidate, Hugh Brody, a British anthropologist with many years experience working with aboriginal peoples.[94]

Brody and counsel for the company then began developing a resolution process. What actually occurred, however, departed significantly from the original construct. Indeed, what the process ultimately consisted of proves to be an elusive matter, and this poses one of the biggest difficulties to writing persuasively about what occurred between the company and the Tribe. Nevertheless, it is worth making reference to the original model when describing what happened, if for no other reason than that it succeeded in engaging both sides in the process.

In broad terms, the resolution process consisted of a series of phases. In the first phase, the company and the mediator negotiated a letter of engagement that described the scope of the undertaking and its projected progress through the stages of (1) fieldwork; (2) workshops designed to address (a) the substantive issues in dispute, (b) the interests each party possessed that gave rise to those issues, and (c) potential settlement structures and "currency;" and (3) the negotiation of an accord. This phase also set forth carefully the safeguards insuring the mediator's independence, a matter of large significance given that the company had engaged and would be paying the mediator. The letter of engagement also dealt with the anticipated mistrust between the parties concerning their respective commitments to the process. If fully executed, it would obligate the parties to recommit to the process at the outset of each phase and prohibit either side from withdrawing from the process in the middle of a phase. This obligation was designed to convince the parties that at the outset of each phase they were each making a real investment, while allowing them sufficient freedom to drop out after making a good-faith effort.

Once IPCo executed the letter of engagement in September 1993, the next phase was to convince the Tribe to execute it as well. While maintaining its litigation pressure, the company invited the Tribe to participate in the proposed independent mediation effort. The company

---

94. Hugh Brody is also a writer and documentary film-maker who has worked with aboriginal peoples in Canada, Alaska, and India, both independently and in conjunction with international institutions such as the World Bank.

met with Tribal counsel and explained its view that the damages case was merely part of the greater fisheries issues taking shape in the three related proceedings. IPCo also expressed its belief that, as long as the Tribe and the company existed, and there was some hope for restoring the fisheries, there would be no end of dispute if the parties continued to conduct business as usual. IPCo then introduced its proposal to engage Mr. Brody and to leave to him the task of convincing the Tribe to enter the negotiations. The Tribe met with the mediator and, after performing its due diligence, agreed in December 1993, to participate in the process and execute the letter of engagement. The letter of engagement's guaranties of independence were not entirely sufficient to eliminate the Tribe's suspicions concerning the possible influence of the company's engagement and payment of the mediator. However, it is certainly fair to say that those guaranties, coupled with Mr. Brody's goodwill and reputation for integrity, were apparently convincing.

There followed the planned phase of fact-finding and cross-education that could be characterized as fieldwork. Each party created a negotiating team whose membership was to remain constant for the duration of the mediation, including representatives from the highest level in each organization as well as lawyers intimately acquainted with the legal issues. IPCo's team included the company's President and Chief Operating Officer, and the Tribe's team included its Chairman. The mediator met extensively with each side's team and studied the history of the Basin, its fisheries, and each party. Each side gave the mediator presentations about themselves and provided liberal access to their files and personnel. The mediator also performed substantial independent research. Once the mediator had a good grasp of the parties and issues, he brought to each party his understandings of the other side's position and the circumstances, thus laying the groundwork for informed communication between the parties. As a conclusion to this phase, the mediator brought the parties together in a relaxed, rural setting for a meeting of several days during which there was a comprehensive exchange of information and views. He then provided an overview of the upcoming process and sought the parties' concurrence in the next phase.

Up to this point, there had been little direct contact between the parties and virtually no debate. The next phase was to be more interactive. There was to be a series of workshops dealing with substantive issues. Each was to be lead by Mr. Brody, with assistance from various consultants, and each was to be dedicated to a discrete topic important to the dispute. These workshops were intended to be a cross between seminars and working sessions. The parties were to be educated, come to grips with their respective positions, and try to develop a

consensus on what would, in each of the areas of dispute, ideally become the building blocks of a final accord. The first workshop was to utilize the well-known "interest-based" problem-solving technique designed to bring the parties to an awareness of what interests they possessed; the notion being that it was their potentially compatible interests that perversely gave rise to their unnecessarily adverse positions.[95] Focusing on interests could thus open doors based on latent commonalities. The workshop was partially an instructional device, initiating the parties into the method, and partly the actual identification of each side's principal interests and any overlaps among them. Additional workshops were to include one on fisheries, designed to engage the parties and their consultants in an identification of jointly understood and accepted facts about the Basin's fisheries. Another workshop involved analogues that would provide the parties an overview of how other similar disputes had been resolved and illustrate where those other processes had gone right or wrong. Other workshops addressed various cultural considerations.

The workshops did not proceed smoothly and not all of the planned meetings occurred. Ultimately, the workshops proved unworkable for a variety of reasons, two important ones being the Tribe's apparent unease with the technique and the Company's frustration with the slow pace of events. The parties did, however, proceed through the interests and fisheries stages. These meetings resulted in mutual education, and provided a vehicle for each side to be heard. As the sides began to know each other better, myths about each party were dispelled, or at least greatly diminished, and some bases for settlement became apparent.[96]

The interests workshop identified the all-important overlapping interest in the Basin's fisheries. The Tribe's interest was in restoring the fisheries so that it could engage in commercial and subsistence fishing and enjoy the ancillary cultural benefits that it believed traditionally flowed from those activities. IPCo, on the other hand, wanted the fisheries addressed so that it could continue to operate its facilities without debilitating constraints being imposed by the federal regulatory authorities charged with protecting the fish. This overlap was an obvious starting point.

The fisheries workshop resulted in an agreement on a set of facts concerning the nature of the Basin's fisheries and their history. These facts were set forth in writing in what became known as the "fact sheet."

---

95. *See* ROGER FISCHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 51-57 (1981).

96. Despite the limits on their utility in this case, I would use workshops again, albeit with modifications in the preparation of the parties.

Broadly speaking, the fact sheet consisted of an agreement on what the fish runs were like prior to IPCo's Hells Canyon Complex, and what they were like at the time of the workshop. This agreement ended the most spurious debate about what had occurred to the fisheries and substituted hard information for the atmospherics of contentious rhetoric.

That being said, the agreement on the fact sheet did have its difficulties. It was reached in the first stage of the workshop, during which each side's fisheries biologists met and worked to an agreement without the parties' negotiating teams. Later, when the negotiating teams joined the meeting, the consensus began to unravel, as the lawyers started to worry about admissions against interest, future cross-examination, tribal politics, and a host of other preoccupations that earlier posed little difficulty for scientists discussing facts. While the workshop concluded ambiguously, the fact sheet maintained a momentum of its own, retaining its integrity and guiding the remainder of the process.

A secondary result of each workshop was a frank discussion of the totality of impacts that affected the fisheries. Without any concession or quantification of IPCo's alleged responsibility, both sides acknowledged that IPCo's activities were part of a much greater, federally-driven process that had lead to the current state of the fisheries. This acknowledgment provided the basis for a more even-handed perspective on responsibility. It also allowed the parties to identify the range of actors important to the various proceedings in which they were engaged, and to weigh their importance in each.

At this point in the process, the parties realized that they had undertaken more than they were capable of handling at one time. The parties' interaction had lead them to a more complete appreciation of the need for coordinated efforts with the United States, the State of Idaho, and certain other parties if progress was to be made in the Snake River water adjudication. But it was not feasible to make these entities participants in the process. This appreciation lead to the reformulation of the mediation to embrace solely the FERC re-licensing and the damages case, leaving the water adjudication to the legal process or a separate mediation. This reformulation was in one sense a set-back because it created a gap in the resolution process. The reformulation was also a positive step because it reflected a realistic, maturer understanding of the complexities presented; better to agree on the solvable than maintain the integrity of theory at the price of pragmatic achievement. Further, the parties proceeded on the understanding that if the current mediation succeeded in creating the framework for a long-term relationship, that might later facilitate judicial or nonjudicial resolution of the Snake River Basin Adjudication.

From this point, the emphasis shifted from workshops to the parties' dedicated, internal focus on fisheries and resource utilization. Each side began to identify with greater particularity their respective patterns of fisheries and water use. This resulted in the company identifying its flow needs and the species it believed relevant to the damages case and with which FERC was most concerned. Likewise, the Tribe identified the species with which it was concerned. The parties then compared the flow needs of the overlapping fisheries and hydro-electric regimes. A picture of coinciding uses developed, narrowing the field of real dispute. This overlap of identified interests would ideally serve as the currency for settlement.

The question then became one of exchange: what and how much should IPCo devote to the situation and what should the Tribe give in return? The answer inevitably involved money, but the amount and the form in which it could be delivered, and its role in the overall settlement, remained an open question. Here, the mediation process switched for a time from a party-driven one to a mediator-driven one. The mediator asked each side for its best and worst cases and thereafter worked with various fish biologists, hydrologists, and natural resource economists to assess impact, causation, and damages. The mediator also worked with legal consultants to identify risks, all of which he weighed. Thereafter, the mediator reported his views separately and confidentially to each side. The parties, with Mr. Brody's assistance, then began meeting again. The negotiations yielded a settlement that consisted of a mixed exchange predicated on the mediator's assessments.

All of the foregoing occurred parallel to the litigation of the legal issues in the case. When the case settled in 1997, it was on appeal to the United States Court of Appeals for the Ninth Circuit from a judgment entered in 1994 on behalf of the company. That the company proceeded with the settlement in light of its legal success, which occurred early during the mediation, evidences its awareness of the pragmatic benefits that could be obtained through building a relationship with the Tribe. The Tribe appeared to reach a similar conclusion, choosing to settle on appeal despite the existence of legal precedent adverse to the company's position and the district court's damaging opinion. The process seems to be a vote of confidence for the desirability of pursuing sustainable resource exploitation.

V. THE AGREEMENT

At the center of the settlement is a link between the parties that turns on their interests in the Basin's fisheries. Several additional undertakings reinforced that link. The deal can be divided into two parts.

First, the lawsuit would be concluded, and IPCo would pay a certain amount of money to the Tribe, a given percentage of which would be dedicated to fisheries restoration efforts designed to address the impacts IPCo's operations have allegedly had upon the fisheries. The fishery measures are to be proposed by the Tribe and are meant to speak to the Tribe's interests, but they also are to bear a suitable relationship to the anticipated concerns of FERC. IPCo will pay the Tribe but should also be in the best position to try to obtain "credit" for those payments and measures from FERC when the Commission assesses IPCo's fisheries mitigation obligations on re-licensing. To help achieve that goal, the parties agreed to consult on all fishery proposals and reach accord on their appropriateness prior to their implementation. Appropriateness in this case means, in broad terms, that the proposals are scientifically sound and practically implementable. Appropriateness also signifies that the proposals fit well with IPCo's approach to its re-license application, and that they will likely meet with FERC's approval and result in the "credit" IPCo seeks.

Second, IPCo and the Tribe will consult during the process of IPCo's formulation of its re-license application. The parties intend for the application to include reference to the various fisheries measures the parties develop in the interim. If all goes well, when IPCo submits its application, the Tribe will express to FERC its full support for the re-licensing of IPCo's Hells Canyon Complex on the terms IPCo proposes in its application. If that occurs, IPCo will release from a trust and will transfer to the Tribe an additional sum, a portion of which is also dedicated to relevant fisheries restoration efforts.

Underlying both components of the settlement is a structure for building a solid and productive relationship between the parties. The parties created as part of their settlement a Settlement Implementation and Dispute Resolution Panel. This Panel will be chaired by a neutral administrator, Professor Francis McGovern of the Duke University School of Law,[97] and staffed by two representatives from each side. This Panel will vet the Tribe's fisheries proposals and will serve as the vehicle for the continuing consultations between the parties preceding re-licensing. The Panel will also handle disputes about implementation of

97. Professor McGovern has extensive experience in alternative dispute resolution.

the settlement and could eventually address other Basin-related disputes between the parties as well. The Panel is intended to institutionalize interaction, making conscious efforts at sustainability a normal part of each side's activities. To borrow from Max Weber, and to quote the Panel administrator's opening speech to Panel members, it is to embody the shift from charisma to routine.[98]

There are additional reinforcing mechanisms, such as IPCo's agreement to make relevant contracting and employment information more readily available to the Tribe. Probably the most important additional tie is a special arrangement under which IPCo will extend to the Tribe the ability to purchase IPCo stock on the basis of the same discount the company enjoys when it purchases its own stock for purposes of its retirement and stock option plans.

Thus the ties that bind: a newly created body, overseen by a neutral party, to facilitate continuing communication between the parties, and to provide a forum for the implementation of the settlement and the handling of grievances; the opportunity to pursue settlement-based fisheries undertakings in the success of which each side will have a strong interest; and the potential for Tribal holding of IPCo stock that makes IPCo's success a Tribal interest. The parties hope these ties are the principal tools in the first step of facilitating a productive working relationship that, in turn, will be an important basis for the sustainability of their respective presences and activities.

The incentives seem to be right, but only time will tell. It is too early to set forth any conclusions, especially given the continuing litigation between the parties in the Snake River Adjudication. What is clear, however, is that the parties now have a structure that can guide them into interaction. Rather than finding themselves unwillingly but regularly across from each other in a hostile, adversarial setting, the parties will voluntarily meet each other regularly during the course of settlement implementation, with the task of reaching an agreement. If their efforts are productive, the relationship should follow.

For those who would have a more decisive conclusion, I can only offer a personal one. Vaclav Havel has written that "every piece of good work is an indirect criticism of bad politics . . . ."[99] I believe that the alternative I have described qualifies as "good work," and I believe this resolution process stands as a criticism of the adversary approach to the relations between indigenous peoples and the dominant society. If this

---

98. *See* MAX WEBER, ON CHARISMA AND INSTITUTION BUILDING 48-65 (1968).
99. VACLEV HAVEL, LIVING IN TRUTH 81 (Jon Vladislav ed., 1989).

resonates at all with my readers, it should generate serious consideration of parallel undertakings.

VI. OBSERVATIONS AND TIPS

I would like to devote the end of this Article to a brief set of observations that I hope will have some practical use. In implementing this process, studying analogous disputes, thinking about my other cases, and researching this type of problem-solving, I have identified what I believe to be certain important considerations. To risk both inappropriate generalization and the recitation of the obvious, I offer the following. I ask the reader not to take my general statements as saying or implying anything in particular about either the Nez Perce Tribe or IPCo.

1. In undertaking this type of problem solving, an anthropologist's insights into an aboriginal group are essential for the nonaboriginal party. If you do not begin to understand a group's politics, economy, values, and history, you will not understand what the dispute is about. This includes, very importantly, uncloaking the myths about aborigines that the media and some tribal advocates disseminate.

2. The indigenous peoples need a "corporate anthropologist" just as much as the non-Indians need insight into native culture, and corporate culture needs just as much uncloaking. These conflicts entail two cultures, and absent mutual appreciation, the parties will have no basis for an informed exchange.

3. It is essential for the non-Indians to come to an understanding of the aboriginal group's process of decisionmaking. It is all well and good, for example, to read a tribe's constitution and understand the technical hierarchy, but that does no good if in reality the real decisionmaking occurs consensually, outside of official meetings in consultations among various tribal constituencies. Similarly, it does little good to know who is officially chairman of the tribe, when several unelected tribal elders may hold the real power.

4. It is also necessary to develop enough insight into the aboriginal group to be able to satisfy oneself that the decision making has occurred properly.

5. Remember at all times the role of history. It looms large throughout the process, and is often the underlying motivator for nuance or avoidance that would otherwise go misunderstood.

6. Do not underestimate the "positive" role conflict plays for aboriginal groups. Aboriginal groups are often marginalized and socially invisible. Dispute can therefore provide a desired forum for being heard and seen, to be acknowledged. Dispute may serve as a surrogate for

recognition. For aboriginal groups striving for a sense of self, dispute can be the vehicle for self-definition and a galvanizing force in a divided tribe. These types of considerations make some aboriginal groups less conflict-adverse, and thus make settlement less desirable to them. This alters the settlement calculus.

7. Do not overestimate the value to an aboriginal group of success in a dispute. Some groups define themselves in relation to their constant struggle with, and continued oppression by, the dominant society. Failure can thus constitute an affirmation of a preferred version of history. This skews the risk-benefit analysis that guides settlement decisions.

8. In formulating ideas about settlement currency, do not emphasize cash, and consider with the utmost care and skepticism lump-sum payments designed to be distributed per capita. Aboriginal peoples are often terribly poor and very inexperienced in the handling of cash. Money-in-hand is often exactly what an aboriginal group does not need; the potential for squandering is too great. Arranging such cash settlements is parallel to the traditional money-for-tribal-heritage exchange, and similarly carries too much potential for later recriminations. Therefore, cash settlements contribute to a cycle: With the loss of the heritage and the squandering of cash comes the search for more money, and hence the search for other disputes that might result in payments. Instead, try mutually to identify projects to which sums can be irrevocably devoted, and employ long-term, trust-based payment schemes.

9. Nonaboriginal companies must become inured to being viewed as other than themselves. They will be viewed as the embodiment of the injustices of history and as the representative of the otherwise faceless, dominant society and power structure. Thus, the company should know that it will be a lightening rod, and must work very hard to make itself known for itself rather than as a symbol.

10. Companies must similarly become inured to the tribal identification of a company's particular activity with the full range of tribal problems. For example, in the usual course one would anticipate that a damages claim based on fish harvesting losses would consist principally of lost profits. But in a tribal context, such a claim could allegedly embrace a range of asserted harms—from alcoholism, to diabetes, illiteracy, juvenile delinquency, the loss of the tribal language, and the decline of the traditional tribal religion—said to be attributable to the decline in the fishery, and thus in part the company's responsibility. This type of claim should be addressed directly but carefully by the

company involved. In fact, this conflation of alleged harms may prove useful through its tendency to widen the scope of settlement currency.

11. Real settlements take an inordinate amount of time and flexibility. They require a process that is designed to endure, adapt and evolve as circumstances change. Do not set yourself up for failure by anticipating or requiring a prompt result achieved through a completely pre-planned process.