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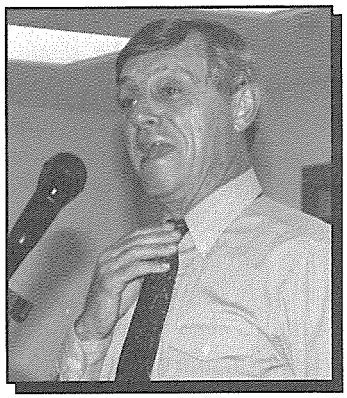

SHARING THE PAIN: MEDIATING INSTREAM FLOW IN VIRGINIA

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I am going to supplement with these remarks the article I have written entitled, *Sharing the Pain: Instream Flow Legislation in Virginia* that describes the process which led Virginia to adopt new instream flow laws, and which is reproduced here following this paper.

The article describes the environmental mediation which assisted in developing the consensus draft of instream flow legislation which the Virginia General Assembly adopted and which substantially changed Virginia water law.

My remarks to you today are based on my experience as an environmental mediator, but I must confess that my teaching and academic propensity also will be apparent. Since 1980 I have served as Director of the Institute for Environmental Negotiation (IEN) at the University of Virginia. I am also a professor of urban and environmental planning in the School of Architecture.

In my life, at least, the classroom and the negotiation table are not that separated. Both the classroom and negotiations involve learning, argumentation, discussion, searching for answers, and both absolutely depend upon some level of mutual trust. There are obviously some differences in the two realms. Perhaps, the most notable difference is that in the classroom I get to set most of the rules and provide the evaluations; in negotiations the parties establish the rules, and determine the outcomes.

I know that you have convened because you are concerned with water resource issues. And, this year you are focusing on conflict resolution in water resource matters. Virginia's water climate, water resources and water law are all very different from New Mexico's. Our political institutions and political alignments also are quite different. So, one concern I had in preparing these remarks was to find some elements of the experience the IEN had in a recent mediation in

Virginia that would transfer usefully to your quite different setting.

The new instream flow legislation in Virginia is, at least in part, the result of a consensus-building process that overcame 10 years of frustration by a specially constituted Virginia Water Commission that was empanelled to make recommendations for changes in Virginia's riparian doctrine. The riparian doctrine, as distinct from the prior appropriation doctrine, which characterizes most western states, stems from the initial understanding that there was enough water for everyone's reasonable use. Even 50 years ago that assumption made a certain amount of sense. It makes less sense every year.

The *Sharing the Pain* article describes in some detail how the negotiations were initiated, the techniques that were used, and the process by which the group consensus was transformed into legislative enactments. Now, the legislation is being implemented by rules and regulations which refine the statute, or take the steps necessary before the law is applied in particular settings.

The Virginia water law revisions which emerged from the mediation process statutorily declare that instream flow is a beneficial use. Prior to the adoption of these revisions, offstream uses were the only statutorily established beneficial uses.

This change in the law is of more than symbolic value, but even the symbolic value is considerable. It is valuable because Virginia's streams and rivers may, particularly in periods of low rainfall, be drained by offstream uses, leaving bodies of water, or stretches of water, without any instream flow. The new instream flow rules requires the state to set limits on the offstream withdrawals to protect the ecological and recreational uses of the stream. This, of course, affects the demands that can be made upon the water by traditional offstream users.

Virginia's population is increasing. Agricultural, urban and industrial uses of water are increasing. Citizens are concerned that these growing demands upon the waters of Virginia are environmentally harmful and are limiting instream uses such as recreational fishing and boating. The water law revisions, in effect, acknowledge a new scarcity of water, at least in some streams at some times.

Scarcity, and particularly scarcity when it arises after historical periods of little perceived scarcity, generates increased economic competition and political conflict. This is one of the key aspects of environmental conflict and why some innovations in resolving environmental conflicts are developing.

The riparian doctrine and the historical methods for resolving water conflicts in Virginia presupposes sufficient water for all and therefore little conflict among users. Where conflict arises it can be settled by litigation and judicial decree based on previous judicial precedent.

As you know much better than I, the prior appropriation doctrine was developed under the assumption of scarcity and the need for determining legal rights in the face of that scarcity. We, in Virginia, are now confronting issues that are similar to those faced earlier by states in the more arid West.

But in a greater sense the entire nation is experiencing more conflict, and heightened conflict over resource issues. Much of this, as in Virginia's experience with instream flow, is the result of environmental concerns that were not historically viewed as major problems. But as the pressure of numbers of people and of demands of the economy on our natural resources grow, we will have to address our basic orientations toward resources as well as toward our institutional means of resolving conflicts. I will return to this theme in a moment.

Virginia's Instream Flow Legislation

The water law revisions which Virginia adopted in 1991, as I have already noted, establishes instream flow as a beneficial use. Additionally changes were made in the criteria and goals of the Virginia Water Control Board's (VWCB) decision-making on projects that required approval under the federal Clean Water Act.

Projects that under federal law require a 404 permit also require a state certification that the project or activity does not conflict with state

water law. This review conducted by the state is issued in a 401 certification. Both permits are required under the Clean Water Act before a project can proceed.

The statutory changes in Virginia water law made explicit the legislature's desire that VWCB evaluate water **quantity** impacts as well as water **quality** impacts in conducting 401 reviews.

Prior to this legislation, the water agency demurred from such assessments because the administrators were not certain that the legislature actually wanted them to review the water quantity (instream flow) issues. Consequently, the agency had confined its water quantity analysis on 401 reviews to whether the stream flow was sufficient to meet pollution-dilution standards rather than to other instream flow values.

The 401 review was required by federal law; the Virginia General Assembly gave this 401 review a concurrent status in Virginia law. The 401 review and permit is also the state instream flow permit. The effect is to generate an instream flow evaluation of all activities that require a 404 permit. There are some constitutional and legal issues that might arise if a FERC permit receives a 404 permit, but the state denies it on the basis of an insufficient instream flow, but that discussion is for another time. It is sufficient to note that the question of jurisdiction was addressed and the legislature acted.

A third legislative change was the establishment of a permit system which required water users in designated areas to limit their withdrawals in time of low flow. These districts are called Surface Water Management Areas (SWMAs). Currently there are three rivers which are developing allocation rules for these rivers.

The law allows the users within the established districts to negotiate among themselves for fair and equitable water reductions of water usage during these periods of low flow. The VWCB has the authority to approve or disapprove such negotiated settlements based upon its sense of what the public interest may require. One would expect that in most instances the negotiated sharing the pain outcomes would be consistent with the public interest as well.

As you might imagine, limiting the permit system only to those locations and to those times when there was a conflict between instream uses and offstream demands made the law acceptable to both opponents of a state permit system for water withdrawals at all times and all places, and to those who maintain that the riparian doctrine is obsolete, inefficient, and even, environmentally harmful.

The concept of sharing the pain ethic is the foundation for the entire set of changes. The law does not abolish the riparian doctrine nor does it establish a statewide water planning and permitting system. It is both a compromise and a creative alternative. Would this compromise and creativity have resulted in legislation without the process described in my article? No one can answer that with certainty, but I think most informed observers of the previous efforts think that the mediation process was a critical element in the process of water law changes.

There were other changes in the riparian doctrine that were important to Virginians, but which are of less interest to you. Some exemptions on reporting the amounts of water withdrawals made by agricultural users were removed from the law, and the Virginia Attorney General was authorized, indeed encouraged, to enter into water suits among private parties to articulate the state's instream flow interests.

Let me, once again, encourage you to read *Sharing the Pain* if you are interested in getting a fuller account of the mediation process and the water law changes made.

Rather than merely repeat what is written in *Sharing the Pain* let me provoke you with some concepts that I have been playing with that are relevant, I think, to finding more effective and less costly ways to resolve environmental conflicts.

Water, air and land, the three critical environmental spheres are cultural as well as natural, physical media. They are cultural in the sense that their natural characteristics are imbued with meaning through interaction with human values and attitudes. The human values and attitudes, of course, are influenced by historical experience

and also are enshrined in law which crystallizes values and attitudes of the people.

There are three concepts that I think are particularly critical to attitudes about natural things or the environmental media of land, water and air in the United States. These same concepts are present in some way in other cultures and nations as well. These three concepts are those of the commons, of resources, and of property.

All three of those concepts are present, or should be present, in any sensible evaluation of air, land, and water. I happen to believe that by considering these concepts and their utility in examining the environmental media, we might overcome the "hardening of the categories" that I think dominates our national thinking.

Americans pretty much still view air as a commons, water as a resource, and land as property. In everyday practical terms we need to think and rethink these three environmental media in terms of these concepts in order to appreciate the character of environmental conflicts. I maintain that water, better than land or air is surrounded by historical attitudes that make it particularly suitable for experimenting with new forms of environmental conflict resolution. Natural things can be viewed as something that belongs to all of the people and to be used commonly by all the people. Gifts of nature and of God are different than personal property or fabricated goods which require human labor, ingenuity, and investment. Land is in some ways the same as air and water. Henry George, the author of the American classic, *Progress and Poverty*, has had more influence on the people and nations that have a more restricted or confined land base than we do, but his thinking on the land as different from capital, or if you prefer, from other forms of capital, is more relevant today than it was in his own time. At some time and in some way land, air and water are a natural gift that humans inherit from one generation to the next. If only in the generational sense, we have some responsibility for understanding all three of the environmental media as a commons.

Historically a commons has referred to common land that is possessed by the community rather than individuals for the common use of the people. In England, or in parts of New England in the 18th century, a commons was available for grazing by cattle owned by individuals.

Today, air and the regulation of air quality is perceived and treated as an existing commons. People believe that air belongs to us commonly primarily because we recognize that it is essential to life, but also because historically it has not been priced or privately owned.

In conflicts over air quality, there is an underlying assumption that no private party has the right to appropriate its use—that is to make it an environmental sink—if it hurts the community. To be sure, there are conflicts over whether air quality changes will hurt the community's health or welfare, but generally speaking, the "polluter" does not have a presumption of the right to use air as one might use land. Sometimes this view of air as a commons can keep us from creatively dealing with issues of pollution control that are likely to respond to the realities of pollution as well as to the realities of economics.

Water is predominantly viewed as a resource. This may be because, unlike air, it has always had an obvious, productive use and some scarcity. And unlike land, water, or at least rivers, flow and hence permits human transportation which has public characteristics. We say "water resources" where we don't often say land resources.

Water is recognized as being critical to life which is limited and which must somehow be allocated among different uses. The political nature of that allocation is taken more or less for granted. Unlike air which has only recently become regulated, or land which is more often viewed as property, water controversies are characterized by disputes over allocation and the benefits of one allocation over another allocation. Now I recognize that the prior appropriation doctrine creates property rights, as does the riparian doctrine, but the property rights are not so adorned with the rights orientation that is associated with landed property.

Land, as I have already said, is viewed in the U.S. today mainly as property and only secondarily as a resource, and hardly at all as a

commons. Land policies and conflicts are heavily influenced by attitudes about private ownership and the rights of ownership.

One of the characteristic features of negotiations surrounding land is the heavy emphasis on the use of the "rights." The language of rights when it is used in more than a trivial sense, is that it connotes a sort of "trump" in the dialogue game. Or, put another way, a party might argue that the use of landed property would be harmful to the community. The other party might say, yes, but it is my right to do it. This is what I mean by a "trump" argument. In other words you have made a good, even a correct point, but the correctness of your resource argument does not win.

Property rights are different than some other rights. The right of free speech cannot be abridged by the community even if the community is willing to pay for it. The use of the term rights in property rights, means that the owner's control cannot be limited by the community without compensation for its economic value.

One characteristic of environmental conflicts in our time is the challenge made to the dominant attitudes and understandings about natural things or environmental media rather than to resolving the conflict by the application of the existing rules or attitudes.

Water issues are generally understood as resource issues as well as property or commons issues. That resources partake of both the commons and the property perspectives makes them especially suitable for alternative dispute resolution (ADR) or to use my term, supplemental policy dialogue (SPD). The first acronym is now well established in the legal profession to encompass forms of dispute resolution that diverge from the practices and forms of a judicial trial. The latter acronym is of my own making and not in general use, but which I believe more accurately depicts what is needed and what is happening in resource and environmental conflicts.

SPD around water issues is likely to bring to the conflict resolution table the diversity of interests, and the public attitudes which are necessary to produce better outcomes. Stakeholders, in the jargon of environmental dispute resolution, are likely to be representative of the diverse interests that constitute the interested community. Their interests may be property-like, but these interests will also concede the resource characteristic. Water conflicts bring to the table an interest that they want to articulate but also a willingness to consider alternatives other than pure and simple compensation.

An SPD or mediation, like the one described in *Sharing the Pain* uses a third party, called a facilitator or mediator, whose major role is to help create the climate for dialogue. The mediator establishes a place, time, and manner for the dialogue with the cooperation of the group, but the most important contribution is to provide a climate, the setting, and the material for mutual education and communication.

Communication is essential to any type of dispute resolution. Roberts Rules of Order, for example, is a set of communication rules. The cross-examination of witnesses in a trial proceeds under certain communication rules.

The mediated dialogue also is largely a communication process. The dialogue is a process that encourages communication that is more open, flexible, and informal. In short, mediated dialogue has very different rules for what is "relevant" than a trial. Relevance includes exploration of concepts and ideas that may be quite remote from an immediate fix of the conflict. From the standpoint of determining the "truth" or getting to the real issues, a mediated dialogue follows different rules. These different rules are based on the idea that the boundaries of technical or legal discourse are sometimes too constraining to a resolution of categorical issues.

A few comments on the use of the word "negotiation" may be helpful to you. Negotiation as it is practiced in dispute resolution is quite different than the type of negotiations one employs in setting a price on a used car, or even resolving a lawsuit on the courthouse steps. Negotiation is, or can be, more than "positional bargaining." Positional bargaining assumes at least two stated beginning positions that compete with each other.

Principled negotiation, as it is called by Fisher and Ury in their book, *Getting To Yes,* is designed to explore alternative interests, and this in turn generates ideas. Interests can be realized by several alternative positions. Thus focusing on interests, rather than positions, encourages a search for mutual satisfaction through exploring options that might permit joint gains, or win-win outcomes.

"Principled negotiation" is what a mediator encourages the parties, or stakeholders, to establish and exploit. Ultimately, compromise may occur, or creative alternatives may be developed, but it is through a process that encourages widening and deepening of conversation rather than the narrowing and winnowing and artificiality of a cross-examination.

Principled negotiation encourages creative thinking and boundary-expanding searches for outcomes. This type of climate, setting and dialogue is difficult to achieve in traditional settings whether they are legislative hearings, administrative rulemakings, technically based decision-making or litigation in courtrooms. The key point is that SPD is not so much an alternative to the other settings and institutions, it supplements and where successful assists them in performing better their responsibilities.

I think that is what happened in Virginia in the instream flow mediation. The setting, process, and interest representation led to agreements that needed further political and legal testing, but these initial agreements provided a positive basis for further action; action that might not have been possible without this supplementation.

I have used the concepts of commons, resources, and property and applied them to land, air and water. My purpose is to encourage you to play just a little bit with your own positions and even your interests. Viewing water, air and land from the perspectives of a commons, a resource, or property can produce special insights into your own attitudes, values and positions; it can also lead to common ground with other individuals and interests who without this exercise would appear incomprehensible, strange, unrealistic, or worse.

I suggest that those of you who live in New Mexico might want to experiment with processes similar to that which are described in *Sharing the Pain.* It could supplement your existing water institutions but, might also provide the impetus for developing water law inventions that will better serve your future need.