

CDR Mediates Platte River Issues to Recover Four Endangered Species

The Challenge

The Platte Cooperative Agreement was signed in July 1997, between the States of Colorado, Nebraska and Wyoming and the U.S. Department of Interior. It created a basin-wide cooperative initiative to resolve and reconcile endangered species recovery issues for four target species—the whooping crane, the interior least tern, the piping plover, and the pallid sturgeon—and the need for water for diverse uses in the basin. Over a period of three to four years, the states, the federal government, (represented by the U.S. Fish and Wildlife Service and U.S. Bureau of Reclamation) and power, agricultural and conservation interests committed to negotiate a framework and adaptive management components for a long-term Recovery Implementation Program to address Endangered Species Act requirements. The parties' alternative to a negotiated agreement would be a return by the Federal agencies to a project-by-project approach to develop separate measures to offset impacts to the listed species. This option had a high probability of costly reviews and environmental mitigation measures for water projects in the three states that need federal permits, licenses or funding.

In negotiations, the parties reached a number of impasses on issues related to the provision by the states and the U.S. of land and water for the program, which they were unable to resolve on their own. CDR Associates' mediators were called in on two occasions to assist them to break deadlocks on these issues.

During the negotiations on regime of the river and flow issues, sessions were packed with multiple representatives of each party, legal counsel and technical staff. Bargaining was often characterized by long and inconclusive discussions or wrangling, adversarial behavior and significant disagreement over technical data. Two states were at extreme odds on proposed flows, and potential impacts they would have on them. The three states were also not in agreement with the U.S. on a number of other contentious issues. Negotiations between the states and the Federal agencies could not proceed until the states resolved the issues between them, which were not happening in the large meetings. At one point, there was a walk out by one of the parties. It stated that a break from talks was needed to determine if a negotiated settlement of contested issues was desirable or possible, and whether its delegation wanted to continue participating. At this point a CDR Associates' mediator was asked to intervene.

The Strategy

After talking with all parties and conducting a brief situation assessment, the mediator determined that each party needed to conduct an internal cost/benefit analysis. The evaluation designed to help them to determine whether potential outcomes "away from the table," their Best Alternative to Negotiation (BATNA), were preferable to what they might be achieved by continuing in talks. He helped each party to assess what would be gained or lost by participation or withdrawal and assess the risks entailed in both strategies. Upon gaining a commitment from all parties' to return to negotiations, the mediator determined that the presence and periodic involvement in negotiations of a large group of legal and technical staff, some of whom were behaving in a very antagonistic and adversarial manner, was inhibiting candor and productive problem solving by the principals. He proposed limiting the number of participants in the next few negotiation sessions to only the ten members of the Governance Committee. The suggestion was accepted. However, before the multi-lateral negotiations could resume, the mediator suggested that a smaller series of private problem-solving meetings be held between the states to see if their differences could be resolved. These

meetings were conducted, and with the assistance of the mediator, the states were able to address and settle their issues and prepare for negotiations with the Federal agencies. Once parties returned to the joint sessions, the mediator proposed productive procedures for discussing issues, managed communications to a limit return to adversarial arguments and behavior, and limited the involvement of technical and legal staff to brief presentations after which principals returned to private sessions for deliberations. After just a few joint sessions, the parties were able to reach consensus agreements on regime of the river and transboundary flows, and proceed to productively address other issues on their own without the assistance of the mediator.

The Outcome

The cost/benefit analysis process proposed by the mediator, utilization of private meetings between the states, limitation of participants to principals in the larger joint sessions, and effective procedures for and management of the deliberation and agreement-making process helped the parties break the deadlock and move forward with necessary accords to complete the framework and details of the Platte Cooperative Agreement. Agreement has been reached by the negotiators and the document has been submitted to the Governors of the three states and the Department of Interior for approval. Some of the elements of the Program include: during the first increment of the proposed Program (10 to 13 years), the states will address the impacts of all surface and groundwater projects existing as of July 1, 1997, by providing 130,000 to 150,000 acre-feet of water per year, on average, in times when flows are less than the U.S. Fish and Wildlife Service's (FWS) target flows. The long-term goal is "sufficient water" for the four target threatened or endangered species. That amount will be determined as the Program progresses through independent "peer review" of past and future studies and in response to new information developed by implementing adaptive management and monitoring its results. Each state will mitigate any future depletions that reduce flows compared with FWS's target flows. Mitigation is intended to be within the state where future depletions occur according to plans in the Program. The state must avoid increasing mitigation burdens on other states and mitigate or compensate for any adverse effects on the Program's three water re-regulation projects.