Abstract

In some cases, conflicts over water can be resolved only by engaging multiple stakeholders. In others, there may be long-term, strategic pay-offs to taking a broader, multi-party approach, even while the immediate dispute is between two parties. Why, and under what circumstances, is it worth initiating a wider dialogue, beyond the immediate parties to a particular issue? What can be the short-term costs or long-term advantages of such an approach? How do you involve reluctant parties? Who must be at the table for a collaborative process to be successful and implementable?

This paper explores when and how water attorneys and their clients may benefit from collaborative, multi-stakeholder problem-solving as a practical tool for developing buy-in for resource decisions, building a foundation for long-term working relationships, and creating meaningful, long-lasting, and less litigated outcomes. It explores questions of whom to involve, how to reach those groups or individuals, and what they may need in order to participate effectively. Finally, it discusses the value of collaborative approaches for increasing parties’ capacities for long-term problem-solving with one other – a crucial tool for managing water, a finite natural resource in which there are so many often competing interests, and in which the potential for litigation is infinite.

I. Two studies in conflict and collaboration

Water provider vs. community

A rural western county was approached by a non-profit organization for a permit to create a special water district. The special district would have assumed responsibility for a water distribution system the organization had been operating for 50 years to serve itself and a surrounding subdivision it had created. Subdivision covenants guaranteed delivery of water to all homes from the organization’s well. Wanting to update its aging water delivery system through a viable financing system, the organization (herein referred to as ‘water provider’) sought to create a special water district with powers to issue bonds, levy taxes, and provide additional services such as increased fire protection.

At the public hearing on the permit, dozens of rural subdivision residents showed up to oppose the permit application. It was the first they had heard of the proposal. They didn’t understand the need for additional services or revenue. They were afraid that if the county approved the permit, the applicant would raise rates to finance what many believed was a veiled plan for additional development. Many were terrified of unknown financial repercussions that would occur without their input, noting a loophole in the service plan that would have excluded subdivision residents.
from serving on the district board. Further, they were concerned the proposal violated the 50-year-old covenants in which the water provider guaranteed delivery of water.

The county denied the permit and advised the applicant to consult with the residents. One particularly alarmed household attempted to sever its ties with the water provider by filing a residential well application with the state, claiming no other water supplies were available. The water provider sued, concerned that allowing private wells could erode its rate base and the existing system, and countered that water supplies were available as it had been providing water to the residents for decades. The lawsuit polarized the community, in addition to destroying much of the past goodwill toward the water provider. Coupled with the water provider’s failure at the outset to openly discuss the proposal with stakeholders, and other simmering tensions among neighbors, the lawsuit contributed to conspiracy theories, mistrust, deep divisions and even personal threats in the community. Residents became afraid to drive through the subdivision, much less attend meetings on the issue in which they feared their neighbors might be carrying concealed weapons.

**Community at odds over flood recovery**

Another western county was recovering from massive floods. The state received millions of dollars in federal recovery aid but needed a way to ensure this money would go to projects that had broad support and addressed the greatest needs. Many properties had been virtually destroyed by the floods and their owners faced the common prospect of rebuilding from scratch. However, the range of flood recovery priorities differed throughout the watershed. Mountain residents wanted to stabilize streams and mountainsides. Agricultural owners wanted to protect ditch infrastructure, replace culverts and clear sediment from the ditches. Owners in the upstream areas feared their downstream neighbors with agricultural water rights were demanding releases of more water than the rivers could hold. Owners of agricultural lands had seen their structures washed away and replaced by debris from the mountains, a result in part of decades of fire-suppression and other management practices that had contributed to historic wildfires.

The situation was ripe for conflict, with federal money poised to embattle residents over limited dollars for worthy projects. Rather than make the choices themselves, state and county officials invested in the formation of stakeholder-based coalitions, made up of members representing the diverse interests in each watershed. Each watershed-based coalition was charged with producing consensus-based plans, goals, and project priorities to submit for funding.

In both examples, broad community support was required for satisfactory water management outcomes. Stakeholder groups needed to find a way to build consensus with others who held sharply divergent interests and in whom, in many cases, they had little trust. In both contexts, community members had experienced some degree of trauma and were keenly focused on their own needs and concerns. Yet as part of a community, they would be required to co-exist and to address water-related and other challenges together in the future. In both contexts, lawsuits, politics, and polarization had the potential to divert limited resources and derail desperately-needed solutions.
II. How do you know when a conflict over water presents a genuine opportunity to resolve broader water management challenges and/or to build capacity to collaboratively address underlying issues?

In the first example, the water provider could have returned to the status quo after the county’s bruising denial of its permit application and accusations from residents of everything ranging from gross mishandling to elaborate conspiracies. Yet it still had to address not only the financial and infrastructure problems of its aging system, but the fact that it was now mistrusted and even vilified by the very people it served – a painful reality, given the organization’s decades-long history and non-profit, service-oriented identity. On its own, however, the water provider’s motivations to reestablish trust and solve practical problems were dwarfed by fear and deep reluctance to engage with residents.

By that time, the county commissioners and staff were concerned about the threat of more lawsuits and even potential violence. The polarization in the community, particularly given the high rate of gun ownership, had provoked real safety concerns among residents. The level of mistrust, both among residents and with the water provider, was exacerbated by the secrecy of the pending lawsuit, which was being painted by many as David (homeowners) versus Goliath (water provider), with residents choosing sides. Meanwhile, residents were now worried about their existing water system and the financial implications of continuing with the status quo. The county, seeing itself caught in the middle of a ballooning, time-consuming dispute, and wanting to support the community, offered to bring in an outside party to help the parties reach an acceptable outcome.

Likewise, for the state and county facing the controversial issue of where to allocate desperately needed federal dollars, the flood recovery process presented an opportunity for collaborative planning based on opportunities for mutual and collective gain. But how could they, or even the affected communities themselves, fairly and strategically weigh the importance of a new culvert in the agricultural section of the creek against bank stabilization for an upstream mountain section? What about fish passages for some of the diversion structures? Creek alignment in certain sections? Critical habitat restoration?

The agencies handed the process over to coalitions of stakeholders in each affected watershed. The coalitions were tasked initially with identifying and describing needs ranging from watershed health and water quality to stormwater management and infrastructure risks. The coalitions were asked to prioritize flood recovery projects based on criteria developed by the stakeholders themselves – criteria ranging from those projects likely to have the greatest impact for the lowest cost, to the urgency of need, to those with the most significant, equitable or widespread benefits.

In both of these scenarios, the first step was to see the value of a collaborative rather than unilateral decision-making approach, in the hope of developing broadly supported outcomes with better chances of long-term success. To engage stakeholders productively in these complicated multi-party problem-solving processes involved not only identifying and involving the critical interest groups and leaders, but also developing the structure for them to engage in effective collaboration.
III. Engaging stakeholders in problem solving – bringing parties to the table and setting the process up for success

For stakeholders to engage in a mediation or problem-solving effort, they need, at a minimum, to trust the process and believe it is a worthwhile use of their time. They must see that the key parties are involved, including those with the decision-making power and others necessary for a successful and implementable outcome. The issues to be addressed must be well defined with input and buy-in from the participants. The problem-solving process must be clear, credible and sufficiently transparent. And the parties’ relevant constituencies must be brought along to support the process and ultimate outcome.

Whereas the scope of some processes may be predetermined – in this case, the watershed planning process had to result in a master plan – the scope of other efforts may be less clear at the outset. In the water system dispute, it was critical that the water provider and at least some of the residents ultimately talk openly with each other. However, from interviews with county staff, the water provider, and residents who had been vocally ‘for’ or ‘against’ pursuing a resolution with the water provider, it became clear it was premature and likely counter-productive to bring those parties together without a general consensus among residents about how to proceed, or at least strongly supported agreement that others could live with. Did residents want to form a special district with the existing provider, provided they were treated as partners in a credible and transparent process? Or did they want to go another route, possibly hooking up with a neighboring water and sanitation district or attempting to get individual well permits, though some realized the latter was legally and logistically unlikely to happen?

First, it was crucial that residents from both sides talk with one another – a major uphill battle, given the level of internal polarization. Secondly, residents had to weigh their options and decide whether it was in their collective interest to engage with the provider, in which so many had lost trust and all good will. This became the initial and major focus of the facilitation effort.

In both scenarios, to build a credible and worthwhile process, it was essential for the facilitator to understand the relevant issues and interests while providing a clear structure for problem-solving. The parties had to agree on the scope of the convener and facilitator’s roles, as well as the goals and parameters of the problem-solving process. In the watershed planning effort, it was clear from the outset the goal was to develop a master plan to submit to the state five months later. On the other hand, in the water system dispute, the goal was simply to seek consensus on a path forward with or without the water provider; the county saw its facilitation support ending as soon as that ‘path’ could be identified. In both cases, participants had to understand and agree on the scope of their task.

Who should be involved, in what capacity, and how should they be engaged?

In the water system dispute, certain residents had to be involved because they were trusted, provided expertise and/or were creative problem-solvers. Others, even though considered by some to be polarizing, had to be involved because of their potential ability to undermine the process or outcome. While it was important not to alienate the majority of stakeholders by
catering to vocal minorities with extreme positions, the process had to be seen and experienced as fair and inclusive.

Likewise, while a number of residents in the water system dispute did not need or want to be at the ‘table,’ they needed to know their interests were being represented and see the process as legitimate, even if they didn’t agree with the outcome. The question was who needed to be involved, at what level and in what capacity, to ensure a successful and implementable outcome without making the process unwieldy. For some, this simply meant being consulted, listened to, and informed along the way.

In the watershed planning effort, the state and county began with over two dozen agencies and jurisdictions they deemed critical to a problem-solving effort. Significantly, the state and county had involved these entities from the beginning to help draft the request for proposals and select a consultant and facilitator from among those proposed teams. Some of these parties were only nominally involved and had yet to truly ‘buy in’ to the process. Once the facilitation team began to interview stakeholders, it became clear that crucial groups and individuals were missing from the coalition. One such group included residents from both agricultural and mountain reaches. It was also clear that deeper involvement by some of the agencies or jurisdictions would be necessary to address some of the underlying jurisdictional, financial, and other legal and practical issues.

Essential questions for these early stakeholders included: What do you see as the key issue(s)? What concerns and needs you have with respect to those issues? Who else needs to be at the table to satisfactorily resolve the underlying problem? What do you see as potential outcomes? Who will help give the process legitimacy? Who has credibility in that group, entity or community? What do should I know about the reluctant group or individual? What might they need to know or have in place to want to participate in this effort? Much of this early engagement requires the facilitator or mediator balancing a need for transparency about the general purpose and scope of the process with the ability to adapt the process as necessary to accommodate stakeholders’ needs.

Often, a crucial question for these early stages becomes how, and in what capacity, to involve parties’ constituents – e.g., members of an irrigation ditch, broader agency staff and leadership, members of an advocacy group, residents, and the general community. Generally multi-party collaborative efforts require a commitment that participants will inform and involve their constituents along the way, in order to emerge with an outcome that will be broadly supported rather than attacked. This can take the form of an operating agreement or something less formal but equally specific. Constituents should know about the process, have questions and concerns addressed along the way, and ultimately see the outcome as legitimate. They should be able to live with the outcome even if they don’t love it.

In public planning or decision-making processes, it is particularly critical to keep the public well informed from the beginning, and to get public input at key junctures. This can involve using email listservs, email announcements, websites, media press releases, signs, flyers and/or mailers. Sometimes this involves public meetings to share information and gather input at key junctures – e.g., through small groups, public discussion, verbal or written comments, and website surveys.
All of this depends on what is necessary to assure the legitimacy, transparency and inclusivity of the process and to ensure the ultimate outcome is supported and durable.

**Setting the Process Up for Success**

In both of these scenarios, the pre-mediation ‘assessment’ process, primarily done through stakeholder interviews, was critical to mapping out a framework for addressing the topics that had to be addressed in order to resolve the underlying issues. In both cases, it required a significant effort to get the necessary people at the table, whether because of internal mistrust or because some were over-extended and lacked a clear incentive to participate. It was critical for these essential parties to understand the scope of the process, know who the other participants would be, and consider the potential repercussions of not participating. In both cases, the groups were clear they could not successfully proceed without all of the essential people in the room.

In these scenarios, as in most multi-stakeholder mediations or processes, it was essential to discuss and define ground rules and the proposed approach right away. These included defining the participants’ roles; how they would communicate outside of meetings; commitments for staying accountable to their constituencies between meetings and seeking buy-in for an ultimate decision; how decision-making would occur; procedures for resolving conflict; and the level of effort to which parties were willing to commit during the process.

Typically, all of these questions are spelled out in the initial engagement and convening of a multiparty mediation or problem-solving process and documented in an operating agreement. They set the process up to be credible, transparent and responsive to the needs and interests of the participants themselves. In this way, the engagement and convening process becomes a critical building block for the collaborative problem-solving process itself.

**IV. Why is engaging parties in a multi-party collaborative process worth the effort?**

Although the process of engaging stakeholders is only the beginning of a multi-party problem-solving effort, in many ways it is the most critical. While it can require a significant investment of upfront time, it lays the necessary groundwork for collaborative, interest-based problem-solving. It is an essential building block for developing lasting, broadly supported outcomes and setting up parties to work together productively in the future.

In the water system scenario, negotiations with the water provider are underway regarding a possible special district to serve the community. Residents have progressed from conspiracy theories, personal threats and toxicity to productive dialogue. They have worked through hard conversations with one another, acknowledging and de-personalizing issues that were once polarizing. They have agreed to no longer use the term ‘camps’ or ‘sides’ and have set up an open listserv to communicate transparently, acknowledging the need to build mutual trust in the community. The private lawsuit over the well is being resolved and has lost its hook, no longer exerting the polarizing influence it once did. The vast majority of residents have agreed to work through the collaborative process to find a resolution, rather than pursuing piecemeal, individual outcomes that previously seemed destined to involve more litigation.
Whatever the ultimate result, the community has developed an example of productive dialogue and a collaborative decision-making process. They know how and under what circumstances to bring in a third party facilitator or mediator. While it surely would have saved time, money and strife had the water provider approached the issue differently from the outset, the parties have a new capacity for working through conflict, as well as stronger, more resilient relationships for resolving issues when they arise.

The watershed coalition finished its master plan within the expedited five-month timeline, with broad support, and funding is beginning to trickle in. Meanwhile, nearly 30 local, state and federal entities have built a foundation for collaboration that is already proving useful elsewhere. One example is the local water quality monitoring group, which formerly consisted of mountain residents living near former mine sites and was seen as representing selective water quality issues. The monitoring group’s board has since expanded to include agricultural water users and others from the master plan coalition. Because of its inclusive representation of watershed interests, the group has taken over the task of implementing recovery projects as they are funded. In doing so, it is serving as one of the first truly representative bodies in the watershed’s history. Within that group, the depth of experience and understanding represented by both mountain and agricultural residents will surely lead to new levels of cross-pollination and broader understandings of the watershed as a system. It provides a structure for responding to floods, fires and other potential natural disasters in integrated and strategic ways.

Conclusion

As lawyers, we often fail to consider broader ways in which to define success, beyond a resolution to an immediate dispute. Sometimes litigation is necessary to swiftly resolve a discreet dispute, define parties’ rights and responsibilities, or answer an ambiguous legal question. Further, lawsuits can provide a necessary catalyst or critical opportunity for problem-solving, often by providing the necessary leverage or forum in which negotiations can occur. In all of these cases, attorneys can provide an invaluable service to our clients by asking broader, long-term questions: Does the conflict present opportunities for learning and/or collaboration? Is the outcome of the lawsuit likely lead to more controversy? Are there ways in which the parties can develop their internal capacity to resolve the next dispute?

They say whiskey is for drinking and water is for fighting. But particularly in the world of water, in which competition over a diminishing resource is growing, practical and creative solutions will be increasingly necessary – not only to resolve discreet issues, but to build our long-term capacity to do this over time. To do so, it will behoove water users to have a clearer understanding of the needs and interests of all stakeholders, to develop opportunities for joint learning (including data-collection, monitoring, and adaptive implementation), and to find creative approaches for meeting the countless needs for our increasingly scarce and precious resource.