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People, places, and resolving disputes: Lessons from the Colorado Plateau

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Abstract

Complex historical and contemporary forces operating in the American West are examined to explain the region's contentiousness and why traditional forms of decision making have become strained. Several efforts at dispute resolution on the Colorado Plateau offer lessons about making policy and resolving disputes in accordance with the demands and opportunities of different places and circumstances. The dispute-resolution cases explored involve the Central Utah Project and Glen Canyon Dam, the Grand Canyon Visibility Transport Commission, the Anasazi Heritage Center, the 6-6 process in Arizona, the Colorado Roundtable, and the Navajo Nation Peacemaker Court.

THE CONTEXT FOR DISPUTE RESOLUTION IN THE MODERN WEST

Throughout our nation, over roughly the past two decades, legislators, administrators, political scientists, lawyers, judges, anthropologists, and all manner of private citizens have given increasing attention to new methods for resolving the controversies, small and large, that shackle our decision-making processes. A significant part of the problem is due to the vastly increased size and complexity of our national society. When our first census was taken in 1790, the new nation held 3.9 million people. Today, my home state of Colorado accounts for nearly that many and our country's total population is seventy-five times larger than that first census figure. In the United States, especially in the West, cities have mushroomed into metropolises and, in many cases, megalopolises. Our body politic has grown in other ways. The nation has opened the ballot box, the whole democratic process, to women, African Americans, Native Americans, and other minority groups.

The population growth and the technological, economic, and social changes have brought much good, but our traditional forms of governance have been strained to the breaking point by these complex systemic changes. When our nation was formed, our national Congress was a collegial working body of twenty-six senators and sixty-four representatives representing a small geographic area along the Atlantic coast. Tight-knit societies could still make consensus decisions in, for example, New England town meetings and traditional tribal forums facilitated by tribal religious leaders or elders. Today, the scale is of a wholly different magnitude, and we are searching for new institutions and new processes.

There have been two great movements to attempt to deal with this burgeoning size and complexity. The first involved the rise of administrative agencies. This development is somewhat more recent than commonly realized. Although the Interstate Commerce Commission was established in 1887, the real beginnings of the modern federal bureaucracy trace to the New Deal in 1933. Large federal agencies were an explicit recognition that Congress could no longer do all of the lawmaking; these new offices were designed as "little legislatures," with a significant degree of authority to make laws and otherwise resolve disputes. The state administrative agencies developed more slowly than those at the federal level, but the basic series of developments was the same, as state legislatures could no longer handle the entire legislative workload.

The second experiment with dispute resolution involved the judiciary. From the beginning, we have had three branches of government, but for most of

This talk was dedicated to the living memory of Wallace Stegner, the novelist, historian, and essayist who the author thinks was the greatest intellectual influence on the American West during the twentieth century. Wallace Stegner died nine days before this address was given.

their existence the main job of federal and state courts was to resolve private, two-party lawsuits. Quite recently, in 1954, the United States Supreme Court handed down *Brown v. Board of Education* and the judiciary took on school desegregation, perhaps the largest public issue facing the nation. In rapid order, access by African Americans to other public facilities, equal treatment for women and many other dispossessed groups, environmental and natural resource issues, and numerous other front-line matters of public concern became issues that would be resolved in significant part in the courts. Today, Congress regularly leaves key phrases in statutes ambiguous, knowing that they will ultimately be resolved in administrative agencies or in the courts.

Now, of course, the new administrative agencies and courts have themselves been swallowed up by the scale of societal problems. Administrative processes have too often become inflexible, highly formal, and interminable. As for the judiciary, the public has a high degree of respect for the quality of our judges—if you have a great deal of time and even more money, so that you can finally get to one. Justice delayed, or justice too dear, is justice denied. Needless to say, legislatures, administrative agencies, and the courts will always be important forums for resolving disputes, but in the past few years the search for alternatives has intensified.

ROOTS OF CONTENTIOUSNESS

The contentiousness is especially acute in the American West, particularly with respect to the lands and waters of the region, and it is worthwhile to pause and examine why this is so.

The first cause is intangible, the rootlessness written of so vocatively by Wallace Stegner. In book after book, perhaps most notably in *Big Rock Candy Mountain* (set in important part here in Utah) and in *Angle of Repose*, Stegner showed how westerners have always been on the move. He rightly tied this to the often harsh land and aridity. Many people just could not, or were not willing to, make it through a long dry year when the streams refused to offer enough irrigation water to make the crops sprout. Ever since James Marshall's find in California in 1848, the economy of the region has been closely tied to its natural resources. As Stegner and others have shown, this led to a lurching economy, with mining and timber companies striking it rich, playing out the find or the stand, and then moving on. Given this, how could the West do much in the way of building the close-knit community fabric that is best for resolving disputes?

It was because of the stable communities, the fact that they were "stickers," as he called them, that Stegner so admired the Mormons, as set out in his book, *Mormon Country*, and in other writings. I'm sure Wally would have chuckled approvingly if he had been told of Eliza Redd, the grandmother of rancher Hardy Redd of La Sal, who settled in Bluff in the 1880s and wrote in her diary, "Who goes through life without a little hardship? We came here to learn, not to suck a silver spoon." But Eliza Redd, and the Mormon communities she and others helped settle and nurture, were the rare exceptions. Historically, westerners have been good at many things, but most of them were done on the move and it cost the towns and cities of the region dearly.

The second reason for the high level of contentiousness in the West involves one of the region's great legacies, the federal public lands. As you know, the public lands comprise 50 percent of all acreage in the eleven western states and the percentage is higher yet in the Intermountain West. Two-thirds of Utah is owned by the United States, held in trust for all of the people.

Yet these magnificent assets, like the admission of dispossessed people into the political arena, have, ironically, increased the level of disputatiousness. The root cause is simple. A private landowner has extensive discretion over his or her land. To be sure, disputes can arise, but the sway of the owner to make a final decision is very broad. On the public's landed estate, however, the situation is very different. We all have a say and we regularly say it. Who could even begin to count all of the controversies now underway in federal and state legislatures, administrative agencies, and courts, and in the media on a day-to-day basis, over the public lands in Utah alone? What a blessing the public lands are. But we get angry when our blessings are infringed upon and, since the kinds of blessings from the public lands are different things to different people, we are in an almost constant state of anger over these wondrous lands.

The third reason that we in the West face a disproportionately large number of disputes traces to distinctive historical forces at work in this region. A person looks at these kinds of concepts in different ways at different times in their lives, but at this moment I think of the history of the American West—or at least its history since the arrival of non-Indians—as having three main eras.

Historical Eras of the American West

The first era began with the California Gold Rush in the late 1840s and early 1850s. People poured into the West, not just from the East Coast, but from all around the world. Gold seemed limitless and so did the water that the miners used to blast the gold loose

from the hillsides. When farmers began to arrive, spurred on by the great Homestead Act of 1862, the rivers still seemed limitless and so did the potential farmland. After the Civil War, the great cattle drives brought domestic stock by the millions to the public grazing land, which, too, seemed without end. After the logging companies mined out the pine stands in the Great Lakes and moved to the Rockies and the Pacific Northwest in the 1890s, the western forests also seemed abundant.

A distinctive body of policy and law—I have come to call them the "lords of yesterday"—grew up in the West under these nineteenth-century circumstances and perceptions. The lords of yesterday were based on an extraordinary combination of two ideas: that public resources should be made available for private gain free or at far below market value; and that the government, in addition to these initial subsidies, should further fuel the development by affirmatively building water projects and other public works to support the opening of the West. It was, in all likelihood, the greatest program of subsidies ever undertaken by any nation, and it surely paved the way for its intended purpose, to open the West for settlement by non-Indians. These lords of yesterday include the Hard Rock Mining Law of 1872; the dedication of the public range land to below-cost, unregulated grazing; the dedication of the public's forests to logging, often through below-cost sales, as the predominant use of the public's forests; the dedication of the rivers of the Pacific Northwest to irrigation and hydropower development at the expense of the salmon and steelhead runs; the many different policies underlying the prior appropriation doctrine of water and the reclamation program; and, as the overarching philosophical idea, the notion that growth should be promoted at every turn. What a time; the world had never seen the likes of it.

The second era in the history of the West began after World War II, when the lords of yesterday rose to their glory. It has been during this short period of time, which began just two generations ago, that so much of the development in the region has taken place. The beginning point is best set at the completion of Hoover Dam on the lower Colorado River, just southeast of Las Vegas. This launching pad for the modern industrial West was impressive by more than western standards. At 726 feet—as tall as a seventy-story office building—Hoover was the world's highest dam. The project used enough concrete to build a five-foot wide, four-inch thick path from the North Pole to the South Pole. The reservoir behind the dam stores 28 million acre feet of water, twice the annual flow of the Colorado River.

Then came the big build-up of the Colorado Plateau, meeting water and energy demands over a thousand-mile grid from the Pacific to the Pecos, a build-up highlighted by the completion of Glen Canyon Dam in the 1960s. It was during this period of just two generations—a blink of time—that we overran the whole West, building up the metropolises, clogging the airshed in each of them; damming the Columbia River and reducing the magnificent fish runs to just 10 percent of their historic level; slashing away at the old growth forests of the green Northwest; and overrunning public land systems from Mesa Verde to Yellowstone and from the Olympic to the Black Hills.

To be sure, the great build-up accomplished some worthy objectives. Farmland has been watered and some farm communities have been strengthened. The cities have water. Electricity is spread out to millions of homes, businesses, and hospitals. But now we find increasing numbers of people asking questions: Was such an absolute conquest necessary? Did the cities conserve first and then ask for water and energy? Did we care enough for the water, the land, and the air? And did we care enough for the people, especially the Native American peoples of the interior West, on whose backs the build-up was accomplished?

The third era began just recently as those questions, and others like them, began to be asked in many different quarters and as we began the serious business of finding ways to answer them.

I believe that years from now, people will look back to the late 1980s and early 1990s as a time when our society began, in a concerted way, to make its stand about this earth and its creatures. By about the mid-1980s, new data reached the public consciousness—data about global warming, ozone layer depletion, and rain forest destruction. In the American West, endangered species catapulted into public view in an unprecedented way. I think of the sharpest defining moment as being the Forest Service's 1986 draft EIS on the spotted owl. It generated the most comments of any Forest Service EIS ever released. Then, in 1989, the salmon runs plummeted with the low water in the Columbia River. This occurred in the lush Pacific Northwest, our most environmentally sensitive region. Then the Rio Conference further galvanized opinion and concern.

The urgency of these and other data led to, or was accompanied by, an unprecedented explosion of ideas. Sustainability, ecosystem management, adaptive management, the new resource economics, biodiversity, environmental ethics—none of these terms were part of the public discourse until just a few years ago. Of course, each of these ideas is still vague—and I will address that issue later—but already we're starting to put them into practice on the ground.

The importance of these events is heightened by the new administration, but not in the narrow sense that a new political party has moved into power in

Washington or that serious proposals to revamp many of the traditional laws and policies dominate the stage on Capitol Hill. Rather, the most profound change is coming up from the ground, from western communities, from young people in the local, state, tribal, and federal agencies. In staff offices all across the West, in the parks, the forests, the refuges, even on the public-domain lands, there are growing numbers of young people imbued with bold ideas that are just a few years old. The people who were at the top, burdened by ideas that had once fit an earlier and different time, had kept the lid on these ideas. Ultimately, people like Bruce Babbitt, Al Gore, and George Miller, visionary though they may be, will be facilitators who will allow and encourage new ideas and energy to germinate and rise up from the ground.

So I think it is an objective reading of powerful historical and contemporary forces, not a lack of historical perspective, that causes us to recognize the importance of this time. The "lords of yesterday" were created in the nineteenth century and spun out of control after World War II, and now it is our job to reconcile those old ideas with a dramatically different modern consensus about how to treat our lands and waters. A sea change such as this means that we will have disputes of many kinds at all levels, and it underscores the imperative necessity of resolving as many of them as we can in an open, fair, and expeditious manner. Obviously, that will not be easy, but it is the central charge of our time.

RESOLVING DISPUTES: LESSONS FROM THE COLORADO PLATEAU

Rather than talking about dispute resolution in the abstract, let me offer several examples of dispute resolution on the Colorado Plateau. Those efforts, some generally successful, some still in progress, may provide us some lessons about what works and what does not.

The Central Utah Project and Glen Canyon Dam

In October of 1992, Congress passed the scintillatingly entitled Reclamation Projects Authorization and Adjustment Act of 1992, commonly referred to as the "1992 Omnibus Water Bill." Two of the titles in the act dealt directly with the Colorado Plateau. The first addresses the Central Utah Project (CUP), scaling it back, adopting provisions to protect fish and wildlife, and attempting to fulfill treaty promises made to the Northern Ute Tribe of Utah. The second, the Grand Canyon Protection Act, provided for modifications of the flow regime at Glen Canyon Dam, traditionally operated to meet the needs of hydroelectric development; the objectives of this legislation were to protect the natural environment, including the stream banks, to protect cultural resources, and to enhance recreational use.

We can make these observations about the 1992 Omnibus Water Bill in general, and specifically about the two provisions just mentioned, with respect to dispute resolution. First, the 1992 act looks like a federal law, but in many ways it is not. Both the CUP and Glen Canyon provisions are best understood as local (that is, state, tribal, municipal, and citizen) initiatives that were manifested in locally negotiated agreements and subsequently ratified by Congress. Indeed, this description fits most of the 1992 Water Act—it is not really a single act but rather fifty separate titles, most of which were negotiated at the local level.

My guess is that we are going to see a great deal more of this. To be sure, there are some issues with national or western reach that Congress will have to treat through legislation—for example, strengthening of the Endangered Species Act, reduction of the timber harvest in the national forest system, and substantial modification of the 1872 Hard Rock Mining Act. In most cases, however, accords will be reached at the local level. Congress may become involved, but federal legislation affecting the West will tend to be the implemention of legislation in which a particular controversy, resolved at the local level, needs congressional action either because it involves public lands, Native American issues, interstate conflicts, or a federal project, or because federal funding is necessary. Thus these two major pieces of water legislation reflect the wisdom that the best solutions can be made locally, with all of the interested parties, including the public and Native American tribes, at the table.

Second, both titles, like most of the other provisions in the 1992 Omnibus Water Bill, placed a high priority on the natural values of our rivers. Reclamation projects for irrigation and hydropower projects for energy production accomplished a great deal of good, but they went too far. Nearly all resolutions of disputes over water in the future can be expected to reduce the dominance of reclamation and hydropower on our rivers and to give more sway to the diverse benefits that a natural watercourse can give.

Third, the CUP and Glen Canyon settlements relied heavily on conservation—of water with respect to CUP, and of energy with respect to Glen Canyon. We can expect this to continue in resource settlements all across the West. Often, conservation can reduce a significant part of the demand now met by existing projects and can obviate the need for new projects. We are beginning to see the benefits of water conservation both on the irrigation fields and in the cities. In the area of energy, we have only scratched the

surface of the potential in conservation: Leading authorities, including the Electric Power Research Institute, show that we can meet one-third to one-half of all new power demands by energy conservation at a savings of billions of dollars per year. What we have gradually begun to learn is that many of the big irrigation and hydro dams were unnecessary in light of contemporary knowledge of conservation, and the same is true with many of the coal mines and coal-fired power plants. Conservation will be a powerful and positive factor in dispute resolution in the future.

Finally, the CUP settlement dealt with Native American rights, as was the case with many other titles in the 1992 Omnibus Act. In this instance, the legislation involved the Northern Utes, who once held one of the largest and richest of all Native American reservations: a treaty-guaranteed estate that covered most of the Western Slope of Colorado, running from the New Mexico border to nearly the Wyoming line. Twelve million acres of treaty land—one-fifth of the whole state of Colorado—were torn away from the Utes in the 1870s to satisfy a gold rush. Then in 1965, the tribe entered into an inequitable agreement, the "Ute Deferral Agreement," that sharply circumscribed any use of Ute water rights, the oldest and largest in the Duchesne River Basin. The 1992 legislation brought some long-delayed justice to the Utes. The need to resolve litigation with tribes and to honor long-ago promises will drive many more agreements over western water and other resources.

The Grand Canyon Visibility Transport Commission

In the 1990 Clean Air Act Amendments, Congress provided for a Grand Canyon Visibility Transport Commission. The Commission is now at work and is composed of representatives from eight states—the Four Corner states along with Wyoming, Nevada, Oregon, and California. The job of the Commission, after an open fact-finding and hearing process, is to make recommendations to the EPA administrator concerning the remedying of adverse impacts on visibility in the Grand Canyon caused by current or projected air pollutants. The idea is that EPA will ratify the Commission's work and that the result will be a "negotiated rulemaking" rather than unilateral federal action.

Jim Souby, Director of the Western Governors Association, which staffs the Commission, reports that he is "stunned at the cooperative nature" of the participants on the Commission. He cites the fact that the Environmental Defense Fund and Phelps Dodge have joined together to push for more funding for research. One critical area of future research involves a "clean air corridor" that seems to be created by a flow of clean air pushing down from Oregon to the Grand Canyon. Future energy development in Oregon could diminish the effectiveness of that clean air corridor.

The work of the Grand Canyon Visibility Transport Commission is still in the beginning stages, and it is too early to draw conclusions as to its effectiveness. We can, however, make these observations about this important institution. First, the idea of creating such a Commission is inventiveness at its best and dispute resolution will constantly require creativity—new approaches created by the affected parties. In this case, a body created and funded by Congress, but constituted by the western states, is charged, in the first instance at least, with protecting a resource treasured locally, nationally, and internationally. In some respects, the Commission is similar to the rule of the Northwest Power Planning Council, also federally created but state-constituted, in the Columbia River watershed. But the Commission is not identical to the Northwest Power Planning Council, a reminder that all dispute resolution efforts should be informed of existing models but not slavish to them.

Second, the Commission underscores the importance of attempting to develop data upon which all of the sides can agree, as opposed to the classic litigation model of advocates from each side presenting data skewed toward their own interests. If, for example, the participants can agree on most of the evidence concerning the clean air corridor from Oregon, then they are many steps down the road toward resolution.

Last, the Commission will become deeply involved in conservation issues. If it accepts and implements the idea that future pollution-causing development can be avoided through conservation and the use of renewable resources such as solar and wind energy, then it will have moved energy policy forward by creating a working example of sustainability—sustainability of the sacred vistas of the Canyon Country.

The Anasazi Heritage Center

Another example of dispute resolution from the Colorado Plateau involves the creation of the Anasazi Heritage Center. The Dolores River runs through the Montezuma Valley, north of Cortez in southwestern Colorado. The McPhee Dam Reservoir on the Dolores was one of the last major reclamation projects. Authorized by Congress in 1968, construction of McPhee Dam began in 1977 and was completed in 1984.

The Montezuma Valley was home to the Anasazi. They left much behind and, given the substantiality of their communities, it is logical that they would: At the height of their occupation, between 1000 and 1300 A.D., the Anasazi population of the area was at least twice that of the current population. A large village

site was found by a Spanish expedition in 1776 and was named after one of the Franciscan priests who headed up the expedition, Father Escalante. A smaller village, named after Father Dominguez, was discovered during this century.

One can well wonder whether yet another reclamation project, heavily subsidized but still expensive for the farmers receiving project water, was necessary on the Dolores River in the 1970s. But that was at the end of the reclamation era, not after it; no one asked the hard questions, and the valley was inundated. In 1975 and 1976, the Escalante ruin was excavated and moved to a nearby hill with a 360-degree view of this piñon-juniper and valley country. The Dominguez ruin and many other relics were also removed.

There was local support for the McPhee Dam and Reservoir, but there was also support for the Anasazi. A settlement emerged that provided not only for the salvage and relocation of the Escalante village, but also for the creation of the Anasazi Heritage Center, administered by the Bureau of Land Management. The Center is a wonderful institution, a valuable resource for the understanding of the Anasazi culture. The Bureau of Land Management has even put together a video, "Mystery of the Cliffs," in which the Teenage Mutant Ninja Turtles, no less, were recruited to star in an episode in which they protect Anasazi pots, rock art, and a village from vandals. Don't underestimate this video's drawing power.

One of the most pressing areas of dispute on the Colorado Plateau is over archaeological sites. I've never felt so close to the profound as when I've discovered Kokopelli figures up a remote, rocky draw; or looked across a small side canyon of Comb Ridge to find "Eagle House," as we called it, perched on a seemingly inaccessible ledge on the canyon's far wall; or when I heard my ten year old, Dave, exclaim, "Dad, a corn cob from a thousand years ago!"

I don't believe in salvage archaeology. I think you lose the profundity when you uproot a site and move it. Still, the creation of the Anasazi Heritage Center strikes me as the right resolution of that dispute for its time and place. Perhaps the Anasazi Heritage Center will be a force in helping us develop a national policy in which we, like Finland, Sweden, Germany, and other nations, consider archaeological sites inviolate. Perhaps, just perhaps, the Anasazi Heritage Center, bred of salvage archaeology, will help us move to a point where we no longer resort to salvage archaeology.

Still, the episode of McPhee Dam and Reservoir underscores how critical it is to have all parties at the table. During the first and second eras in the history of the West, the only parties at the table were the developers and the boosters. McPhee Dam reminds us that the Anasazi should have been represented, too. We need, and perhaps some idealistic young people will help establish, an Anasazi Defense Fund to represent all of the Old People and all that they left behind. The Anasazi need a firm of lawyers, archaeologists, anthropologists, economists, and lobbyists to fight the many battles ahead in the legislatures, courts, and administrative agencies. There is also a larger need to shape public opinion so that a consensus in favor of the Old People will develop. Dispute resolution cannot work unless everyone is represented, and we will not have done right by the Anasazi until they are at the table, too.

6-6 PROCESS IN ARIZONA AND THE COLORADO ROUNDTABLE

A fourth area of dispute resolution involves the seemingly intractable disputes surrounding our use of the western rangeland. This is an area of public resource policy where, by my experience, there is solid opportunity for lasting progress. Both ranchers and environmentalists have made real contributions to the western rangeland but both have serious defects in their positions. Both sides have failed to fully address the true public interest: achieving a fully sustainable western rangeland that will support a wide range of economic, environmental, and community values. We need and deserve a healthy range system that can sustain vibrant riparian zones; healthy uplands; productive watersheds; wildlife; the ranch cattle industry and the things it has produced—a uniquely western kind of society, steady, family-oriented, steeped in the honest values of hard work, and shouting out open space; and the quiet, understated pastel beauty, serenity, and spirituality of our western rangeland, which the ranchers hold in at least as high a regard as the rest of us.

Right now, these things are not being sustained, and ultimately both ranchers and environmentalists must share some responsibility for this. All across the West, our rangelands have been pounded by excessive use by ranchers—not all ranchers, by any means, but too many—who simply turn their stock out in the spring and round them up in the fall. The cattle tend to congregate in the riparian zones, destroying them, and they overgraze the uplands. One of many results of this is the unproductive, steep cutbank streams, the clear majority of which are produced not by natural causes, but by overgrazing. The costs in watershed degradation, soil erosion, and lost wildlife habitat are beyond our capacity to measure.

Environmentalists have performed a major public service by calling attention to the situation, but the environmental movement has not been able to participate in making deep change. The truth is that

too many positions from the environmental camp—"cattle free by '93," for example—have the odor, if you will, of newly arrived easterners who object to seeing their new Hi-Tec hiking boots stained with manure. They have spent too little time giving honest respect to the ranching industry and the wide range of community benefits it produces.

The environmentalists have spent too much time on the wrong issues. They have focused too rigorously on below-cost AUMs (which plainly exist) and on the number of AUMs. The subsidies are not the issue—the total subsidy is relatively small in federal-budget terms and provides important economic benefits to western communities. Even the number of AUMs is, in most situations, not the issue. The Savory method—which has popularized the ideas of Gus Hormay, Fee Busby, Wayne Elmore of the Bureau of Land Management, and many other traditional range experts—shows that, for most spreads, better fencing and herding techniques can keep the cattle moving, can greatly improve the condition of both riparian and upland areas, and can allow ranchers to graze substantial numbers of stock while increasing the watershed, wildlife, recreation, and aesthetic values of the range as well. Alan Savory and his predecessors, however, have not been able to offer up a solution to the manure issue.

Two efforts on the Colorado Plateau—both promising, both new—approach this controversial issue in a cooperative way at the local level. In Arizona, ranchers along the Mogollon Rim developed an informal association called "6-6,"named after the six ranchers and six environmentalists who first met together in 1989. The group has worked hard, getting out on the ground and reaching the first critical stage: ranchers agreeing that they have pounded the land too much and environmentalists acknowledging that the ranch cattle industry has much to offer. The group has expanded steadily and has become an ongoing symposium, with an expanding audience, on range management. The 6-6 association now is moving to the level of actually setting management plans for specific ranches that can be used as a testament to the idea that "range management practices must be changed but, when they are, the range can thrive." In Colorado, the Colorado Resource Roundtable has proceeded in much the same way. There is agreement that grazing fees are not the issue and that a simple fee increase would probably do more harm than good to the broad social and ecological goals being pursued by the Roundtable.

Dispute resolution comes in many forms, and not always with a wallop in the form of a federal statute. Depending on the circumstances, there may be a need to move slowly and create trust among fair-minded people who can spread the word to others, who can then spread the word further. Inventiveness. Specific responses to specific needs at specific times and places.

The Navajo Nation Peacemaker Court

A last example of creative dispute resolution on the Colorado Plateau involves the Navajo Nation Peacemaker Court. In 1892, as part of the United States' decade-long intensive effort to assimilate the Indian-ness out of Native American people, the Bureau of Indian Affairs imposed so-called Courts of Indian Offenses on most tribes. The basic law was promulgated by the Bureau of Indian Affairs and codified in the Code of Federal Regulations. These Courts of Indian Offenses, one of which was established at Navajo, adopted Anglo procedures and philosophy wholesale. Navajo judges in those courts did their best to incorporate Navajo traditions, but this was difficult within the federally mandated framework.

In 1952, the Navajo Nation exercised its sovereignty and formed its own judiciary, the foundation of which was Navajo common law. The Navajo courts have had a considerably distinguished history: among other things, the judiciary has grown to seven district courts and a three-member supreme court; provided for non-lawyer Navajo court advocates to represent parties who cannot afford lawyers; established a bar exam for lawyers who wish to join the Navajo Bar; written hundreds of opinions, some in Navajo, as precedent; and stood firm for the principle of separation of powers in the face of various assaults on judicial independence by former tribal chairman Peter MacDonald.

In 1982, the Judicial Branch began an innovative process called the Peacemaker Court, and peacemaking has steadily grown in use and stature. Traditionally, Navajos called in a *naat'aanii*, or peacemaker, to mediate disputes. Today, the Judicial Branch has recognized eighty-seven peacemakers—medicine men, elders, and other respected people chosen by chapters, the local units of government at Navajo. Peacemakers have the respect of the parties and the skill to get people to talk out their problems with one another. Parties in court can, if they wish, leave the adversarial system behind and decide to resolve their disputes, civil or criminal, in the Peacemaker Court. "Dispute resolution" is an accurate enough term to describe peacemaking, but Navajo judges eschew that term, perhaps because it is so *au courant* in Anglo jurisprudence, and the judges want to underscore the fact that peacemaking existed long before the language that created the term "dispute resolution" was heard on this continent.

The Navajo Nation justice system has been written about quite widely, and former Chief Justice Thomas Tso, current Chief Justice Robert Yazzie, and Justice Raymond Austin have been active in explain-

ing their system to the outside world in their writings and public presentations. Recently, I heard Chief Justice Yazzie offer a compelling explanation of the reasons behind peacemaking. His reasoning is commendable for setting out the philosophical basis for dispute resolution in our society as well as in the Navajos'.

Chief Justice Yazzie describes the Anglo-American courts as representing what he calls a "vertical" system of justice. "Judges," he says, "sit at the top over lawyers, jury members, parties, and all the other participants in court proceedings. Judges possess a tremendous amount of power [and] the parties involved in the dispute do not have as much power." Parties may not communicate freely with the judge, are subject to their lawyer's decisions, and tailor their testimony, not to the truth but to the litigation strategy. And, as he puts it, "the party with the most money can 'buy' justice because he can afford the best lawyers and legal procedures." There is almost always a winner and a loser.

Traditional Navajo justice, as Chief Justice Yazzie describes it, is "horizontal." He explains that "in the Navajo peacemaking system, all human beings are treated as equals. There are no rules to dictate how proceedings should be controlled. In the peacemaker process you can speak with the mediator. [The peacemaker] aims at one goal and one goal only—restoring true justice among individuals, families, and the larger community and society. This is done by allowing the wrongdoer and victims to 'talk things out.' No one is treated as the 'good guy' or the 'bad guy.' The ultimate goal of the peacemaker process is to restore the minds, physical being, spirits, and emotional well-being of all people involved." Peacemaking creates individualized solutions, which sometimes include restitution to the victim's family; community service; or a reuniting, in a family or divorce case, often accomplished through the healing of a traditional ceremony. There is, as Justice Yazzie puts it, none of the "eye for an eye, tooth for a tooth" notion of retribution implicit in the Code of Hammurabi and in our vertical judicial system.

CONCLUSION

These examples, including the philosophy of Chief Justice Yazzie, tell us a good deal about making policy and resolving disputes in the West. Everyone needs to be included. The process needs to be horizontal, not vertical, so that, among other things, results can be crafted with the free-flowing creativity and inventiveness, tied to individual places and circumstances, which is the hallmark of the best agreements we have reached to date. Sufficient data, agreed upon by all the participants to the extent possible, need to be available. We must always look for opportunities to create new resources by conserving from existing resource use. Decisions should be made and implemented at the most local level possible.

Resolving disputes over natural resources in the West needs to proceed in accordance with contemporary demands and opportunities. We realize now that the traditional listing of multiple uses is far too narrow-gauged. Yes, minerals, range, timber, water, recreation, fish, wildlife, and wilderness are resources. But there are other resources that must be added to that list. On the Colorado Plateau, visibility, remoteness, and cultural resources are all critical resources of local, natural, and worldwide significance. So, too, are beauty, mystery, and spirituality. The list of valuable resources also includes the cultures of the small Mormon towns of southern Utah, embedded in that rough landscape for a century or more, and the world views and working societies of the tribes, there for many millennia longer than that. We must, hard though it may often be, identify all costs to all resources, people, and communities, and consider all of those costs when we make decisions.

We need to remember, too, that each resolution must rise organically from a place and its history. Any lasting resolution must be inlaid in its place. Stegner (1992) wrote in *Where the Bluebird Sings to the Lemonade Springs:*

> History was part of the baggage we threw overboard when we launched ourselves into the New World. We threw it away because it recalled old tyrannies, old limitations, galling obligations, blood memories. Plunging into the future through a landscape that had no history, we did both the country and ourselves some harm along with some good. Neither the country nor the society we built of it can be healthy until we stop raiding and running and learn to be quiet part of the time, and to acquire the sense not of owning but belonging.... Only in the act of submission is the sense of place realized and a sustainable relationship between people and earth established. (p.206)

In this sense, most modern dispute resolution over natural resources in the West will merge with sustainability, ecosystem management, community planning, integrated resource management, and adaptive management. We must, through open, flexible, consensus processes, identify the natural, social, and economic values we are determined to sustain; define the geographic area over which sustainability will be applied; adopt some plan to

achieve sustainability; and then change that plan in a flexible way as new data and circumstances arise. We must recognize that sustainability will come, not in one grand overarching plan, but piece by piece, place by place, on a scale that offers up opportunities for participation by the local and the young populations.

In no remote sense do I mean to paint this as easy. On the Colorado Plateau, given that hard, creative work has brought some results, we still are not willing to manage the largest river in the Southwest so that it remains a river when it reaches Mexico. One hundred and eleven years later, the ache of the Navajo-Hopi dispute goes unresolved. The swords stay drawn on the Utah wilderness issue.

Although it will not be easy, I still say that in these next years people should remain tight with their current companion, idealism. The following passage is familiar to many people, like Shakespeare, Beethoven, or Picasso, but it is permissible to pull it off the shelf once again like a dog-eared *Lear,* to settle back in a seat at Symphony Hall for another Ninth, or to wander again the old halls of the Prado. For whether it is dispute resolution, sustainability, or the right future of the American West—I happen to think that the three are the same—do any of us have a higher calling than to call up the best we have so that Wallace Stegner's words (1969), his highest dream, come finally to pass?

> Angry as one may be at what heedless men have done and still do to a noble habitat, it is hard to be pessimistic about the West. This is the native home of hope. When it fully learns that cooperation, not rugged individualism, is the pattern that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery. (p.38)

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