

**Dispute Resolution Meets Policy Analysis,
Or Native Gathering Rights on "Private" Lands?
A Profile of Peter Adler**

John Forester, ed.*

Department of City and Regional Planning

Cornell University

2004

This one case involves Hawaiian traditional [or] customary gathering rights—Native Hawaiian rights to gather on private lands to pursue their cultural rights. This case is unusual in its outcome because it's actually a case where the legislature asked a group to make a recommendation, and they came back and [the group responded], “Don't do anything,” and the legislature agreed and didn't.

It's interesting because one of [the] criticisms of “alternative dispute resolution” or ADR is that when something is proposed, it's only a question of how, [not whether, to do it], and here's one where the proposal's on the table, and this group worked very hard, did some very good intellectual work as a group, and basically said, “Don't do anything right now. Don't do what your impulses are—which is to pass laws. Take another tack.”

But first—how did I become a mediator? Actually, a bit like everybody else—it was a tortured trail. Originally, when I was an undergraduate, I thought I was going to be a biologist. I grew up in Chicago and was quite interested in limnology and freshwater streams and the biota of the Great Lakes and that kind of thing.

But I got completely detoured into History and English and a lot of other things as an undergraduate. After graduating and spending two years in the Peace Corps in India, I came back and studied sociology.

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Editor's note: I interviewed Peter Adler at the University of Hawai'i on April 9, 2002. Thanks for help with transcription and editing to Cornell students Andy Love, Steve Mikulencak, Tanneasha Gordon, and Rachel Weiner.

I did my masters at the University of Missouri, and then a PhD through Antioch's "university without walls" system. Again, I focused on sociology, that's really my discipline, but I have retained a lot of interest in science and life sciences, those kinds of things. I thought I was going to be an academic, and candidly, by the time I finished my PhD, I thought, "I don't want to do this."

I really wanted to be more in the world of action. Although I valued the connection I had with the University, and I was able to straddle both worlds, I saw myself as a practitioner more than a researcher. I tend to think of myself as a practitioner first and as a researcher second.

But first and foremost, where I get the energy from is the work itself and doing it. That came about when I finished my PhD. I didn't want to be a teacher. I didn't want to be a professor. I wanted to be an adjunct professor.

So, I spent a couple years working primarily on the Big Island with a rather unusual Outward Bound program that took executives' kids and people of all different walks of life through pretty rigorous wilderness expeditions. The Outward Bound program was a kind of leadership training. It had a lot of different facets to it. One of them was a very strong cultural component.

One of the things that I was learning from teachers and my training [was] Ho'oponopono, the old Hawaiian dispute resolution methods. That's a conflict resolution system that has some similarities to mediation. It's grounded in the Hawaiian family system, which is an extended family system. It was a practice that was used in these extended families to try to correct problems.

Ho'oponopono [is two words]. "Pono" means righteousness, and "Ho'o" is a verb that says 'to make.' So it's about making things right, making things righteous again that are out of balance, out of harmony. It's a process that has similarities to mediation, in that there's someone who presides over a process. They have to be a trusted person to preside over it. They're not necessarily neutral, but they do play a leadership role in taking a group through a process of restoring trust or untangling a problem.

It's normally done by one of the senior family members. This person is called a "Haku" [who is one who braids] things back together again. So to make a long story short, I was taught a version of that.

After I left the Outward Bound School, I was quite interested in that and I stumbled into a job as a director of one of the first community mediation centers here, the Neighborhood Justice Center on Oahu. I helped develop that for five years.

I then went to work for the judiciary and the courts to help develop ADR programs there. Then, [for almost the next] nine years, I was working for the Hawaii Justice Foundation, which allowed me to do some private practice work, so it was part-time. So, I continued to do my own ADR, primarily in environment, public policy, some organization issues, and some business cases.

I did both mediation and facilitation. And I've worked at both ends of the spectrum—both the prevention planning end of this work as well as the untangling, breaking of impasses end of things. I think of this as a line—from things that you do at the front end before conflicts have become intractable or highly pitched or highly escalated, to the [breaking of impasses].

For example, I spent most of this morning with a group of federal and state agencies and some NGO's that are jointly designing something called the Pacific Basin Information Node. It's really a strategic planning effort in which all agencies are going to put data on a commonly accessible site and put analytical tools on there and be able to create new ways of Geographic Information Systems mapping, mechanisms for looking at species—all kinds of different issues. Here with the agencies this morning, we were sitting around and part of my job was to lead them through to a conclusion, to a plan that resolved issues of strategy, how they're going to do it, funding, governance, staffing, the whole thing. So, that's at the planning end, a collaborative planning and preventative end, before things heat up.

At the other end of the spectrum is a case, that I'm in the throws of finishing, that involves a series of interlocking lawsuits between a developer and a group of environmental advocates over water withdrawals and golf course impacts from a proposed development on the Big Island. They're in litigation, they asked me to be a mediator, and I've been working with them over a number of months. We have a settlement. Now we're just finalizing it. That's what I mean by the two ends of the spectrum. It's two ends of a conflict spectrum.

I love my work because I like participating in important dramas. I learn a lot. I like helping people get unstuck if I can possibly do that. I like people finding both intellectual and emotional solutions to things. I love problem solving. I love watching people take something that's either

broken, or has the potential to be broken and do something productive. That's the short version, that's the short answer.

Now, this “gathering” case grew out of a very important Supreme Court decision that basically granted Native Hawaiians the right to go onto private property to exercise their customary gathering rights. “Patch” was the name of the lawsuit that the Supreme Court had heard.

So, Native Hawaiians, for example, will go into the forest and gather certain kinds of medicine and certain kinds of flowers for certain kinds of ceremonies. Or they will go take certain kinds of fish out of certain portions of a stream. These are part of the exercise of their traditional culture. These are things that they traditionally did.

The developer proposed to actually fill certain kinds of small ponds—they're sort of a brackish water pond, and in these ponds grow small shrimps that Native Hawaiians would very often harvest.

The developer was basically going to develop a property there, and the Native Hawaiians said, “We'd want to be able to come to that property and gather those”—but the developer, essentially, didn't give them access.

They went to court and the case rattled around the court system for a number of years, and finally the Supreme Court said, “You have to do that. You have to give the Native Hawaiians access to exercise their customary rights. It's in the Constitution—[these] protections for Native Hawaiians, protection for their culture. You cannot just [deny them access.] Developers, you cannot just extinguish these rights that the Native Hawaiian people, in general, hold. And planners, you have to give consideration to that when you do you permit hearings and your permitting processes. You can't just say, 'We don't have to account for that.' You do have to account for that.”

So, that had huge reverberations in the community. It was an important issue symbolically for Native Hawaiians—and for the business community: All of a sudden they were left in a position where they said, “We don't know how to write mortgage titles anymore. We don't know how to finance properties. Because what happens if a Native Hawaiian comes on my property, exercising those rights, and gets injured? Am I on the hook for it?”

So, if I'm a lending institution and you're a big developer, and you want financing, I may say, "I'm going to exclude some things from our financing, or I'm going to hold you liable for certain kinds of things."

So, all of a sudden, the business people were thrown into quandary—they didn't quite know what to make of this. There was a lot of legislative pressure, and a number of proposed bills by the legislature to change the law.

This was a very volatile issue, and it also fit into the context of a resurgent Native Hawaiian culture, with Hawaiians pursuing lots of new political arrangements. For example, there's a bill pending right now in Congress to create—essentially to confer on Native Hawaiians—some version of a sovereign state, a state within a state, such as many Indian tribes have.

So, in the aftermath of the Supreme Court decision there were several bills, one of which was particularly irritating to the Native Hawaiian community, which would have required Native Hawaiians to register their rights. They would all have to go down to some agency and say, "I'm Native Hawaiian, and I have rights too..."—but the Hawaiians said, "What are we going to register? You mean every time I want to go up to the forest to pick a flower or gather tea leaves to do a tradition Hula ...I'm going to have to register?" The Hawaiians found this very, very onerous.

So, the legislature said, "Well, lets thinks about it," when they got a lot of protest. What they did was that they required the State Office of Planning to convene a process that would take a look at this Supreme Court decision, the Patch decision, and how it should be implemented.

The legislature had tried to remedy what they thought was a problem, [and they] got a lot of backlash, and [then] they said, "We don't know what quite to do. Let's do some kind of process."

They turned to the State Planning Office, and they said, "You do that processing and come back to the next legislative session and tell us what to do."

[That was] in 1999, not that long ago, and I was retained by the State office of Planning to help them figure out a process and help to facilitate that, potentially.

What I did was spend a bit of time talking with some very smart planners at the State Office, and in a series of widening conversations, I talked to different Native Hawaiians and business people. I asked the question, "If we were to have some intelligent conversation about this, to try to work on this issue, who should be at the table? Who could we bring to the table? What would

those conversations need to look like to be comfortable for you? What are some of the specific issues?”

So, this was an analogue to conflict analysis even though we didn't do a formal written analysis. But there were a series of interviews, all of which were designed [so I could] come back to the Office of State Planning and say, “Here's a process recommendation.” So, that was actually the sequence that took place.

Having been hired by the State Office, I was received fairly well, when I went around talking to people. I think there were [some] suspicions that the State Office was part of a cabal of people trying to do bad things. But one of the things about Hawaii is that people pretty well know that there's a lot of knowledge about each other. This is a very small intimate community. This is like Ithaca, New York. This is a small community, and people's reputations are quite important, and people's relationships are quite important.

So, I'm not an unknown commodity. I'd call up people and say, “What do you think about this, and what do you think about that?”

They might say, “I don't like the way your last case came out, and I don't want to have anything to do with you,” but that wasn't in fact what happened. People were kind of curious and interested.

I went around at first to try to identify who should be in the process. I did a preliminary analysis with the State Office people, who are very experienced and knowledgeable about State Planning issues of all sorts.

The initial exercise was to develop a list of stakeholder voices. It wasn't so much trying to figure out every group, every Native Hawaiian group or every business group, but to say, “What are the critical voices that would need to be at the table if we're to try to work through this issue in a fairly disciplined way?”

Some of the ones that came up had to do with the lending companies and escrow companies and the landowners' association—people who actually own large tracts of land, the developers.

There were a number of different Native Hawaiian interests. There were formal organizations of Hawaiians—for example, there's an Office of Hawaiian Affairs, which is a State agency. Then, there were a number of cultural practitioners of one sort or another, who are not necessarily as organized into formal associations.

The Hula Halau teach the schools of Hula and think of themselves as “cultural practitioners.” That’s not a word that I particularly like, but it’s their word. There are other Hawaiian groups who do other kinds of arts. There may be fishermen, for example, who have fishing groups and practice making nets and throwing nets and doing that. So, there are different cultural practice groups. A lot of this is in the context of the last twenty-five years of a reviving of Hawaiian culture.

So it was on the basis of that first brainstormed list that I went out and started talking to people. That set the stage, then, to come back and propose some kind of process. I’d talked with everyone about what a process would need to look like to be safe and comfortable.

What I suggested was that we not call it anything to do with “mediation.” We do not call it anything about “facilitation”; that we not call it a ‘round table,’ which are words that I’ve used in many other settings. So, we called it a ‘study group.’ I said, “Let’s have a study group.”

So, we had a study group, and we were to study this issue. We were to hold ourselves in some disciplined and rigorous discussions over a period of months, and that became the strategy—to lower the expectations of it.

If I called it “mediation,” it sound like there are deals to be made, and my sense after these interviews was that we didn’t want to talk about deals. We wanted to try to think this thing through and better understand the needs, the interests, the “drivers,” if you will, and the politics of this particular issue—implementing the Supreme Court’s Patch decision.

We assembled a group and had an initial meeting of roughly 15 people. I held most of our meetings initially at the State Office of Planning. They had a nice, big conference room, easily accessible to everybody.

The initial meeting is always quite important in my mind because it’s all about managing expectations and tone setting, and much of what happens is chartered at that initial meeting. Basically, we did some stories. I explained to people what the purpose of this was, that we were looking for a way to think hard about Patch, its contradictions, and its implications.

We wanted to do a longer-term discussion, as opposed to doing three meetings and then wrapping it up. I was trying to set the tone that we’re in a longer-term [process]. I was hoping that it would be rigorous, but low-key, and that there would be great tolerance for people to explore the issues. So, that was a part of how I was thinking and, again, very much based on some of the intelligence that had to come up in the initial scanning that I’d done.

So, we had stories. I asked people to talk about their connection to the issue—personally, not so much institutionally. People took that as a chance to sort of speak at a personal level and say, “Well, the banker feel this way, but let me tell you how I feel, and I feel like as a citizen [of this] state—you know, this is me, personally, John Doe—this is what I think.”

So, I was asking people to do something—which turned into, actually, a ground rule of etiquette or protocol for the whole thing—which was [that] all the formal hats were off. In other words, one of the expectations that we set at the very beginning was that unless someone formally told us that they were at that moment representing their group, we would always assume they were speaking personally, until they said to the rest of the group that they were speaking organizationally or institutionally. So, that really allowed a lot of running room for conversation without everybody assuming that every time you said something you were representing [your organization]. It immediately took a little bit of the pressure off of the conversations.

That first meeting was all about trying to have some primary discussions, understand the questions, and understand the issue—to go back through this, but have people talk first at a personal level. At the end, it was a long day, and a long meeting.

At the end of that, we chartered a general strategy of how the group would work. The strategy that emerged, and then got perfected in later meetings, was that this study group would spend a number of meetings thinking through the issues, talking about the issues, gathering information about the issues, and trying to build some understanding, and, also—if there were recommendations to make—having a proposed set of recommendations, or at least an analysis. But, what we said was, [that was] going to be Phase One.

Phase Two would be to take these [recommendations] out to community meetings, to the rest of the communities that weren't in the study. [Phase Two was] to have the study group itself be presenters, and have bankers sitting side-by-side with Native Hawaiians saying, “We've [been] talking about this, and here's some of what we've been talking about. Here are some provisional conclusions. Do we have it right?” and to go around, which we did, in fact, in the second phase. Then, in the third phase, we would return to the table to try to conclude our conversations and come back to the legislature with a report. That turned out to be the strategy.

Why did these 15 or so hang in for all these meetings? We'd have to ask them to know for sure, but my sense is that it was the only game in town. The courts weren't hearing it anymore.

The courts had done their thing. So, then the only [thing] they'd hear [were] any further appeals or any further new cases on it. The legislature had a series of bills, none of which had enough support to proceed.

In fact, the legislature had been vilified for even coming up with some of the ideas that they'd come up with. The Native Hawaiians were so pissed off—so angry. When the Senate suggested that all the Native Hawaiians in the State go register their rights, the Native Hawaiians went down to demonstrate at the Capitol and beat the drums for forty-eight hours down there. If you're a legislator sitting down there, listening to Hawaiian drums going—this sends a message. It sends a big message.

So the Native Hawaiians were outraged. Meanwhile, the business community was saying, “We still don't have any more certainty that will allow us to write titles, and make loans, and conduct business, and the effect of this will be that we're going to discourage any kind of people from coming to this State.”

So when these people came together, I don't think they were angry personally, at each other, but it was a pretty hot button issue, pretty high on everybody's [agenda].

In the initial meeting, I wouldn't say that it was charged, but I would say that everyone was suspicious, very suspicious. They didn't want to lose any ground. They're always comparing, “Can I do better privately in the political realm that I can do around the table here?”

I think the reason why people hung around was because the answer was that they probably couldn't do any better politically. There was no place else to go. That's what I think. Then I think there were other things that developed over time. I think there was a respect and a fondness for each other that developed over time. As in some of the best of our processes, people actually start to like each other. It's not just respecting each other, but they start to care for each other, to take care of each other in little ways, and some of that happened in this.

There were some very interesting intellectual conversations. I think one of the additional things the group did was add some additional members. It wasn't “Peter's decision”—it was more of a rolling, aggregated decision about [the group's composition]. Because, as I told them in the beginning, “I don't know if I got it right. If we have people missing, let's get them in here—if there are voices missing.”

One of the things that happened was that this developed into a very interesting, intellectually challenging, [case]. These were very smart people around the table. These were professors of

Hawaiian Studies. These were people from the Attorney General's Office. [These were] some of the best in the business community and some Native Hawaiians who are deeply respected as teachers.

To move this process along, I think much of what I was doing—[and] I think the hardest part—was managing expectations: trying to manage and to do a funny kind of balancing between getting people curious and committed and motivated and enthused about actually trying to solve problems: getting people excited about accomplishing something, but on the other side, trying not to create expectations that, if we don't solve the problem, we've failed. So, that's what I mean by managing expectations and a certain "balancing."

I think that's kind of difficult, because, on the one hand, I'm trying to prod people and push people along and encourage people, but on the other hand, I'm saying, "Let's take our time. Let's just kind of work on this."

So, there's a bit of paradox and an ambiguity. I'm working with that, which I don't mind, because I think that's what much of this is.

I can't explain the moment-by-moment analysis that says, "Now's the time to push hard," "Now's the time to lie back", "Now's the time to be analytical", "Now's the time to be focused on feelings", "Now's the time to think about something conceptual", "Now's the time to think about something practical." But there is a to-ing-and-fro-ing, a back-and-forth between these things, that takes place and that took place in this particular case.

When it's going well, I have this feeling that there's a momentum to things—that a group's interacting in a way that "little windows of 'ah-ha!' go open for them; options start to go open for them; there are clarifications; there are understandings about things; some of their own assumptions tend to be disconfirmed—and those things sort of open possibilities.

One of the ways I've tried in practice [to encourage that to happen] is by preventing people from talking about solutions very fast—in other words, deferring that stuff. There are a number of different ways I do that.

I mean, for example, one of the things that I did this morning with this group was in the face of people who wanted to do a linear problem-solving process—"First we'll figure this out, then we'll figure that out..."—is to say, "No, no, no, let's do this. Let's do a pass at A, take another pass at B, let's take another pass at C, and see how these things line up with each other," and

we'll loop our way along. Let's do this rather than first figuring out C, and then we'll go to D, and then we'll go to E.

So, I get people to stay patient with a bit of moving around the different elements of an issue or a problem—rather than trying to think that there's an A-to-B-to-C approach. So, I really try to set some expectations—I'm trying to get a group to work in that mode. I can say that it is frustrating for some people, but most people, most of the time, seem to like that.

If someone says, "Look, I don't have a lot of time here. I've got a lot of other things to do—I don't want to fart around: Let's solve the problem," I'm probably going to say, "What I'm going to ask you to do, Joe, is to be a little patient with this thing through this meeting, and at the end of the meeting, why don't you put out your solutions. But, for at least the purpose of this afternoon's meeting, if you would be patient before you go to that, I want to hear a number of things that will set the stage for everybody's best ideas." I might do something like that.

Another thing that I will do is, also, de-emphasize agreements. In other words, I really try to differentiate the front-end business of trying to achieve clarity from the more back-end business of trying to push for "agreements" or "consensus" or "resolutions."

Again, this means deferring solutions for a while and saying, "The first goal is just clarification. It's understanding."

So, I might say, "Joe, Bill's been talking about similarities and differences and the overlap between the Native Hawaiian view of land and the conventional Western views of land. Do you understand that? What do you think about what he's saying? I know you want to talk about your resolutions, and we'll get to it, but [in the] meanwhile what do you think about what Bill said?"

So, I will tell people, quite upfront, that the goal here is "clarity," early on—"We're not interested in agreement, yet." Maybe we'll get to that. In fact, I'm sure we'll be able to talk about those things, but this is like preventing premature negotiations, just not letting people get preoccupied with solutions too fast. So, some of this is about looping; some of this is about setting the goalpost on "clarity" as opposed to "resolution."

Another piece that I love—that I have a big predilection about—is trying to put information on the table and getting questions framed. What I mean by that is, "What is the technical, scientific, economic, legal or political information that we don't have around the table? For us to talk more intelligently about this issue and be more informed, what information don't we have?" I'll ask the group just like that, "What information don't we have?"

I won't ask it right away, not until we've done some things, but I will ask the group, "What is the information that is missing for us to have a reasoned conversation, or a good conversation, or a thorough conversation, or an intelligent conversation?" Inevitably, no group has all the information they think they need. So, can we figure out some common pieces of information that are most crucial for us to have a second discussion? Who's going to get that, and how can we get it?

So, someone says, "Well gee, you know, we really don't have any data on how many Native Hawaiians actually go to Hula Halau. What's the registration?" Because, presumably, they're all going to go up in the forest to gather materials.

Well, I don't know if that's an important piece of information. Probably it's not—you won't find it in the resolution here. But what's interesting to me is getting people to agree on questions, questions that they think are important, and also to take the initiative to go out and bring jointly conceived information back to the table. So, I like doing that.

That's also part of what leads me to my interest in managing scientific information in these processes, particularly in real science-intensive cases, where people are battling over models or scientific facts or theories or methods. I like working on those kinds of problems. I like trying to pour some new information on the table—if there is some new information to be brought in.

There are a number of strategies to get this working. People come and say, "Bill, you work for the Attorney General's Office. You would have access to some of that. Would you go get that for the next meeting?"

Or they might say, "Well, nobody's got that. We need to commission a \$500,000 study on this thing."

"Well," you say, "nobody's got an extra half a million in their pocket, so we're probably not going to be able to get that. What can we get that's a proxy for that kind of information—not for perfect research, just for our discussion, since you say it's important." There are those kinds of things.

One of the things that happens, as the conversation develops, is that a group like this gets on a learning curve together. It's a "study group." So, they're asking questions, and they're trying to frame questions together, which is nice, because it means that we may get some common answers downstream.

It also gets them actively engaged in the information or data gathering, if there is data to be gathered. I think it helps them circle around a problem, as a group.

Everyone comes in with their own predilections about what's the issue, what's the question, and what the answer is going to be. Everybody's got that.

What I'm trying to do is defer that answer for a while and see if there are joint questions to which they can seek a joint answer, and set the stage for that over a period of time, over a period of meetings. This changes them from their original presumptions that they're walking in with and their original mindset.

My assumption is, they all come in with answers—they come to a public issue like this with a lot of answers—but we don't know the questions all the time. We don't know what questions your answer is trying to answer, exactly. It's a little bit like Jeopardy: "So, you've got your answer. What's the question that that's designed to answer?"

So the banker says, "I'm trying to figure out how to create stability in the mortgage documents that lenders give out, or in the escrow documents. I want to figure out how to clear title from land and transfer titles—and I can't do it if there are these Hawaiian rights and encumbrances, and so on."

So, he comes in with his answer to that.

But if I'm a Native Hawaiian I might not even know what his question is—all I hear is his answer. And similarly all the banker's hearing is, "I want to come onto your property. I want to come onto any property, any time I want."

What I'm hoping is that people will be able to understand the questions that are driving people. I'm also hoping as they look for kinds of social or political answers to some of these problems, that they will develop some additional questions that they want to jointly answer. So, they might say, "Gee, how many properties are there that are in jeopardy?"

That's a legitimate question, because it turns out there aren't that many.

It turned out that the problem was a big fear, but there wasn't a lot of evidence that was really going on. But still, that was a huge fear of the business community—that they would discourage local investment and offshore investment—but there was no real evidence. There wasn't a lot of evidence that people were being denied a chance to get their title to their properties or to transfer title, or that Native Hawaiians were being summarily excluded from coming onto land. It happened a couple of times. Was it a widespread problem? Not really.

So, you can create these very heavy-handed legislative answers to stuff like that. This is not to say that there aren't any problems—that there aren't issues to be talked about.

So, I'm saying people are walking in with their answers, but they've got a lot of different questions. Their questions are their worries and their fears and their hopes. They are worried about a lot of things that don't necessarily pan out. [So in a process like this, we're trying to ask,] "Can we figure out ways to meet these fears?"

In other words, if you're really afraid that Native Hawaiian culture is going to be either enhanced or reduced by what happens here—then if I understand that, that's another way of getting at interests and getting at some of the fundamental drivers and the general needs that underlie the specific positions that people are taking. It's sort of [a] back end way of getting there.

Getting them to ask questions together is partly recognizing each other's concerns. But they also start to circle towards things that look like solutions to the problems. Part of [this] is so that as they start to circle towards things that look like solution to the problems, that they're doing that with a much fuller and better understanding of, "What's brought the other people in here?"

[So] I can't just answer my questions. There's got to be an answer to your question—and, it's a question that we've jointly studied and jointly thought about and tried to inform with more information.

It's the difference between having a law professor come into a process like this and tell everybody the history of customary gathering rights in the mainland and how that's worked in other states—versus having a group go to that professor and say, "You know, we're studying this, and we really need to hear a little bit about how this has worked in other states."

So, I'm really interested in the group deciding what information it wants to acquire and for what purposes they think they're going to use it. So I'm facilitating a negotiation that's about, "What information do we need?" and "How do we learn about a problem?" rather than facilitating a negotiation about a solution. In the later stages, we'll talk about solutions. We'll get at that.

Getting them to agree on the information that they need is a very, very useful device, particularly when people are fighting over very different kinds of facts or they have different understandings of the situation. It's a way of jointly thinking about contentious problems rather

than: you think about it, then you beat me over the head with your answers, and I'll think about it, and then I'll beat you over the head with my answers.

Our next step in this particular case was to try to pick apart some of the elements of Native Hawaiian gathering rights and to ask a series of questions about who needs to gather what, where, and when. Could we begin to paint that picture and answer the question about how Hawaiians can go about that? Because, pretty soon what happened was that people were agreeing on some of the principles. People were saying, "Well, sure, Native Hawaiians should practice their culture," and, "Sure, people ought to be able to transfer title."

So, we've converted some of this stuff into a kind of "How can we . . . ?" question. If you agree with that and I agree with that, then the question is, "How do we do the best job of giving you access to your cultural practices?" If I'm the banker, "How do I make sure that I can transfer title?"

So, the problems are now joint problems. You've got to help me solve mine, and I've got to help you solve yours. Problem definitions [now] have some legitimacy with each other, which they [didn't] necessarily have when people walked in the room: "I don't give a shit what your problem is—let me tell you about my problem!"

That's normal, that's business as usual. The whole idea, again, is to convert this **[Peter: into a joint problem? into a "how" question?]** In this particular Patch case, we wound up doing a fair amount of detailed work—really looking at this issue from a lot of different perspectives, coming up with some very preliminary kinds of conclusions, and taking those back out to these community meetings, which was that second phase I talked about. If I can tell you, that second phase was really volatile.

We'd been studying this issue in a kind of quiet, deliberative, contemplative, informed, respectful way. All of the sudden the group is now going out to these public meetings and saying, "We've been studying this, and what do you think about it?"

The Hawaiians are rolling out, screaming and crying. Business people refused to talk about it in public, because they'd just get beat up when they went [to] these kinds of meetings. So, from my perspective, there was this huge venting [that] went on.

What's that like for me when there's such venting going on? You take a lot of lumps—you get beat up a lot. I mean, there's a white guy running this process over Native Hawaiian stuff, and I hear, "Who are you?" and "How come you're doing this?"

So I'm trying to get this study group to do this stuff and have them do the presentations [with] Native Hawaiians. They did, they did—there were a lot of joint [presentations]. This is where different political interests will roll out and use a public process like this to rile up an issue, to make a statement about an issue; they're not really particularly interested in what's in there.

It's hard to handle this. The public venting [on] issues like this is real difficult [to handle], because most of the people are not coming with much information—they're coming in with slogans, and they're coming poorly informed, and they're not really interested in sitting still and getting informed. It's that classic hot-button issue.

So, I'm always hoping that people will come away with a little bit of information. I'll do everything I can in these meetings just to simply allow everybody to talk, but also to allow people to get informed about what's going on. But I also have very low expectations of public meetings. One of my goals as a facilitator is to try to make [these meetings] a little better and a little bit more respectful. But in terms of either coming away with more clarity or with information or something closer to resolution, I have fairly low expectations.

Now let's go back to the third phase. My job is the same: trying to help the study group finish its recommendations and say, "What did we learn from those public hearings? Did we learn anything that changes our preliminary conclusions?"

The third phase [was] the easiest for me, because the question to the group now [was], "What did you hear when we went out with these [questions], with our theory of this? What, if anything, that you heard would cause us to finalize our strategy in a different way or change it?"

What was so interesting was that the group hadn't fully come to its conclusions by the third phase, so the public process actually did do some interesting things. It led to what, I think, is the actually pretty amazing outcome of this process, which was that the group went back to the legislature and said, "Do not pass any laws."

The business guys who had first gone in and said, "We want laws to regulate this," came out of this and said, "No. No, don't do that."

Everybody held hands on this and said, "If you pass a law right now, you will exacerbate the issue; we're not sure [about] the extent of the depth of the problem, and it's way too premature to have any kind of law on this. Their rights are so particular—the gathering customs and practices

are so particular to different areas—that the conversation needs to be at a locale-specific area. You can't pass a law that "umbrellas" over all this stuff.”

The legislature listened, and they didn't pass a law. I wouldn't say that the issue has gone away, because Hawaiians are still very excited about practicing their culture and acquiring land rights and water rights and all the things that they're pressing for. But, in fact, the legislature didn't pass a law on the advice of this group.

I'm saying there was a change, particularly in the business community. I think the business community [now] took a different view of this. There was also some continuing discussion between some of the Native Hawaiians and the business people. They formed an ongoing discussion group that went way beyond [this process] and didn't involve me. So, it was a very interesting case. It was a big, tough, complicated piece.

I like to think about some of this work as an addition to managing meetings and trying to strategize processes. I think of it a little bit as choreography. I'm doing some choreography here. I'm trying to choreograph what is in the end a version of a negotiation or a communication. I mean, an ongoing communication and negotiation process are problem-solving processes, so, I'm trying to help say, “You know what? Before we dance this way, let's dance this way. Before we move here, let's move here.”

I'm trying really hard to do a little bit of stage management, [but] I don't mean that in a manipulative way. What I'm trying to do is not trying to micro-manage everybody's outputs. I don't really care what the outcome is. I mean, I get attached to having something, but I'm hoping, by designing something—even in the naming of a process, and by the kinds of meetings that they are, and the kind of expectations that get set in the beginning, and the kinds of exchanges that take place both emotionally and intellectually—that people will move through a process in which they are acquiring new understandings and information about each other, their views, and their positions, and that they will be able to stay pretty tolerant for a while—as opposed to acting on their instincts which are to do drive-by solution seeking. It's [a] drive-by, hit-and run: “We're all busy people. We've got to get it done. There's a big political issue. What's your solution? Ah, this is never going to work,” or, “Gee, let's start haggling over this stuff.”

So, I'm trying to figure out a pattern for this group, for this group of stakeholders, or this group of disputants, if you will, interacting with each other over a longer period of time. I guess

that's what I mean by choreography. I'm trying to say, "Well, here's what I hope the tenor and impact of the first pieces of [our] meeting are going to be. Here's what I'm hoping is going to happen in these different stages of this process."

Part of [responding to the drive-by mentality] is managing the expectation of how much time we're going to be working on this. So, if people say, "I've really only got this afternoon," then that calls for one kind of choreography. But it's different if we've set this up as, "This is a study group, and we're going to meet for 4 months and really deliberate about this."

The commitment was for people to say, "We need these voices at the table! Are you able to commit to a string of discussions over four to six months?"

If they said, "No," well, then we asked, "Ok, who could represent your voice or this perspective and do that?"—because, otherwise, people are just going to bash on each other. They're going to beat on each other, and maybe they'll stumble into a solution.

[In addition to getting them to loosen up, to slow down from the 'drive-by' syndrome I want them to have both a set of intellectual and emotional understandings]. Actually, it starts with the emotional side and then goes to the intellectual side. Because, again that's part of having people talk about how this issue touches them personally, and kind of staying patient with that.

Someone says, "You know, my family goes up into the mountains, and we gather olapa leaves for this particular Hawaiian ceremony."

Or someone else says, "I'm a lawyer here, but you know what, I grew up in this community, and it pains me that Native Hawaiians hate me because I'm not Hawaiian."

So, stories start where people are personally. But, I also don't want it to turn into personal therapeutic talk—I don't want to stay there. So, really that's a jump-off place.

[As for the emotional quality of the meeting] I'm hoping that people will understand that this is not a just a theoretical problem—that it's problem that touches them, touches people personally. So, the only way that you can get at that is by asking the question as innocently as you can and letting them talk in the way they want about how this issue comes into their life, personally.

I can say I found you can't go wrong by asking that. I mean, I've asked that all the time, and I can't remember a time when somebody's run away from that, done something wrong or bad. I mean, I just haven't had that experience. Usually it becomes revealing of things and humanizes discussion.

[So, in regards to how they are different walking out of this process than when they're walking into the process,] first of all, I think these are issues in their lives. I don't think these issues are their lives—which we as mediators may get confused. We get so case-o-centric on this stuff, we're living and breathing it—the case is our unit of analysis; we love this stuff; we strategize it, and fill our life full of all kinds of choreographies and tactics. But my sense is that this is just one thing that's going on.

Is that to say that they don't change at all? No, that's to say, “What's the level of change that we're looking for?” I'm not looking for transformations that so people will somehow say, “I just moved to Maui now after this case because this changed my life, or I decided [to become] a Sun Yantis in India or....” The scales, the expectations, are lower.

I do want to tell a funny story, because one policy negotiation a few years ago was a wonderful case. Neil Milner and I worked on it together, and it had to do with mental health policy. At the end, they'd really done a good piece of work. The last day we're going around, and everybody has a few minutes to say parting thoughts, and one says, “This was really a great process—we really made great progress.” Someone else says, “Yeah, I learned so much.”

One guy, who's a very smart and nice man, who's a psychiatrist who worked for the state, said, “This has been a good process, but I just want to tell you that I view this as slightly above having a root canal. I mean it's a lot of meetings, and we've done some good work, but you know....”

It was just kind of humbling because he brought it back into perspective. So, if we ask, “How do people change or what are the changes we see?” I mean, I'm quite happy if people have more traction on the issue and they've talked about it in a reasonably respectful way and if they've proposed some solutions or hit a break-through moment. To me [those] are changes. The changes are more in the political chemistry [sense] because these are public cases as opposed to [private ones].

The parties sometimes develop different feelings about each other. Yeah, I mean I see that happen. That happens a lot, but that's not my primary goal. I'm much more interested in that as a vehicle for doing things than as an end-goal. So, I tend not to [make it my goal]. I'd rather do the transformative work without talking about the transformative work, if you will.

I've talked about the importance of people not hitting each other head-on, but somehow being able to learn from each other or about each other. Getting people to think about what other

information they want is another version of that. At one level you can think of that as a distraction, because my experience is that people dream up all kinds of information they want, and they don't know why they want it. So, thinking about what are the common questions and the common information they need—and actually going out and deciding what's worth actually putting some energy into—is a different piece of it.

Maybe somebody will say, “Well, we've already done all that, we already know all that.”

Then we'd say, “Terrific! Could you bring that to the table next meeting so we can talk about it? You've got the answer to her question? That's fabulous: Let's get it on the table next time. Will you make a presentation? Can you do it in twenty minutes?”

So, if people will say, “Yes, it would be good to know that,” I'm having people address their uncertainty together to say, “Yeah, we would all be better off if we knew this.”

So, in a way, posing an uncertainty brings them together. Now, people are brought together because their common enemy is ignorance—but you've got to get them into that mode where they are willing to entertain that and where they will sit still and be patient with a discussion that says, “What are the questions that we should be asking?” or “What is the information that we need to gather?” But if someone's sitting there saying, “Who needs all that? I got the answer,” and we're still in that mode, it's tough.

If we're still in the mode of, “I've got the answer, so we don't need to ask all those questions—we don't need to gather that information,” I might talk with them privately, or I might deal with this right in the spot. I might call a break, talk privately with them, and say, “You may have answer, but can you sell it?”

I might “talk turkey” with that person, “You think you can make it work. Do you think you've got enough horse-power in here to make it work by four o'clock today? I don't think so.” I don't mind telling people that.