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I. INTRODUCTION

Used to settle and resolve various types of disputes, Alternative Dispute Resolution (ADR) is gaining widespread momentum and popularity throughout the legal community of the United States.[1] During this period of growth in ADR, federal and state governments have often been in conflict with sovereign Native American tribes in the United States. These disputes, ranging from land and water rights to the setup and operation of casinos, are often resolved in the courts.[2] The court battles may result in a resolution, but litigation requires vast amounts of money in legal fees and often leaves the parties unsatisfied.[3]

Native Americans have their own unique traditional method of resolving disputes. Their processes, called *peacemaking* by some tribes, place the emphasis not on the guilt of the wrongdoer, but on restoring relationships and finding a solution that is amenable to all involved.[4] This emphasis on saving the relationship has many similarities to current practices of mediation.[5]

Among the similar goals between mediation and peacemaking are the use of ADR allows both sides to reach a better conclusion and the desire to spend less money and to satisfy more people.[6] However, this approach has critics who see it as another attempt to force "Anglo culture" on tribal com-

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1. *See* Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 824 (1996).

2. *See* Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 34-35 (1997); *see generally* Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381 (1997).

3. *See* Susan D. Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 STAN. ENVTL. L.J. 151, 166-67 (1992).

4. Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 879-80 (1999).

5. *See* Tsosie, *supra* note 2, at 36-37.

6. *Id.*

munities.[7] Other critics feel this approach cannot work because of unequal bargaining power between the two parties and the fact that tribes are forced to win a court battle before they can come to the mediation or negotiation tables.[8]

Part II of this paper examines the resource disputes that have arisen between tribes and the government in recent years.[9] Part III looks at the unique problems of Indian gaming.[10] Part IV explores tribal methods of dispute resolution and its possible impact on disputes over resources and gaming.[11] Part V illustrates the practical application of ADR to tribal disputes and possible problems that can result thereby preventing success.[12] Part VI looks at a recent settlement reached in Washington State and compares that process to the theoretical application of ADR to similar disputes.[13] Part VII concludes, arguing that ADR, being more analogous to traditional tribal practices, provides a better way to resolve these disputes than litigation.

II. THE ANCIENT ISSUE OF NATURAL RESOURCE DISPUTES

Before the recent issue of gaming hit a nerve in state politics, the primary dispute between tribes and the government concerned the allocation of land and water resources.[14] Most often, the parties negotiated these water and land rights in treaties now more than seventy-five years old.[15] These treaties created land reservations for the tribes and provided them with water rights.[16] However, as time went on, the tribes' rights proved open to legal attack and

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7. *Id.* at 36.

8. *Id.* at 36, 39-40.

9. *See infra* notes 14-27 and accompanying text.

10. *See infra* notes 28-44 and accompanying text.

11. *See infra* notes 45-72 and accompanying text.

12. *See infra* notes 73-97 and accompanying text.

13. *See infra* notes 98-107 and accompanying text.

14. *See* Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U.L. REV. 13, 18 (1998).

15. *See* Tsosie, *supra* note 2, at 34.

16. *See id. See also* Brienza, *supra* note 3, at 154-55. Brienza mentions the great impact of Winters v. United States, 207 U.S. 564 (1908), where Native American water rights were first acknowledged. *Id.* In this case, the Court determined that these water rights should take precedence over all other water rights assuming they predated the challenger's rights. *Id.* This is almost always the case as the Native American's rights relate back to the treaties creating the reservations they live on. *Id. Winters* allows these rights to attach to all reservations and expand based on the reservation's need and on the amount of land under Native American control. *Id.* This is crucial to the current discussion because these rights are now being contested by tribes across the nation as they attempt to gain control of what *Winters* says is rightfully theirs: enough water to supply the tribes needs.

were eventually challenged in courts.[17] The tribes worked hard to have their rights determined extra-judicially, but ultimately had to resort to litigation to defend those same rights.[18]

ADR has the potential to be very effective when asserting predetermined rights. A criticism of using ADR in claims for natural resources has been that the tribes must first have their rights adjudicated.[19] While litigation is costly and time consuming, the real work often begins after litigation when an agreement on the allocation of these rights must be worked out involving many parties.[20] Several commentators have suggested that the use of negotiation or mediation may be helpful post-litigation.[21] Specifically, mediation has been advocated to settle recent disputes over water rights and the allocation of the existing water supplies.[22] In an effort to reduce the potential length of proceedings, it has also been suggested that ADR could be used in the initial proceedings rather than going to court to adjudicate resource rights.[23] A major concern is that the resource supply may be so severely depleted over the course of litigation that the rights, which are eventually won, will be worthless.[24] Therefore, some commentators feel that using ADR during the initial stages may help to affect a faster resolution with lower expenditures of time and money by all involved.[25]

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17. *See* Tsosie, *supra* note 2, at 35.

18. *See id.*

19. *See generally* Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922 (1999); *see also* Tsosie, *supra* note 2, at 39.

20. *See* Note, *supra* note 19, at 929-30; *see also* Brienza, *supra* note 3, at 166.

21. *See* Note, *supra* note 19, at 929-30; *see also* Brienza, *supra* note 3, at 167-72 (commenting on the cost-effectiveness of traditional methods of litigation); *see also* Tsosie, *supra* note 2, at 36.

22. *See generally* Brienza, *supra* note 3.

23. Nader & Ou, *supra* note 14, at 13.

24. Brienza, *supra* note 3, at 167.

25. *See generally* Brienza *supra* note 3. This author focuses on the disadvantages of litigation as opposed to alternative methods of resolving disputes, specifically the author champions the use of negotiation. *Id.* at 166-72. Brienza discusses the problems litigation creates, such as the extensive time and money required to fight the battle. *Id.* at 166-67. Also discussed are the jurisdictional problems that arise when tribes are forced into state courts to litigate. The author suggests this puts the tribes at a large political disadvantage as elected judges are hearing cases, which will potentially have a drastic impact on their electorate. *Id.* Additionally, the law is clearer in the federal courts due to the nature of the treaties. *Id. at 165.* The author then goes on to point to the benefits of negotiation such as lessening the adversarial nature, time and cost and enabling the parties to work toward a solution. *Id.* at 168-72. These themes will be echoed throughout this article.

It is not clear what effect a new method of dispute resolution would have on these matters. Commentators suggest negotiation and mediation are similar to traditional tribal methods of dispute resolution.[26] The similarities may lead to an atmosphere more conducive to resolution if the method is less foreign to the tribal parties.[27] The resource disputes will become even more prominent as time passes, and the resources being contested become even scarcer.

III. THE RECENT ISSUE OF GAMING

As the initial wave of resource issues began to wane in the court system, a new conflict arose between states and the tribal governments - Indian Gaming.[28] The Supreme Court held that tribes had the right to engage in gaming activities on their reservation lands.[29] Many states did not like the idea for a plethora of reasons and hotly contested the issue in courts and state legislatures.[30] The issues related to gaming ranged from the potential taxation of profits to the determination of which gaming activities would be allowed by the states.[31] All of the basic concerns stem from resource disputes in that the ultimate underlying issue is the ability of the tribes to exercise the rights accorded them by treaty, specifically their status as sovereign nations.[32]

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26. *See* Note, *supra* note 19, at 930 (suggesting this is the case because tribes are more accustomed to "cooperative agreements" and that ADR would be a welcome break from the storied bitter disputes between the tribes and states over a variety of issues).

27. *Id.* at 930.

28. *See generally* Rand & Light, *supra* note 2, at 383. This article provides a general overview of Indian gaming and presents the arguments of both sides. *Id.* at 382-83. In particular, it discusses the framework of the Indian Gaming Regulatory Act ("IGRA") and how it relates to the larger picture involving tribal sovereignty and relations with the federal government. *Id.*

29. *Id.* at 382. The landmark case California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), was the culmination of many cases in the courts. *See* Rand & Light, *supra* note 2, at 382. The Court declared states could not regulate gaming activities conducted by the tribes on their land. *Id.* at 396. The overriding concern for the court was the tribe's interest in "self-determination and economic development" and that this was important enough to override the state laws addressing this issue. *Id.* The end result of Cabazon was that Congress reacted and passed the IGRA in an attempt to both codify the court's decision and bring uniformity to the area. *Id.* at 398.

30. Rand & Light, *supra* note 2, at 405-08. In particular, officials are concerned with the potential influence of organized crime on the gaming industry. *Id.* However, it is also a concern that gaming will have negative side effects on the surrounding areas. *Id.*

31. *See id.*

32. *See id.*; *see generally* James A. Casey, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404 (1994); *see also* Tsosie, *supra* note 2, at 80-81, A major problem the tribes face is the inability to exercise the sovereignty granted to them. Id. at 407. The IGRA in some ways furthers this problem by forcing tribes into mediation to create an agreement with the states. *See* Rand & Light, *supra* note 2, at 382-83. This creates a feeling of

In response to the multitude of casinos and corresponding problems that arose, the federal government enacted the Indian Gaming Regulatory Act ("IGRA").[33] The Act set forth standards for establishing casinos throughout the country. The provision most relevant to this discussion requires states and tribes to reach compacts containing specific terms under which the casinos will be allowed to exist, an agreement not likely to be met with enthusiasm by the tribes.[34] In accordance with this section, if an agreement cannot be reached as to the construction of the compact, then the law provides for mandatory mediation.[35] This is, in part, a reaction to the ADR movement, but it is also a response to the overburdened court system.[36] The history of animosity between the tribal governments and the state and federal governments is well-known and often leads to an aggrieved party running to court at the first sign of disagreement.[37] Through this provision, the federal government appears to be making a preemptive strike to prevent massive litigation when disagreements occur during the compact writing process.

The federal government's mandate of mediation in certain circumstances shows that ADR has a place in these types of disputes. It appears that because gaming is not a direct result of long-ignored treaties, the parties should reach a written agreement to formalize the conditions and terms of acceptance.[38] Because the parties must co-exist, a non-adversarial method of dispute resolution holds potentially large benefits as it allows the parties to work out an agreement based on the needs and wants of both sides.[39] The agreement

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subordination among the tribes because they were granted sovereignty under many different treaties but have not always been able to exercise their sovereignty. *Id.*

33. *See generally* Rand & Light, *supra* note 2 (discussing the makeup of the IGRA including many aspects not particularly relevant to this discussion).

34. Tsosie, *supra* note 2, at 68-69.

35. *Id.*

36. *See* Note, *supra* note 19, at 930. This provision is put in to the IGRA in part to attempt to slow the massive amounts of litigation commenced by both sides in regard to Indian Gaming because the US court system has a well-documented history of being overburdened.

37. *See* Tsosie, *supra* note 2, at 72; *see also* Nader & Ou, *supra* note 14, at 24-25. Both articles suggest that because of the *negative* relationship existing between the parties, either side's first instinct is to take the matter before a judge rather than work for a solution through ADR.

38. *See supra* note 16. This footnote provides information on how water rights were obtained directly from treaties and eventually, judicially in a Supreme Court case. *Cf. supra* note 29. Gaming arose differently and in a more indirect manner. Gaming arose from tribal rights to be sovereign nations, leading the Court to declare gaming is acceptable and states could not interfere.

39. Tsosie, *supra* note 2, at 69.

would be more satisfactory to the parties involved and, consequently, less prone to future litigation if both parties reached a consensus.[40]

There are also some negatives to the mandates of the IGRA. The primary problem is the tribes, as sovereign governments, resent the federal government telling them what to do.[41] Thus, the mandatory mediation seems to be a further extension of the Anglo world being forced on the tribes.[42] Some have expressed concern that in this format, the mediation would be wholly unsuccessful because the parties are not coming to the table voluntarily but are maintaining their adversarial positions. Thus, the parties have little room for friendly negotiation.[43] The tribes and the states are not on equal footing when tribes must participate in mediation involuntarily; the state is placed in the superior bargaining position, and the tribes have expressed this fear about the use of ADR in general.[44]

In the end, however, it seems likely that the use of ADR would be pertinent in disputes over gaming compacts. These disputes involve reaching an agreement on a number of terms and should have room for negotiation. Resolving these disputes in this manner could lead to a better relationship between the parties primarily because they will have worked together to reach an agreement instead of one party imposing on another through judicial means.

IV. THE PROCESS OF PEACEMAKING

The Native American peacemaking process bears similarities to mediation and negotiation and has potential benefits for use in disputes beyond the intra-tribal world.[45] This form of resolving disputes has recently garnered

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40. *Id.* The IGRA mandates that the state and tribe come to an agreement and form a compact with regards to any gaming operations potentially occurring on reservation lands. *Id.* If a compact cannot be reached, the IGRA then forces the parties into mediation in an attempt to reconcile any existing differences. *Id.*

41. *See* Rand & Light, *supra* note 2, at 393-94 (The tribal sovereignty appears to be compromised or belittled when the US federal government mandates the action of the sovereign tribal nations).

42. *See* James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 56 (1997). This article is written by a Chief Justice of the Navajo tribe and in many ways presents a view of ADR and tribes contrasting with that of other commentators.

43. *See* Tsosie, *supra* note 2, at 69-72. This portion of the article focuses on the difficulties the IGRA poses to negotiations between tribes and other governments.

44. Brienza, *supra* note 3, at 179-80; *see also* Tsosie, *supra* note 2, at 88.

45. Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 4-5 (1997).

much attention in the academic world.[46] The ADR movement has increased attention to methods of resolving disputes not involving litigation, consequently bringing attention to the Native American process of peacemaking as another method of ADR.[47] The peacemaking process focuses on truly resolving the issues rather than adjudicating them.[48] It focuses on solving the problem causing the dispute rather than on remedial retribution or punishment being handed down for injuries, thus offering the parties a deeper resolution.[49] The unique process of peacemaking is as important as the results it reaches.

Peacemaking in many ways resembles mediation or negotiation. The parties come before a peacemaker who listens to the information and discusses the problem with the parties.[50] The process is reflective of the Native American culture where a high value is placed on integrity and there is a strong

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46. Zion & Yazzie, *supra* note 42, at 55; *see also* Robert D. Garrett, *Mediation in Native America*, 49 MAR. DISP. RESOL. J. 38, 43 (1994). Garrett offers several examples where tribal methods have been discussed in connection with improving mediation processes throughout the country. *Id.* There was a tribal peacemaking conference held at the Oklahoma City University School of Law, an article in an AAA publication, as well as a discussion in the Mediation Journal. *Id.* This last article examined intertribal court systems that have been set up to deal not with problems within the tribe, but also to resolve disputes between tribes. *Id. See generally* O'Connor, *supra* note 45.

47. *See* Garrett, *supra* note 46, at 43; *cf.* Zion & Yazzie, *supra* note 42, at 71-72. In the Garret article, mediation is suggested as an effective method of dispute resolution that has been extraordinarily successful resolving problems among tribal members and may have application outside of tribal disputes. Garrett, *supra* note 46, at 43. In contrast, the Zion article posits that the animosity between the "white man" and the tribal communities prevents any effective negotiation or mediation. Zion & Yazzie, *supra* note 42, at 72. The authors of that article also suggest that by prescribing the use of ADR, this method is being forced onto the tribes just as the court system of the United States was forced onto them when disputes first arose between the two sides. *See id.* at 71.

48. Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 880 (1999).

49. *Id.*

50. Zion & Yazzie, *supra* note 42, at 78. This article goes into detail as to the workings of the Navajo peacemaking traditions. In particular the process begins with the parties meeting with a *naat'aanii* (referred to as a peacemaker throughout the text above) who acts more as a facilitator than as a judge in the traditional Anglo system. *Id.* The naat'aanii is rarely an impartial third party and is in fact often a blood or clan relative of those involved in the dispute. *Id.* That concept flows directly from the large importance which the tribe's place on family relationships. *Id.* The *naat'aanii* proceeds to guide the parties to a resolution through discussion of the problem and any underlying motivations, rather than making a decision to bind both parties. *Id.* at 79-80. This allows the parties themselves to reach a resolution, often effecting a longer-lasting and more satisfactory solution. *Id.*

emphasis on family involvement.[51] Peacemaking diverges from the traditional Anglo methods of resolving because it is encouraged, if not required, that the family members of the parties attend the session.[52] Another aspect running contrary to Anglo practices is that the peacemaker is often familiar with one or both parties in the dispute.[53] This is seen to help facilitate discussion between the parties and ultimately lead to a resolution of the dispute.[54] Peacemakers are traditionally well-respected elders of the tribe who are thought to possess talent in listening and offering advice to the parties.[55]

The process begins with the parties meeting and praying with the peacemaker before the group with the assistance of a peacemaker discusses what happened and what the best solution would be.[56] The goal of the session is to find a solution to the problem and restore the parties to a healthy relationship rather than to punish one party for a perceived wrong.[57] This puts the parties in a mindset much different than the traditional adversarial mindset we are accustomed to seeing in dispute resolution processes.[58] The key is that the parties are working together to achieve a resolution both sides will find acceptable.[59]

Literature cites an example of a man brought to the peacemaking court for domestic abuse where he was forced to confront not only his wife, but also their families to explain his behavior.[60] In this manner, the guilty party was forced to admit to what he had done, come to terms with it, and discover

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51. Costello, *supra* note 48, at 878-91. As mentioned in the preceding footnote, there is a large emphasis on family relationships in tribal dispute resolution. *Id.* This author suggests that this is a direct result of the Native American lifestyle where the members of the tribe live close knit lives and have extensive interaction with one another. *Id.* at 878-79. The only way that this lifestyle can be maintained is if the parties resolve disputes by working together. *See id.* The animosity fostered by an adversarial legal system would lead to dissension in the tribe and a breakdown of the existing familial structures creating an uncomfortable and inefficient living situation. *See id.*

52. *Id.* at 880. Involving family members is thought to help the process by adding voices to either side in case one or both of the parties is afraid to speak. *Id.* This is one more way in which the tribal system works to promote long-lasting unity among the members of the tribe. *See id.*

53. Zion & Yazzie, *supra* note 42, at 78.

54. *See id.*; *see also* O'Connor, *supra* note 45, at 3. Both articles emphasize the importance tribes place on maintaining and repairing relationships between the parties involved in the dispute.

55. Zion & Yazzie, *supra* note 45, at 77.

56. *Id.* at 78-79.

57. *See id.* at 79-80.

58. Costello, *supra* note 48, at 880, *see also* Garrett, *supra* note 46, at 43.

59. *See* Zion & Yazzie, *supra* note 37, at 80-81.

60. *Id.* at 81-82.

why he did it.[61] The resolution in this case involved counseling for violence and alcohol abuse.[62] In the end, the peacemaking court helped to restore the family relationship that had been damaged by the violence. This story illustrates the unique approach to dispute resolution embodied in Native American peacemaking. The parties working together rather than against each other is the most important and, in some ways, a novel aspect of this process. This approach has even been used in at least one civil dispute between a family and a negligent manufacturer; here the case was settled in peacemaking court, as opposed to traditional civil court.[63] This illustrates the potential for expanding the use of peacemaking beyond disputes among tribal members disputes involving non-Indians.

Peacemaking is used in various forms throughout the tribes. One of the most developed court systems belongs to the Navajo Nation.[64] The Navajo Nation's court system blends traditional peacemaking with the American court

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61. *See id.* This example illustrates the importance of family involvement. In the case discussed in this article, a wife-beater attempted to deny his actions but was quickly corrected by his sister who was present at the meeting with the *naat'aanii*. *Id.* This was not done in the form of a reprimand by the sister, but was rather an attempt by her to correct her brother's unrealistic attitudes, and force him to confront his problem. *See id.* In addition, the sister then offered her assistance in his battles, not only with abuse, but also with alcoholism. *Id.* The identification of the alcoholism as a source of the problem is another illustration of how peacemaking gets to the heart of the issue rather than simply treating symptoms through harsh judicial remedies. This story ends with the couple staying together and working with all of their family members to create a new and better life for themselves. *See id.*

62. Navajo peacemaking, by addressing psychological problems, provides a type of counseling. *See* Zion & Yazzie at 820.

63. *See* Zion, *supra* note 42, at 82-83. To illustrate the potential for taking peacemaking beyond its traditional boundaries of intra-tribal disputes, this article mentions a civil wrongful death suit that was handled in a peacemaking atmosphere. *Id.* In this case, a child was killed after being shoved into a dryer and burned to the point of death. *Id.* The family sued the manufacturer and after examining the issue it was the defense attorney, not the tribal members, who felt peacemaking would be a better option. *Id.* The parties then met and true motives were disclosed allowing a better resolution to be reached. *Id.* In fact, a settlement was reached that was akin to what could have been received in court but with far fewer attorney fees and much less time spent in the resolution process because a lengthy trial was avoided. *Id.* This is one example of how the traditional Native American methods of dispute resolution can be applied to the Anglo system to reach effective solutions.

64. *See generally* Zion & Yazzie, *supra* note 42. This article discusses the Navajo court system in great detail, as well as illustrating concern and potential problems that may arise if ADR, even peacemaking influenced ADR, is forced onto the tribes. The authors are skeptical that such methods will be successful because it is simply another example of the white culture being pushed onto the tribes.

system.[65] Some tribes employ systems very similar to the one detailed above while others have their own modified version of peacemaking.[66] Many tribes, or groups of tribes, have created some judiciary to resolve disputes among members.[67]

The use of peacemaking as a tool to resolve disputes between tribes and other governments holds great potential benefit for the tribes.[68] It may reduce costs by lessening the need for litigation and producing settlements or agreements that satisfy both sides.[69] In a non-pecuniary sense, there is also potential for long-standing animosity between the tribe and the states to be worked out over the peacemaking table.[70] The rifts may begin to heal if the parties are placed in an atmosphere where working together and discussing the disagreement will help them to reach a lasting solution.[71] This is the ultimate goal of peacemaking: restoration of relationships while solving the immediate problem.[72]

V. PEACEMAKING POTENTIAL IN RESOURCE AND GAMING DISPUTES

Applying peacemaking to the disputes discussed above may help to solve resource and gaming problems in a more efficient manner. Due to the long history of litigating these issues, it may be difficult to force the parties into

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65. *Id.* at 83-84; *see also* O'Connor, *supra* note 45, at 2.

66. *See generally* Costello, *supra* note 48 (discussing the Grand Traverse Tribe of Indians and the way they have setup the dispute resolution program in their tribe).

67. *See* O'Connor, *supra* note 45, at 1. There had been a creation of 170 tribal court systems as of 1992. *Id.* These systems were to some degree based on Anglo systems but all incorporated more traditional Native American methods of dispute resolution into the processes. *Id.* at 2.

68. *See* Nader & Ou, *supra* note 14, at 24.

69. *See* O'Connor, *supra* note 45, at 5. The author suggests that large benefits could be had if we learn from the tribe's systems and methods.

70. *See* Zion & Yazzie, *supra* note 42, at 83-84. This article recognizes the need to repair relationships but also notes that IGRA serves only to enhance the existing divisions by forcing tribes to subordinate to other governments and follow their rules. *See also* Nader & Ou, *supra* note 14, at 24-25. This article is more supportive of using ADR in disputes between tribes and the government. It goes on to discuss similarities between peacemaking and modern ADR that could lead to more success in resolving these disputes.

71. *See* Garrett, *supra* note 46, at 42-43. The author feels that mediation is a perfect method for resolving disputes when the parties must continue to work together after the resolution. *Id.* He points out that traditional tribal methods are effective in accomplishing this goal because the parties feel empowered and work together reaching the resolution rather than against each other as would happen in a prolonged court battle. *See id.* This relates to the disputes between the tribes and other governments because their relationship is ongoing and animosity only contributes to future relations being difficult and unproductive.

72. Zion & Yazzie, *supra* note 42, at 83; *see also* Costello, *supra* note 48, at 880.

another method of dispute resolution.[73] Some argue that negotiating these disputes is a successful alternative to traditional litigation methods.[74] There is potential for using some form of ADR to resolve both resource and gaming disputes; peacemaking is one possible method that may be used. Observers have suggested that by using a method more akin to traditional tribal dispute resolution practices, the tribes would be more comfortable during the resolution process.[75]

When examining resource disputes first, the benefits of applying peacemaking is very apparent. In these cases, the parties involved are interested in effectuating a quick and efficient resolution.[76] If the existence of Native American rights has previously been adjudicated, the use of these processes may be even more beneficial.

After adjudication, the critical issue is allocating the resources in a manner that satisfies the needs of all involved.[77] In many instances, tribes may have an ultimate right to the water supply but must concede some of it to surrounding farms or residential areas depending on the individual situation.[78] Determining the allocation of these rights through a process where the parties speak to each other and voice concerns, rather than speaking to a judge, holds great potential for success. It lessens the adversarial nature thus preventing

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73. *See* Tsosie, *supra* note 2, at 42. The author points out the need for courts to be used before tribes can use mediation or negotiation.

74. *See id.* at 36; *but see* Brienza, *supra* note 3, at 172. These articles present contrasting ideas on the success of Indian tribes outside the Anglo court system in resolving disputes. Brienza argues that using ADR and other less adversarial methods of resolving disputes can provide solutions, which are more effective and less expensive. This is in contrast to Tsosie who feels that tribes still must litigate issues in order for the balance of power to be fair. Tsosie does feel that mediation and negotiation can be useful in resource and gaming disputes but not until after there has been full litigation to determine the extent of the rights possessed by the tribe.

75. *See supra* note 26 and accompanying text.

76. *See* Brienza, *supra* note 3, at 167-68. Brienza presents the idea that resources are scarce and during long drawn-out battles over the rights, the resources are being used up. Thus the parties should be motivated to solve their problems quickly or the winner will be left holding nothing but a piece of paper entitling them to resources, which no longer have any value.

77. Brienza, *supra* note 3, at 173-74.

78. *Id.* at 154; *see also* Timothy Egan, *Indian Tribe Agrees to Drop Claim to Tacoma Land for $162 Million*, N.Y. TIMES, August 29, 1988, at A1. This article discusses the problems associated with land being occupied by many parties. This can be analogized to problems with water rights because in today's society it is often the case that many groups of people will share one water supply, giving the "owner" of the water rights a great deal of power.

parties from harboring ill feelings motivating further disputes at later times.[79] Instead of one party winning and one party losing, all sides come together and a feeling of community may result strengthening the bonds between those involved. This method could allow water rights to be negotiated reaching a solution satisfactory for all involved.

This is, however, not a perfect process. In many instances, litigation will be required first, as discussed in the case study in Section VI.[80] In addition, tribes sometimes feel they are better suited to fight a court battle because the tables are more level in that scenario.[81] The fear that the state or federal government will attempt to force the tribe into an unfavorable situation is very real.[82] The use of ADR in these situations holds a great deal of potential benefit to the tribe and cannot be overlooked; however, the potential pitfalls must not be ignored either.

In respect to the gaming issue, the use of a peacemaking-like process may be even more beneficial to the tribe. Gaming issues arise indirectly from the treaties granted to the tribes by the government, whereas resource debates often stem directly from the language of the treaties granting the tribes land to live on.[83] In that respect, gaming issues have less history to muddy the waters of dispute resolution. However, the issues with respect to gaming do have a deep impact on tribal sovereignty.[84] In that sense, resolving gaming is-

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79. *See* Brienza, *supra* note 3, at 173. The use of compacts in this situation is another alternative way in which to encourage the parties to reach agreement. Note, *supra* note 19, at 924.

80. George Hardeen, *Tribe to Sign Land Settlement Pact*, L.A. TIMES, March 24, 1990, at A2 (discussing the need of the Puyallup tribe to sue for rights to the land under previously signed treaties before they were able to enter into discussion on how to settle the dispute monetarily). For further discussion of this general issue, *see* Tsosie, *supra* note 2, at 39-40.

81. *See* Note, *supra* note 19, at 932. The article points out that in many cases the only way to equalize the power of the parties is to fight a court battle. *Id.* It is noted that tribes simply do not possess the same power at the bargaining table, as do federal or state governments. *Id.* This author mentions that some commentators feel that is why litigation will remain the preferred method of resolving disputes between tribes and the government. *See also* Tsosie, *supra* note 2, at 39.

82. *See* Tsosie, *supra* note 2, at 75-76. This portion of the article discusses problems of negotiations related specifically to gaming issues. *See id.* at 75-78.

83. Brienza, *supra* note 3, at 154; *see also* discussion, *supra* note 29. Tribes are granted the power to govern themselves as sovereign nations within the US borders through the many treaties that have been signed. *See* Rand & Light, *supra* note 2, at 382-83. This sovereignty is what gives rise to the Indian gaming issue because the tribes are allowed to create their own laws on the reservations. *See id.*

84. *See supra* note 29. Many tribes and commentators see the federal government's interference with the Indian gaming industry as an insult to tribal sovereignty as it limits their ability to govern themselves. *See* Rand & Light, *supra* note 2, at 383. This is due in large part to the IGRA mandate that tribes engage in certain practices in order to maintain their gaming operations. *See id.* In some ways this can be seen to be in violation of the treaties signed long ago.

sues can be just as difficult as resolving resource issues.

The debate over gaming is a much more natural place to use any ADR method, be it peacemaking, negotiation or mediation, than in resource debates. This is primarily due to the type of agreement being worked towards in gaming discussions. In these situations, the ultimate goal is a written agreement detailing the terms of Indian gaming.[85] The parties must work out which type of gaming will be allowed, state tax on proceeds if any, logistics of building the casinos and any relevant employment issues just to name a few of the negotiated items.[86] This is the reason the IGRA mandates the formation of compacts between the state and the tribes.[87] Consequently, the parties are forced to enter into mediation if they cannot agree to terms of the compact on their own.[88]

The benefits that a peacemaking approach could have in this area are similar to those presented in the resource disputes. The mindset the parties bring to the table can have a major impact on how the dispute is resolved. Many states are adverse to the idea of gaming on Indian land because it takes away from lottery revenues and may be accompanied by possible negative side effects on the surrounding area.[89] If the parties enter mediation with hostility and the intent that they will "win," then the mediation discussions may be slow and fruitless.[90] On the other hand, if the parties come to negotiate the terms of the deal under the guide of a peacemaking-like process, there may

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85. Tsosie, *supra* note 2, at 68-69.

86. *Id.* at 71.

87. *Id.*

88. *Id.* at 69.

89. *See* Rand & Light, *supra* note 2, at 383-84. The authors mention that a large part of the opposition to the gaming industry arises from the fact that many view it as an immoral activity. *Id.* Many feel that extensive gambling operations will lead to run down areas and higher crime rates creating less desirable living conditions. *Id.* at 405-07. The states are also concerned with their revenue generating capacity being lowered. *Id.* at 383-85. However, the author does go on to note that there are several aspects to Indian gaming that have a positive impact on the tribes and surrounding communities. *Id.* at 403-04. The primary impact is that tribes can now be more economically self-sufficient, thus creating a larger economic base and potentially benefiting the areas around the tribal lands as more money pours into the region. *Id.*

90. *See* Costello, *supra* note 48, at 879. The author discusses how much can be gained from using non-adversarial methods of dispute resolution and uses the Navajo peacemaking system as an example. *Id.* at 880. This is a reiteration of the idea that the most important aspect in resolving disputes is working on the relationships between the parties. *See id.* If the parties do not become adversaries throughout the resolution process then they may have better future relations hopefully preventing further disputes from arising. *Id.*

be a tendency for them to cooperate more.[91] The parties can hopefully begin to work on solving the situation with the help of a facilitator or peacemaker.

This is admittedly a large divergence from the methods in which these parties (the state and the various tribes) are used to in resolving their differences. There are those who feel it will never work due in large part to the great cultural rift which exists between the two sides.[92] Some feel that forcing Native American methods into the ADR process is akin to forcing Native Americans into the Anglo court system and they resent the attempt to use tribal methods in this manner.[93] Tribes are also hesitant to leave a court system, which they have begun to use more successfully in recent years.[94] However, as with the resource issues, it would be pertinent to explore other options for the disputes to be resolved.[95]

The disputes over resources and Indian Gaming are not going to disappear and may become even more frequent. The possibility of further protracted disputes is unappealing to either side at this point. This would entail a great deal of time and money spent arguing over issues which may be solved by both sides meeting cooperatively and working until both sides are satisfied by the agreement.[96] The use of ADR and especially a peacemaking-like approach presents this opportunity. Peacemaking focuses on healing and resolving disputes rather than on obtaining a victory for one side or the other.[97] Approaching both gaming and resource issues in that manner, even if it is through another method of ADR, could lead the parties to think of the dis-

91. O'Connor, *supra* note 45, at 5.

92. Zion & Yazzie, *supra* note 42, at 72.

93. Garrett, *supra* note 46, at 43.

94. *See supra* note 81 and accompanying text.

95. *See generally* Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821 (1996). The author explicitly states her views on how the peacemaking process may be used outside of tribal situations. She explains the process briefly, but more importantly points out the benefits that arise from the use of a process akin to tribal peacemaking. *Id.* at 829. She mentions the possible use in neighborhood disputes due to the fact that it is in some ways similar to a tribal living situation because the parties must interact and co-exist beyond the current dispute. *See id.* The author supports peacemaking like resolution processes because they empower the parties and allow for a resolution to be reached without creating lasting anger or animosity. *See id.*

96. *See* Brienza, *supra* note 3, at 162. The author discusses potential problems with litigation. *Id.* The article goes on to point out that negotiation would be a potentially successful method of solving similar disputes. *Id.* at 168. Brienza advocates the use of ADR to resolve problems that exist between tribes and the governments, especially in the area or conflicts over the rights and use of resources. *Id.*

97. Costello, *supra* note 48, at 880. The article describes the process of peacemaking and its goals of restoring the parties to their prior relationship rather than one party scoring a victory over another as would occur in litigation. *Id.*

putes in a new manner and hopefully help them to reach a successful resolution with as little hostility as possible.

VI. CASE STUDY: THE PUYALLUP TRIBE IN TACOMA, WA

A good way to illustrate both the strengths and weaknesses of ADR is to examine an actual land dispute in Tacoma, Washington. It involved the Puyallup tribe of Indians in the Tacoma area and does not possess unique facts; rather, it is a dispute similar to those faced by tribes across the country.[98] The Puyallup tribe had received vast portions of land in the Tacoma area, including a large part of the city itself through a treaty in the past.[99] This treaty was ignored and much of the tribe's land was taken and used by the city and state governments.[100]

The tribe was forced to sue in federal courts to have their rights to the land in question determined judicially.[101] After a lengthy court battle, the tribe was determined to have rights to the land in that area.[102] The next step was to create a workable solution through negotiations because many residential areas and industrial areas were included.[103] Thus the use of ADR was particularly apropos in this instance because litigation would have been nearly impossible to manage, if feasible at all.

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98. Nadar & Ou, *supra* note 14, at 28. The authors mention that there are currently "several dozen disputes over American Indian water rights now in state and federal courts . . . ." *Id.* The authors also note that in the cases currently in the court system, the tribes first had to litigate the existence of the rights before they could litigate the application of those rights. *Id.* This is very similar to the facts of the Puyallup settlement, where land rights were litigated before the negotiations on the use of that land could commence. *See infra* note 94.

99. Kate Shatzkin, *A Historic Day for Puyallup Tribe: $162 Million Settlement Applauded, Denounced After Signing Ceremony*, SEATTLE TIMES, Mar. 25, 1990, at A1.

100. *Id.* The multiplicity of interests is apparent in the settlement as the money paid to the tribe came from several different sources. *Id.* The federal government paid 77 million dollars, the Port of Tacoma paid 43 million, the state of Washington paid 21 million with the remaining 11 million dollars coming from private property owners and companies in the area that was the subject of the negotiations. *Id.*; *see also* Hardeen, *supra* note 80, at A2. This article discusses the various terms of the deal. Tribal members over the age of 21 receive $20,000 in cash and the tribe gets several acres of waterfront property for them to develop, thus creating their own income stream. *Id.*

101. Hardeen, *supra* note 80, at A2.

102. *Id.*

103. Egan, *supra* note 78, at A1.

Instituting more of a peacemaking mindset could be even more beneficial. This would allow the parties to approach the situation not in a give and take mindset but in a problem solving mindset.[104] Ideally, the parties would focus on the problem and the factors to be considered and come out with the best solution for all involved. In Tacoma, the negotiations resulted in the tribe receiving $162 million dollars for giving up claims to land in addition to receiving hundreds of acres in prime industrial areas to help them develop an economic base for the tribe to gain self-sufficiency.[105] This appears to validate the positive aspects of using an ADR method to deal with these issues. However, it also illustrates that the tribe first had to fight a court battle just to get its land rights approved in the first place.[106] Perhaps all sides could have been better served if a mediator had stepped in at first rather than litigating over the initial rights. We will never know. Would peacemaking have better resolved this dispute? The fact is that several tribe members were unhappy with this settlement for a variety of reasons.[107] Perhaps the use of peacemaking would have been beneficial here. It appears unquestioned that incorporating peacemaking ideas and mindsets into conventional ADR holds large potential benefits. This example is one case where conventional ADR was used with some success.

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104. *See* discussion, *supra* note 89.

105. *See* Shatzkin, *supra* note 99, at A1; *see also* Egan, *supra* note 80, at A1. There have been many benefits to tribal members beyond the obvious cash benefits. Personal interview with Chad Wright, member of the Puyallup Tribe of Indians (Oct. 25, 2000). The tribe has been able to develop its own highly successful gaming site along some of the land they received in negotiations. *Id.* The tribe's economic base has grown and the members are able to be much more self-sufficient. *Id.* There have been non-pecuniary benefits as well. *Id.* The tribe has been able to create a fund to help support its members in their pursuit of higher education. *Id.* One member in particular has been able to attain a legal education and will return to the Tacoma area to practice law, specializing in Native American issues. *Id.* This is an illustration of how monetary benefits translate into long-lasting positive effects on the tribe and its members. This deal has been especially successful and the Puyallup Tribe of Indians has been able to reap very large benefits that continue to improve the tribe's situation as a result of the negotiated agreement. *Id.*

106. *See* Hardeem, *supra* note 80, at A1. This article detailed the process the tribe went through in reaching its final agreement. *Id.* This was an example where the tribe was forced to litigate the existence of its rights to the land through a pre-existing treaty before they could negotiate the extent of those rights with the members of the community. *Id.*

107. *See* Shatzkin, *supra* note 99, at A1. As with any deal there are always detractors. *Id.* Many tribal members felt that the negotiators had sold them out for money. *Id.* There was sentiment that the land being given up was invaluable and that money could never actually fully compensate the tribe for their loss. *Id.* Others expressed concern that throwing the large amounts of money at people who had never before had very much would be a waste, as the members would simply waste the money given to them. *Id.* However, the overwhelming feeling was that this was a positive step for the tribe, which would give them benefits far into the future. *Id.*

VII. CONCLUSION

This article has examined the traditional disputes which have arisen consistently between the federal government and various tribal governments in recent years. Oftentimes, Native Americans were given treaty rights to land and water as well as being guaranteed their own sovereignty. In many instances, those rights were ignored over the years until the tribes could begin to contest them, usually in a court battle. The advent of ADR has led to many disputes being ultimately resolved through mediation or negotiation. The traditional tribal method of dispute resolution is called peacemaking. It involves a cooperative process with the intent to restore relationships rather than declare a winner and a loser. In disputes like those presented here with a history of great animosity, it is apparent that any method of dispute resolution that may help repair those relationships would be beneficial. The Puyallup example shows how negotiation can be effective in allocating pre-litigated rights. The use of ADR before litigation, and the incorporation of aspects of the traditional peacemaking process into the resolution of these issues could save time and money, as well as positively change the attitudes of the parties to aid in the resolution of issues that arise in the future.