

Final OA Report on Problem-Solving Phase of Cerro de Oro Case

OA is pleased to present this final report on the problem solving-phase of the Cerro de Oro case. Although the report reflects inputs from the two parties to the case, it is not intended to be a consensus document and remains a product of OA's authorship.

Background

The Office of Accountability at OPIC (OA) received a complaint about the Cerro de Oro project in November, 2010. Based on the expressed willingness of the parties to participate, OA began convening a dialogue table in March, 2011. A chronology of OA activities with respect to this case through August, 2011 and background on the complaint itself can be accessed via the link <http://www.opic.gov/cerrodeorocomplaint>.

At the point when OA began to engage with the parties in January, 2011, the level of distrust between them was quite high. In particular, the communities expressed to OA that they had received little information about the project's characteristics, construction activities, and what permits had been obtained; they felt that the company had not fulfilled prior commitments made to them; and they were unsure about who to contact in the company with their concerns. For its part, the company maintained that it had followed all the procedures required by law and that the dispute had more to do with levels of compensation.

Early on, OA informed the parties to the complaint of its intention to support the dialogue through the point when an up or down decision on the project would be made. For reasons discussed below, however, in September, 2011, OA notified the parties of its intention to finalize the dialogue table and to seek a role for Oaxaca state authorities in reaching a final decision about the project. Accordingly, OA began engaging with the state authorities in October, and the result of that engagement culminated in the participation of state authorities in the November 14 meeting.

November 14 Meeting

OA convened a final dialogue table on November 14, which included the participation of not only the parties to the dispute, but also state, federal and municipal authorities. OA began the session by reviewing with the group the important progress that the dialogue table had made in support of the three previous agreements:

- The company has maintained a suspension of all construction activities throughout the duration of the dialogue as a measure to build trust with the communities, and ceded the decision about the project's future to the four communities.
- As requested by the communities, the company presented an alternative design to each of the four ejido assemblies on November 12 and 13. The alternative design complies with the parameters set forth in prior agreements based on the key concerns expressed by the communities.

- At these assemblies, the independent expert on dam safety presented his final report indicating that the dam is safe. At the request of the communities, the expert complemented his earlier findings by taking readings of certain instruments in the dam, although he stated that doing so was not necessary to reach his conclusions. He concluded that project construction will not affect the safety of the dam as long as it follows CONAGUA's approved procedures. The independent expert also presented his final report indicating that the water spring will not be at risk from construction of the alternative design.
- At the four assemblies, CONAGUA, the ultimate authority, confirmed that the dam is safe. Although CONAGUA also acknowledged the long term need to control vegetation on the dam and to reactivate some of its instruments, these factors did not preclude CONAGUA from making its judgment about the dam's current safety.
- Two other federal authorities had previously transmitted formal written communications on the project: the energy regulator (CRE) acknowledged receiving plans for the alternative design and called for the company to work with authorities to obtain the necessary permits for it. In response to a community's request for an investigation, Mexico's environmental regulator (SEMARNAT-PROFEPA) did not find that the project had violated Mexico's environmental laws.

OA continued the November 14 session by noting that, despite these important actions, there still existed substantial mistrust in the dialogue process and between the parties, as evidenced by the following:

- The July agreement called for the communities to notify OA and the company whether or not the alternative design provides a good basis for further dialogue. In their July 30 letter, the community authorities chose not to do so because of their continuing concerns about the dam's safety. (In OA's judgment, this notification would not have materially compromised the communities' ability to take a final decision on whether the project moves ahead.)
- During the assembly meetings on November 12-13, some community authorities questioned the credibility of the dam safety expert that they themselves had selected with the company's agreement. Community members continued to question the findings on dam safety based on their concerns about various risk factors. Though the parties had previously agreed to accept these findings, some communities resisted the expert's methodology.
- Community authorities in two of the assembly meetings said that they had made up their minds to oppose the project before they heard the company's presentation on the alternative design, which they had specifically requested the company to develop.
- Since the dialogue began and continuing up through the November meeting, each party has continued to accuse the other of violating various provisions in the written agreements they had negotiated, and to request OA's intervention.

Given the lack of trust that has persisted in spite of achieving substantial progress, OA asked the community representatives present in the meeting what other concerns they had about the project. Several representatives continued to voice reasons for their distrust, but no new concerns were raised that helped OA to understand the vehemence of their opposition. However, representatives from different communities did make comments that indicated they held divergent positions about the future of the project. In particular, Los Reyes (the community most directly affected by the project) expressed its support for the project, while the other three communities, two of which would only be indirectly affected, expressed opposition. In addition, one community member stated that the previous agreements reached in the dialogue don't matter.

Based on this discussion, OA confirmed that continuing the dialogue process any further was unlikely to lead to a resolution of the conflict, as called for in the March 11th agreement. OA did not take a position on whether the continuing level of distrust is rational nor on who is responsible for it, but simply that it inhibited further progress. (As convener, the OA Director was responsible for monitoring the dialogue's prospects for resolving the dispute to determine whether continued investment of public funds to support it was worthwhile.)

At that point in the meeting, OA announced that it was ending the dialogue process and turned the rest of the meeting over to Oaxaca state authorities. A representative of the Governor then led a discussion about next steps, and proposed holding community consultations. The representative stated that the project is a priority for the state government, but that the government would not over-ride the will of local communities. On November 29, the three communities that had indicated opposition to the project (Santa Ursula, Paso Canoa, and Cerro de Oro) in the November 14 meeting circulated a letter to OA and the company confirming their opposition to the project, adding a new reason that it is contrary to their vision of development.

OA greatly appreciates the time and energy that all parties invested in order to participate in the dialogue table. The process resulted in significant achievements -- improvements in the project's design to meet community demands, a commitment to fund participatory community development, an independent analysis that concluded that the dam and the water spring are safe, and increased attention by authorities to the dam's future safety.

The process ultimately ended without the parties reaching a resolution, as the four communities at the dialogue table are split. They have some common interests (e.g. dam safety) and some divergent interests (e.g. positive and negative impacts of project construction). In the end, their divergent interests outweighed their common interests with the most impacted community wanting the project to move forward while the others wanted it to remain stopped. It is not clear as of December, 2011, whether or how the dialogue's achievements will be carried forward.

OA's observations and lessons from the process

As this case constituted OA's first problem-solving dialogue, in order to maximize the potential for learning for future cases, OA offers the following observations and lessons from the process.

Standards for technical studies -- The parties agreed to commission an independent study of dam safety because the communities did not trust that public authorities were adequately protecting them against dam failure. For this study to have contributed to resolving the dispute, its findings needed to reduce the scope for ambiguity and for misinformed opinions about the dam's safety. Although the parties agreed to accept the results of the study and agreed that the expert would determine his methodology, the study did not fully serve OA's objectives because after the report was circulated some stakeholders said they did not find it credible.

Another approach may have helped to avoid this scenario. Under an alternative approach, the parties would still select an expert based on credentials, as did occur in this case. The selected expert would then provide services to the dialogue in explicit phases. The first phase would be for the expert to establish the standards against which dam safety would be measured and that respond to the questions posed by the parties. In this phase, the expert may also work with the parties to refine the questions to ensure that they can be addressed in a measurable and objective manner. If the parties agree to the set of standards, then the expert would be commissioned to proceed with the actual analysis. If not, the study would not proceed.

Flexibility in ground rules – It was useful for OA to build trust in the dialogue process by being flexible and deviating from established norms in conducting the dialogue (e.g. expanding the number of community participants beyond the community authorities, allowing videotaping of a meeting, allowing the participation of local politicians). In future cases, OA will continue to be flexible as long as the integrity of the dialogue table is protected.

Need for direct relationship – Affected communities have the right to secure outside support of their choosing. At the same time, in order to accurately identify and confirm the underlying interests of all requesters, the OA Director, its mediator, and other OA representatives must retain the ability to directly and freely engage with community authorities throughout the problem-solving process. Logistical constraints in engaging with community authorities and the March agreement by the parties for communications to be channeled through the communities' NGO representative inhibited OA's ability to understand the underlying interests of the requesters. To address this issue in future cases, the OA will establish a direct relationship with community representatives and will consider hiring its own local representative.

Free expression of interests – One pre-requisite for a successful dialogue is that parties express their true interests. OA became aware of a number of instances within and outside the dialogue table in which the right of a party to freely express its views at the dialogue table may have been inhibited through intimidation or fear of reprisal. Because OA did not have a direct relationship with the requesters, it was not able to protect everybody's right to freely express their interests. This situation underscores the need for OA to be able to establish a direct relationship with all parties, as per the above observation.

Involvement of public authorities – Early on, OA identified significant challenges to convening and mediating the dialogue that led OA to solicit the engagement of public authorities. (This was consistent with the previously expressed desire of the parties.) OA focused on the Oaxaca Governor's office, given

that it would have a broad perspective on the various dimensions of the conflict (e.g. regional vs. local, environmental vs. social vs. economic development), as well as a better understanding of the political context. Recognizing that public authorities may choose to play various roles in the dialogue process, OA will consider soliciting their involvement on a case by case basis when:

- there is a significant political dimension that is difficult for OA as an outsider to understand, much less manage;
- both parties believe that the participation of public authorities would add value to the dialogue process; or
- parties have reached an impasse under the OA-convened process.