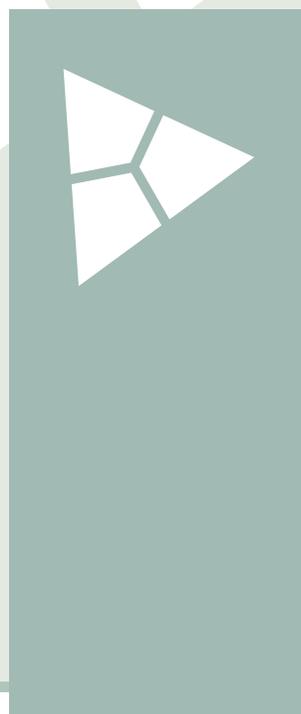
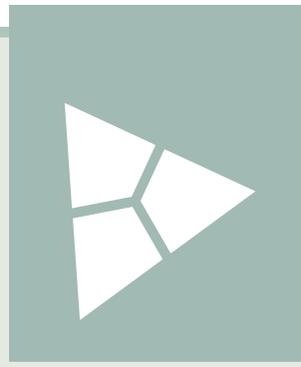
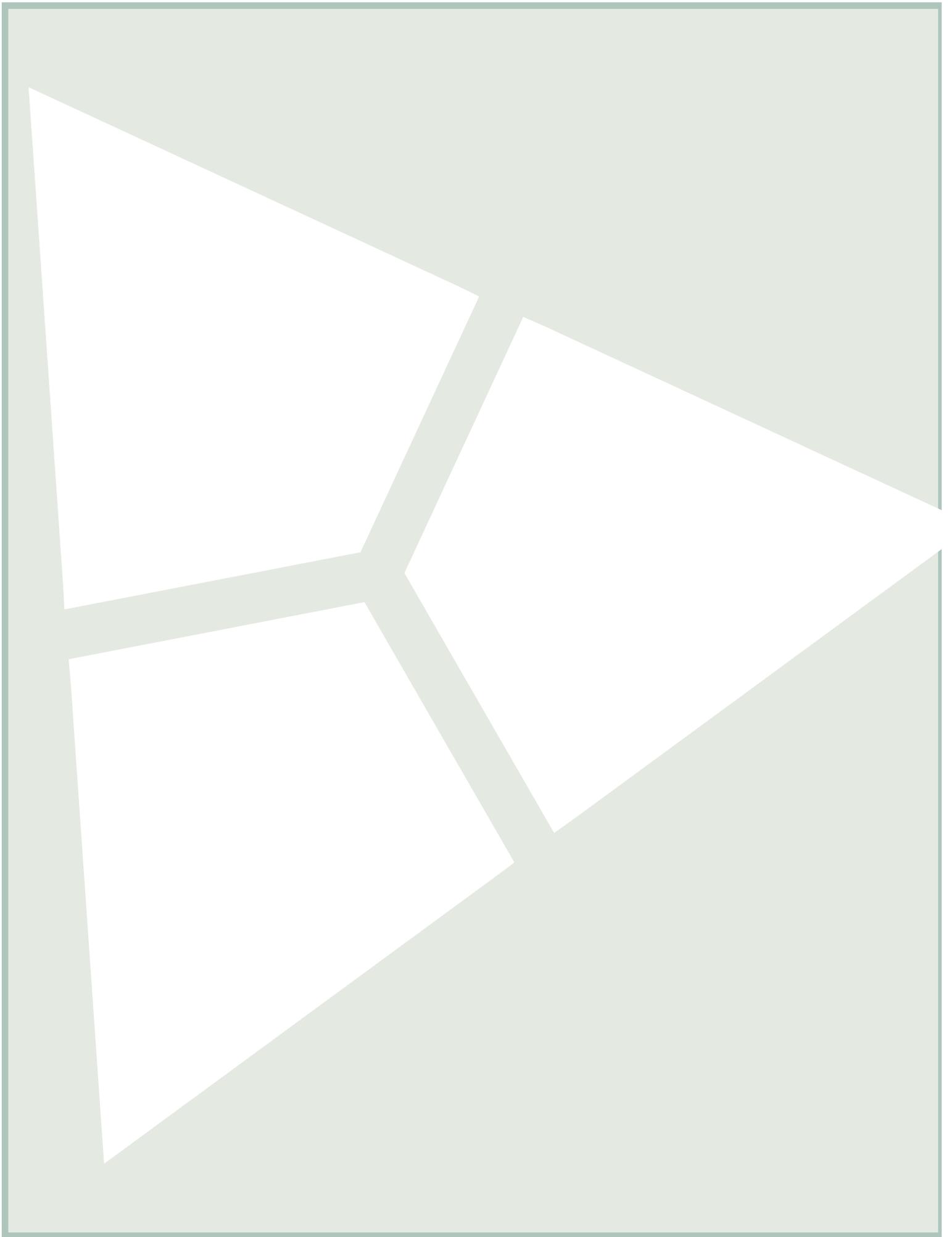


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Alternative Dispute Resolution
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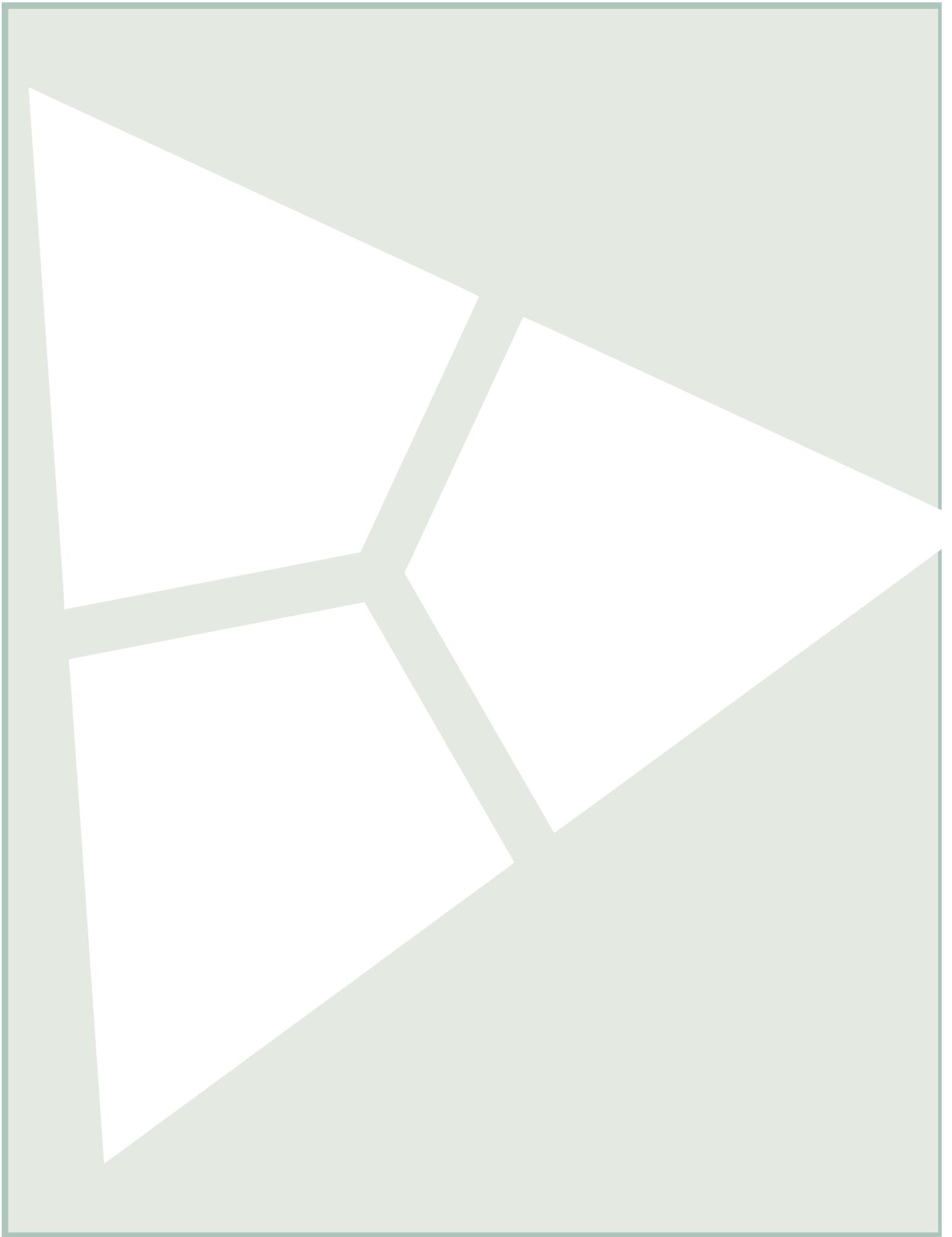
**Natural Resource Alternative Dispute Resolution
Tool Kit**

Compiled by:
John R. Schumaker, Ph.D.

September 1999

U.S. Department of the Interior
Bureau of Land Management

BLM/WO/GI-99/07+1400



Natural Resource Alternative Dispute Resolution Tool Kit

Compiled by:
John R. Schumaker, Ph.D.

This Alternative Dispute Resolution (ADR) Tool Kit was developed in 1996 by the Natural Resource Alternative Dispute Resolution (NRADR) Initiative Team of the Bureau of Land Management (BLM). The information in this document will be updated as the BLM gains experience in the use of ADR processes. BLM managers and staff are encouraged to update or add sections as they use ADR processes, and to suggest new items for inclusion that may be useful to other BLM offices. Updates will be posted on the NRADR home page at: www.blm.gov/nradr.

Acknowledgments

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William C. Calkins, New Mexico State Director, is the Executive Leadership Team sponsor for the NRADR Initiative.

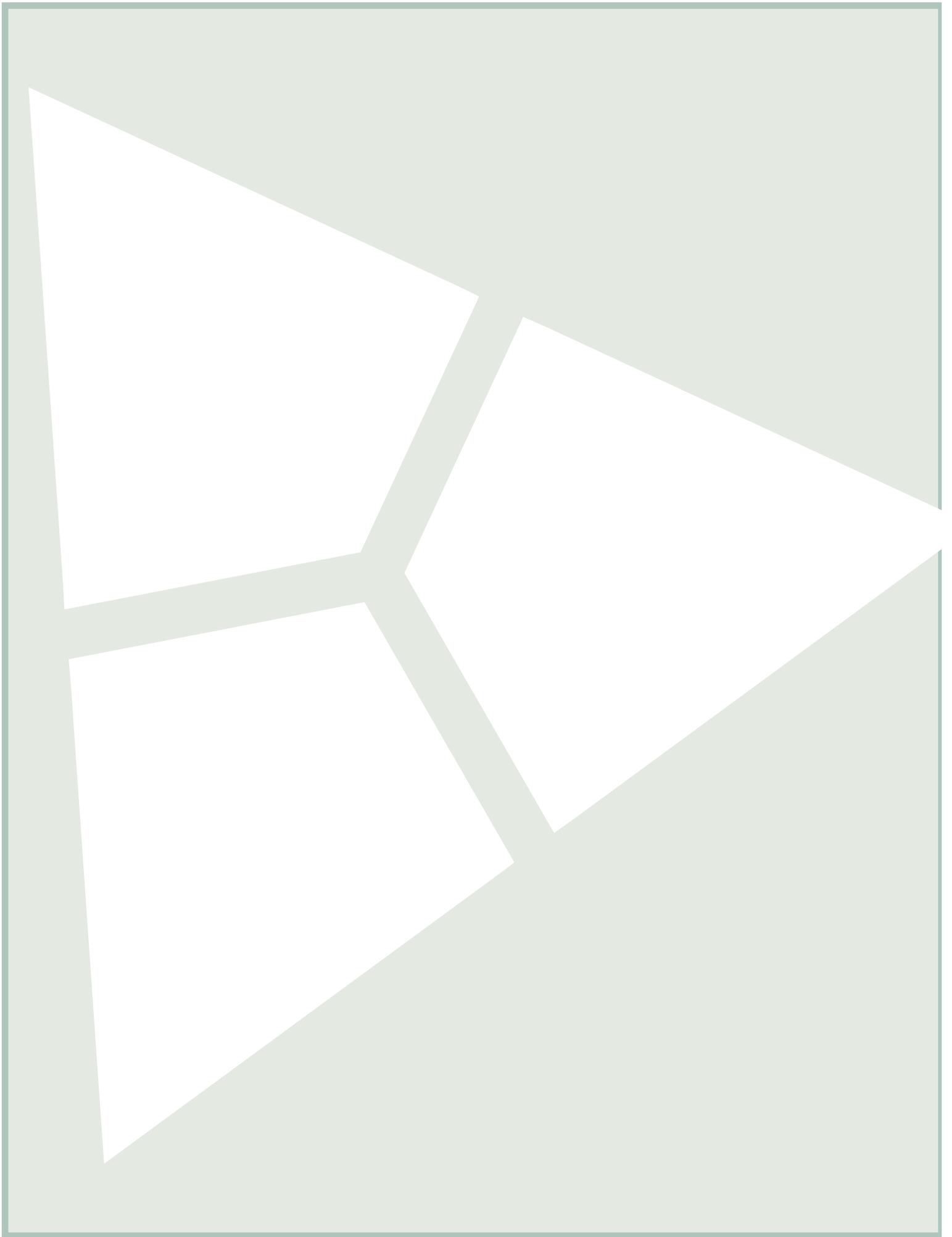
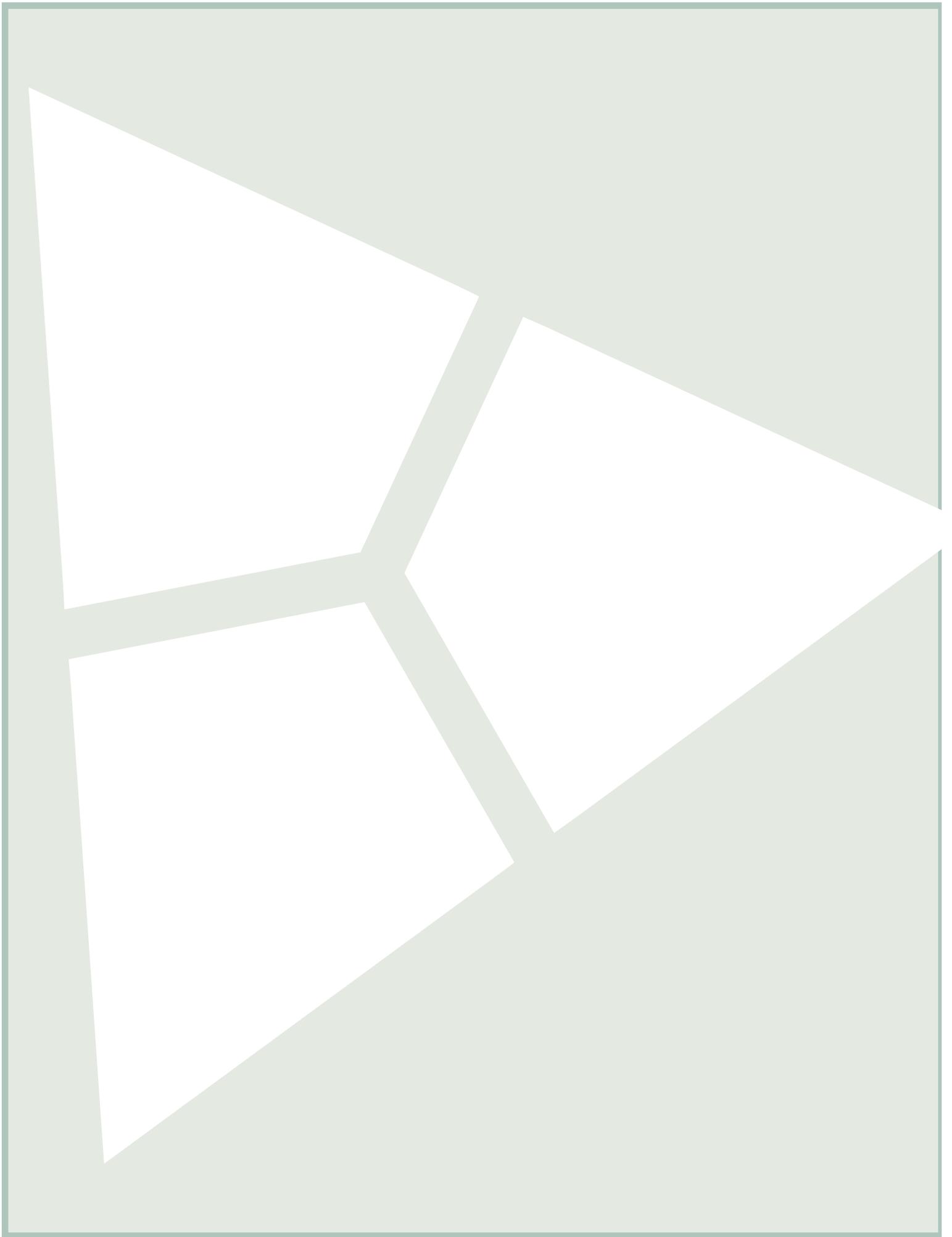


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Section 1. Glossary of ADR Terms

by John R. Schumaker, Ph.D.

This section is divided into three parts. The first part is intended to provide brief definitions of ADR terms for quick reference. The second part is intended to provide more detailed information about those ADR terms that may require further explanation. The third part provides the definitions of ADR terms as they appear in the United States Code (U.S.C.). This list of ADR terms is not all-encompassing. New terms and processes are being developed by ADR practitioners, but most of the newer processes are generally refinements or combinations of the processes defined here.

Brief Definitions

Alternative Dispute Resolution: Any procedure, other than litigation, used to resolve issues between two or more parties, including, but not limited to, conciliation, mediation, arbitration, hearings, negotiation, settlements, minitrials, factfinding, summary jury trials, private judges, or combinations of these techniques.

Arbitration: A process in which a third party(s) listens to the facts and arguments presented by the disputants and renders a decision. The decision may be binding or nonbinding depending on the prior agreement between the parties. Arbitrations are normally much less formal than a court.

Conciliation: A form of dispute resolution similar to mediation in which the emphasis is not only on the resolution of specific issues in dispute but also on the repair or establishment of relationships between parties who had or need to have an ongoing relationship. In contrast to mediation, third parties who assist with conciliation need not be necessarily neutral.

Consensus Building: Uses ADR processes such as negotiation, facilitation, or mediation to address issues before serious and protracted

disputes arise. Consensus building and collaborative decisionmaking are often used interchangeably. By bringing all affected parties (the stakeholders) into the process as early as possible, the consensus-building procedure has been effective in resolving major multiparty, multiagency, multigovernment environmental problems. The mediators in this forum may take a proactive role in defining the stakeholders; getting stakeholders to agree to the mediation effort; guiding the process; and upon reaching resolution, administering the process of documentation by getting the final approval and signatures from authorized decisionmakers.

Convening: Helps to identify issues in controversy and the affected interests. The convener generally determines whether direct negotiations among the parties would be a suitable means to resolve the issues, and if it is, the parties are brought together for that purpose.

Early Neutral Evaluation: An informal process whereby the parties or the court select a third party neutral to investigate issues and submit a report or testify in court (Department of Justice, 1992, which expanded upon President Bush's Executive Order 12778 on Civil Justice

Reform, dated October 23, 1991). The neutral may help the parties develop a discovery plan, identify areas of agreement and disagreement, and explore settlement opportunities, or may offer an overall evaluation of the case. The procedure is nonbinding, and generally, the results are not admissible in court. This procedure appears to be a variation of factfinding, although the Department of Justice guidelines specifically identify factfinding as a separate procedure. This is an example of the many variations in terms and procedures found under the ADR umbrella. It is essential that parties in a dispute and their representatives/advisors understand the differences in terms and procedures.

Facilitation: A process in which one or more individuals assist meeting participants in maintaining direction and focusing on agreed-upon agendas. Facilitators are often meeting managers, whose skills are in making adequate meeting arrangements, keeping track of proceedings, and assisting the meeting director or moderator in conducting a meeting. The line between facilitation and mediation is often indistinct and the terms are sometimes used interchangeably. Both use unbiased, neutral language to communicate with all parties. It is common for a mediator to be a facilitator, but not the reverse.

Factfinding: A process in which a neutral third party is retained by the parties involved or appointed by an appropriate authority to gather evidence and determine the facts in a dispute. Factfinding is an advisory and nonbinding process, but the factfinder may be asked to provide recommendations.

Hearings: In the ADR sense, these are informal dispute resolution forums in which a "hearing" officer is designated by appropriate administrative authority such as a city ordinance or Federal statute. This differs from formal

hearings before an administrative law judge in formal administrative adjudication forums such as the Interior Board of Land Appeals.

Med-Arb: A process in which the parties have agreed to first attempt to resolve their differences by using a mediator, and if unsuccessful, to proceed to have the dispute arbitrated. The neutral(s) who serves as the mediator may or may not serve as the arbitrator, depending on the prior agreement between the parties.

Mediation: A dispute resolution process whereby a neutral third party(s) acts to encourage and facilitate the resolution of disputes without the power to prescribe a solution. Mediation programs may be voluntary or mandatory. Mediator selection may be decided by the parties or may be imposed by prior agreement or by a court. Mediation processes are varied and often are the result of the style of the mediator.

Minitrial: A very private, voluntary, generally nonbinding procedure. It is an informal summary of the parties' positions before a neutral moderator or advisor. A retired judge is often used as the neutral advisor. The minitrial is conducted in the presence of high-level management representatives who have the authority to settle the case. The purpose is to reveal the theories, strengths, and weaknesses of each side as an aid to resolve the case. Settlements often occur immediately after minitrials.

Negotiated Rulemaking (Reg-Neg): A process in which the content of a proposed rule is developed through negotiation by representatives of affected interests, including the agency. The Negotiated Rulemaking Act of 1990, Public Law No. 101-648, which was made permanent in the 1996 Administrative Dispute Resolution Act, provides this authority.

Negotiation: A form of dispute resolution that is conducted directly between the parties or their agents. Negotiation covers a wide range of communications that take place to resolve differences or to cause people to agree to a common goal or resolution of issues. The key to the definition is that third-party neutrals are not involved in the process. Negotiations are typically private and controlled by the parties as to content, timing, and structure. Some negotiations can be described as legal; other negotiations may not involve resolving existing or potential legal points (Williams, 1986).

Ombudsman: A person who serves as an investigator, red tape cutter, and/or facilitator for complaints, questions, or issues brought forward by clients, users, or employees of the ombudsman's employer. An ombudsman may be appointed by ordinance, statute, an association, a particular business, a Federal agency, or other means. An ombudsman generally serves by appointment, and in most cases, is not a true neutral. The ombudsman generally gains power and authority through personal ability to gain trust and to solve problems and disputes among members within an organization or community through the support of the officer who appointed the ombudsman (Sander, 1975).

Private Judges or Rent-a-Judge: A fairly new innovation by some private dispute resolution firms and some courts (Lovenheim, 1989). Retired judges typically are used to hear these cases, which would have been taken to a real court; the parties are responsible for costs and agree in advance to accept the decision as if it were a real court decision. Courts will sometimes, at the request of the parties, appoint a referee to preside over a private trial. The private judge's decision has the same force and effect as a decision by the court. The advantages of this process are speed, privacy, and the ability

of the parties to select a judge with expertise in the disputed matter.

Settlement: A form of dispute resolution that normally takes place after formal charges or complaints have been filed in court or with formal agency dispute resolution systems and before the adjudicator, judge, or arbitrator has rendered a decision.

Settlement Judges: Serves essentially as mediators or neutral evaluators in cases pending before a tribunal. The settlement judge is usually a second judge from the same body as the judge who will ultimately make the decision if the case is not resolved by the parties. Magistrates in the Federal court system often serve as settlement judges and may compel attendance of senior officials and business heads who have decisionmaking authority.

Stakeholders: All the individuals, organizations, and agencies that meet the definition of a "party" found in Title 5. In general, this means all citizens, businesses, and institutions, public and private, that have standing and will be affected by decisions relating to an issue in controversy.

Summary Jury Trial: Court-run programs designed to give the parties a peek at how a real jury might decide their case without going to the expense and time of a real trial. It is a short proceeding, generally one-half to one day, in which the attorneys for the parties to the dispute are each given about an hour to summarize their case before the jury and the judge gives a brief explanation of the law. The jury's decision is nonbinding unless the parties have agreed to accept it as binding ahead of time. One advantage of a summary jury trial (SJT) is that it gives parties who can't afford a full trial their day in court. Settlements often occur immediately after SJTs.

Expanded Definitions

Alternative Dispute Resolution: ADR is any process used to prevent, manage, or resolve conflicts using procedures other than traditional courtroom litigation or formal agency adjudication programs where a "judge" issues a decision or an order based on the merits of the case as presented by lawyers or disputing parties. In almost all cases, in the traditional litigation processes, the presentation for the parties is done by their attorneys and the parties are only observers or carefully controlled witnesses. These formal processes often preclude the introduction of nonlegal concepts, discussions, and solutions even when they may be the best solutions to the conflict. Conversely, in many ADR processes, the parties in dispute speak for themselves even when their attorneys are present. Studies show that parties to mediation are more likely to comply with the terms of the agreement reached in mediation because the parties have a direct voice in presenting their information and in developing terms of agreement (Dennison, 1993). This compliance benefit, in addition to benefits in flexibility, cost reduction, time savings, confidentiality, informality, and preserving relationships may be the most valuable reason for using ADR processes.

ADR, when broadly defined, also includes activities to resolve disputes after they have been taken to court or a formal agency forum. Many ADR programs are court-connected. When a complaint or suit is filed in a court system, the court orders an alternative to the court process before the point at which a decisionmaker, the judge, must issue a decision or order. An increasing number of courts are adopting ADR procedures, mediation in particular, which direct parties in dispute to try to resolve their problems with the assistance of a mediator. ADR is popular with the courts because the quality of agreements is improved,

and resolution time, costs, and case loads are reduced.

Arbitration: Arbitration is a process whereby a neutral third party or panel listens to the facts and arguments presented by the disputing parties and renders a decision that may or may not be binding in accordance with the prior agreement made between the disputing parties. Formal rules of evidence, including those related to hearsay, are often set aside and it is left to the arbitrator(s) to determine the truth and value of the evidence in the documents and testimony presented to them.

Mentschikoff (1961), of the University of Chicago Law School, described commercial arbitration using three different models: umpire, adversary, and investigatory:

▲ **Umpire Model:** Usually a single person is entrusted to make a decision without the participation of the parties, but at the instigation of one or both parties. Disputes typically resolved using this model are characterized by four factors: 1) the monetary amounts and the affect on the parties and their group are relatively small, 2) standards and norms are relatively clear to the parties and their group, 3) the parties desire a speedy settlement, and 4) the facts are clearly discernible by the umpire. This model frequently is used by trade or commercial groups and its chief value is the speed and economy of the decision. Decisions are not unlike those made by traffic cops or quality inspectors in the commercial sector. The umpire rarely has the power to make the rules but merely applies rules made by the body representing the parties.

▲ **Adversary Model:** Disputing parties control whether to use the procedure, what issues to present for decision, and what data and

arguments to present. The burden of investigation and case preparation is on the disputing parties. Some segments of society may have established prior ground rules for this model. For example, the Better Business Bureau (BBB), in its automobile arbitration agreement with automobile manufacturers, has established rules that allow consumers to bring complaints to arbitration. The manufacturers have agreed to abide by the decision of the arbitrator while allowing the consumer to accept or reject the decision of the arbitrator. Customizing the process as in the BBB agreement is typical for many commercial arbitration agreements, including those for brokerage houses and medical groups. Probably the most common and easily recognized form of adversary arbitration is typified by labor-management arbitration programs.

▲ **Investigatory Model:** Groups use this process to keep their members, licensees, or regulated businesses in line and to make offenders obey established standards of practice. It is characterized by decider control. An entity, for example, a professional association's ethics committee, rather than a party, decides if the party has violated group norms, if a dispute needs to be adjudicated by an arbitrator, what issues will be considered, and what data and arguments will be accepted. The burden of initial investigation and case preparation is on the deciders. This model and a submodel, the investigatory-parental model, are typified by the proceedings of some administrative agencies, commercial groups, and ethics and business practices committees of commercial groups.

Arbitration programs also can be characterized by the approaches taken by the American Arbitration Association (AAA) and by typical self-contained trade groups (Mentschikoff, 1961). The primary differences in these

approaches relates to the precedence value of arbitration decisions and the manner in which decisions are enforced. Both approaches take the general position that the courts are not available for final determination of the legal issues and errors in law are not grounds for setting aside an arbitration award. The principal legal question of enforceability of an arbitration award by the courts in the United States relates to questions of procedure (Mentschikoff, 1961):

▲ The AAA rules and regulations were set up primarily to ensure that its awards would not be set aside by the courts on procedural grounds. The AAA deliberately follows a system that discourages precedent setting by requiring its arbitrators not to write opinions, but to state only the amount of the award. The AAA looks to the courts to enforce arbitration decisions made by AAA-sponsored arbitrators, but not to review the substance or procedures. The AAA encourages parties to be represented by attorneys (Mentschikoff, 1961).

▲ Most self-governing trade groups, on the other hand, see great value in establishing precedence through their arbitrators' awards and awards are enforced by using internal sanctions against its members. These groups often discourage or expressly forbid the use of attorneys to represent the disputants. Self-governing trade groups try to avoid review by the courts (Mentschikoff, 1961)

Other programs use combinations of these methods that best suit their needs. The BBB requires written decisions. Decisions are reviewed closely by the BBB staff to ensure that correct procedures were followed and the arbitration agreement was adhered to, and to ensure that decisions are linked directly to the request for arbitration from the consumer. The

decisions of the arbitrators have no precedence value. The BBB discourages the use of attorneys and relies on trained community volunteers to serve as its arbitrators.

Labor relations arbitration is similar to a judicial proceeding and results in a written decision justified by reference to general principles, yet the arbitrator's decision has no precedence value. In Federal labor relations procedures, however, a form of precedence is used because arbitrators in Federal labor disputes must follow the precedents established by rulings of the Merit Systems Protection Board (MSPB) for those issues that can be appealed to the MSPB.

The opportunity to establish a variety of arbitration programs is evident. In some programs, the arbitrator's decision is binding on both parties, as in many labor management programs, for example. In other programs, one party binds itself to the decision of the arbitrator but allows the other party the right to accept or reject the decision, for example in the BBB's autoline program. There are also programs that allow both parties a nonbinding option, which then moves the process toward a factfinding process instead of an arbitration.

Conciliation: Conciliation usually means a form of third-party intervention or mediation in which the emphasis is not only on resolving disputes, but also on repairing or reestablishing good relations among parties who need ongoing relationships. It would be difficult to distinguish the American Bar Association's (ABA's) definition of a therapeutic mediation from the definition of a conciliation effort. The key difference may rest on the relationship of the parties. Conciliation relates to those who have close or personal continuing relationships such as family, neighbors, or close business associates. This is the forum used by many community dispute resolution panels, usually trained

volunteers, to resolve civil disputes between members of a community. Consideration and resolution of issues involving "feelings" between parties are as important as or more important than the resolution of the substantive issue in dispute. In community mediation or conciliation programs, it is common to find that the complaint first presented, for example, a barking dog, is often a superficial expression of another problem, often a longstanding, underlying dispute that surfaces because feelings are admissible.

Some practitioners contend that there is no difference between the terms mediation and conciliation and that the meanings arose from the name of the Federal Mediation and Conciliation Service (FMCS). One story is that both terms were included in the agency's name because one house of Congress used the term conciliation and the other used the term mediation in the bills that created the FMCS. The conference committee used both to resolve a conflict over the semantics. Research into the legislative history of the FMCS might prove whether this is true or not.

Factfinding: Factfinding or an inquiry is a process in which a neutral third party is retained by the parties in dispute or appointed by an appropriate authority to gather appropriate evidence to determine the facts (Sander, 1975). Factfinding is advisory and nonbinding, but the factfinder can be asked to provide recommendations to the parties. Factfinding is often preliminary to labor-management negotiations between parties such as teachers and school boards. Factfinding can be a powerful inducement for settlement, especially when the appointed factfinder commands the respect of the parties and other observers of the dispute. The appraisal or recommendations made by the independent factfinder are often difficult for parties to reject. In addition, a factfinder can be particularly valuable when there is a wide

disparity in the bargaining power of the parties (Sander, 1975).

Hearings: In the ADR sense, hearings are informal dispute resolution forums in which a "hearing officer" is designated under an appropriate administrative authority such as a city ordinance or a Federal statute. An informal meeting is conducted to determine if an ordinance or rule is applicable or has been violated. This definition of hearing differs from a "hearing" held by an administrative law judge (ALJ) for an organization such as the Interior Board of Land Appeals (IBLA). Hearings over which an ALJ presides are generally part of the formal administrative adjudicative process established in Title 5, U.S.C. The ADR Act describes these hearings, as well as court processes, as increasingly cumbersome and inefficient.

There are other approaches to hearings. One example of an ADR-type hearing is the procedure prescribed in a Boise, Idaho, city ordinance to determine if an animal is "vicious." A determination of viciousness carries sanctions and insurance requirements for the owner of the animal. The decision of the hearing officer using this ordinance is appealable to the district magistrate court. Another example of a hearing is a provision in the Federal statutes that allows a Federal employee to challenge a ruling made by an administrative officer to garnish an employee's wages for the recovery of a debt owed to the Federal Government. The decision of the hearing officer in this case is binding on the government but not the individual. Hearings of this nature might be classified as arbitrations by Mentschikoff (1961).

MEDALOA™: The AAA announced a new procedure in November 1993 called "Mediation and Low Offer Arbitration" or MEDALOA. In this process, parties are encouraged to try to settle their dispute in a mediation session, but if

all issues cannot be resolved, the unresolved issues are submitted to an arbitrator. Each party submits its final demand and final offer to the arbitrator, who then must select between the two positions presented by the parties (World Arbitration & Mediation Report, 1994a).

Med-Arb: Med-arb is a combination of mediation and arbitration processes (Sander, 1975). Parties often agree to try to work out their differences first through mediation, but if mediation does not work, parties then agree to proceed directly to arbitration. The parties agree in advance on how to declare the mediation effort unsuccessful and who has the authority to do so. This may be the mediator or one or both of the parties. The initial agreement usually addresses who the arbitrator will be. Some agreements call for the mediator to change hats and become the arbitrator; however, another school of thought is that the mediator has become too involved and has too much confidential information to act as an unbiased arbitrator. In this case, a new neutral party is selected to arbitrate the case (Sander, 1975).

The AAA supports the med-arb process by the way its administrative fees are structured. Parties who use the AAA to arrange a mediation pay a relatively modest fee to AAA for the administration of the mediation effort. In those cases where mediation is unsuccessful, AAA deducts the mediation administrative fee from the arbitration administrative fee. The fee includes scheduling, meeting places, notifying parties, and providing names of mediators and arbitrators from their lists of recommended ADR professionals. Parties make their own fee agreement with the mediator or arbitrator.

Mediation: Mediation is a process by which a neutral third-party or panel acts to encourage and facilitate the resolution of a dispute without the power to prescribe the solution. The

Standing Committee on Dispute Resolution of the American Bar Association (1993) describes mediation as "...usually a private, voluntary, informal process where a party-selected neutral helps disputants to reach a mutually acceptable agreement" (Hinchey, 1992). Mediation programs go beyond this definition because some are mandatory and others do not provide the disputants with the option to select the mediator. There may be as many forms of mediation as there are disputes, but the format for conducting a mediation falls into several basic styles. These differences primarily involve who the mediator is, the focus of the mediation effort, and the manner in which the mediator or mediation panel conducts its business. It is common for disputing parties to agree on selecting the mediator.

The ABA committee defines the basic types of mediation as rights-based, interest-based, and therapeutic. The definition of each depends on how much emphasis is placed on the legal principles or rights in the dispute; problem solving based on the crafting of ingenious solutions outside the legal principles involved; and, finally, those situations in which the level of emphasis on feelings and emotions is equal or superior to the emphasis on legal issues (Hinchey, 1992):

▲ Rights-based mediation is most familiar to the trial lawyer. A lawyer may be involved either as the nonparty neutral or as the parties' representatives. The goal is to settle a dispute with attention given to the identified legal rights of the parties.

▲ Interest-based mediation is more free-wheeling with less attention given to the individual legal rights of each party, but with a focus on the parties' interests or compelling issues of the dispute. Interest-based mediation is typical of many natural resource disputes.

▲ Therapeutic mediation focuses more on the problem-solving skills of the parties involved. The mediator may emphasize the emotional dimensions of the dispute. Often, the parties discuss ways of handling similar conflicts in the future.

Another way of describing mediation processes divides mediation into two models, the evaluative and transformational models. These models are similar to those described by the ABA. Evaluative mediation consists of analysis of potential risks and benefits in a continued course of action; i.e., litigation or arbitration. This style is preferred by many attorney mediators and allows the mediator to express his/her evaluation of the strengths and weaknesses of each party's case. There are ethical concerns within the legal community about this style of mediation since it may be seen as providing legal advice by the same attorney to both parties. It may also tend to be confrontational and border on the adversarial process found in our legal systems. Transformational mediation focuses more on emotional and personal issues such as relationship building (Herrman and Ashbaugh, 1994).

Another way to explain mediation is by the manner in which parties interact with each other and with the mediator(s). One form of mediation emphasizes direct face-to-face meetings of the parties in dispute in a process where all parties are present nearly all the time. The disputants or their spokespersons conduct direct dialogue with the other disputants once a third party, the mediator, has established communications between them. The role of the mediator then becomes one of an educator, keeping the discussions on track and ensuring that effective communications are maintained. The mediator may or may not become involved in helping to formulate solutions. A mediation effort conducted by Thomas Colosi of the

American Arbitration Association (AAA) for the U.S. Forest Service's Klamath National Forest in northern California appears to be a successful example of this form of mediation. The dispute involved proposed timber sales after a wildfire had burned about 260,000 acres in 1987 (Alternative Dispute Resolution Report, 1988).

Commercial or business mediations tend to be conducted without the parties meeting face-to-face except during some preliminary meetings and at the conclusion of the mediation. In this style of mediation, the mediator holds confidential private sessions (caucuses) with each of the parties. The mediator then works or "shuttles" between the parties to convey attitudes, information, and proposals, ever careful not to violate confidences shared in the private sessions. The mediator may or may not take a proactive role in developing solutions or approaches for resolving the dispute. The role or style of the mediator may be defined in advance or may arise based on the individual style of the mediator or the parties' sophistication with mediation. While this process may look like a negotiation, the key distinction is that in a mediation, the agent, who is the mediator, is neutral, whereas in negotiation, the agent(s) represents one or more of the parties.

A typical commercial or business mediation will resolve a conflict, for example, between a contractor and subcontractor, by developing solutions that work but that may not be those arrived at in a court of law. The parties may look at areas such as contract adjustment, apologies, debt structure, future business, timing, ownership, control, exchange of services, and cost avoidance. The objective is to design a solution that minimizes loss or damage and maximizes the chance of all parties to stay in business. As observed by Sander (1975), it is the ingenuity in the potential solutions that can be reached between the parties in mediation

that places it beyond the capability of the formal adjudicative systems.

Labor relations mediations are often conducted in an aggressive style in which the parties use the mediator to convey proposals, feel out the opposition, continually narrow differences, and attempt to influence one party to accept the other party's position. This style, and international mediations such as the shuttle diplomacy conducted by former National Security Advisor and Secretary of State Henry Kissinger, are the more visible forms of mediation in the U.S. and often are seen as the "correct" way to conduct mediations.

Mediation can also be used in consensus building. An example of a successful consensus-building mediation that focused in conflict prevention was the exhaustive effort to clean up PCBs in the New York Bight (McCreary, 1989). This effort incorporated use of active third-party neutrals, mediators, to build a consensus agreement among many parties and resolved a major environmental problem without resorting to lawsuits or appeals to agency administrative adjudication forums. The mediators in this example took a proactive role in defining the stakeholders; getting them to agree to the mediation effort; guiding the process; and, upon reaching resolution, administering the process of documentation, and obtaining final approval and signatures from authorized decisionmakers.

Another type of mediation is referred to as "Michigan-type" mediation (Department of Justice, 1992). This mediation model can result in an award by the mediator. A decision in 1993 in the Michigan courts ruled to affirm an order that stated the parties may agree to a modified mediation procedure in which the recommendations of the mediator were binding (World Arbitration & Mediation Report, 1994b). This

has many characteristics of the med-arb procedure described below.

Mediation programs also may be defined on the basis of their relationship to the court system. Many programs are a function of the court and are referred to as court-connected, as in many jurisdictions for family law such as child custody. The mediations may be arranged voluntarily or may be the result of a court order. Many jurisdictions have programs in which the mediators are part of the court staff and mediation sessions are free of cost to the parties in dispute. Other jurisdictions have established referral services to private practitioners, which may or may not be free to the parties involved.

An unabated debate continues over whether or not disputants in family courts should be required to pay for court-ordered mediation. There appears to be little debate over this issue in other arenas. Normally, parties in dispute share the cost of mediation unless other specific arrangements or agreements have been made.

Many mediation activities are operated independently of the courts. Examples are business mediations conducted within their own structure or with the assistance of organizations such as the AAA. Other examples are the community-based mediation or neighborhood justice programs such as the Sounding Board in Boise, Idaho. This program responds to requests for mediation from members of the community, accepts court or police referrals, and also accepts referrals from municipal departments such as planning and zoning commissions.

Minitrials: Minitrials are voluntary, private, and generally nonbinding procedures (Ury and others, 1989; Harter, 1987). Informal summaries of the opposing parties' cases are presented to a jointly selected moderator or neutral advisor. Retired judges frequently are used as neutral

advisors. Minitrials are conducted in the presence of high-level management representatives who have settlement authority. The purpose is to reveal the theories, strengths, and weaknesses of opposing positions to the parties as an aid to resolve the dispute. The neutral advisor may or may not give opinions to the parties about the strengths and weaknesses of their case. Minitrials have been used primarily between disputants in commercial cases and have been used successfully by the U.S. Army Corps of Engineers (Edelman and others, 1989; Harter, 1987). Minitrials may have future potential in the administrative adjudication processes established by each agency. For example, the Department of the Interior's proposed policy for ADR announced in the Federal Register on June 13, 1994, specifically mentions using minitrials within the agency. The most probable use would be by administrative law judges in the Office of Hearings and Appeals.

Settlement: Settlement may be described best as a form of dispute resolution that occurs after claims or complaints have been filed in a formal dispute resolution forum. A typical settlement scenario takes place on the courthouse steps immediately before the beginning of a trial. Trial attorneys make last-minute settlement offers on behalf of their clients and, if accepted, "settle" the dispute. A number of court jurisdictions have established programs to appoint settlement masters and settlement judges to help the parties before proceeding with a court case (Joseph and Gilbert, 1989). Whether an ADR activity can be described as a settlement depends on the time, place, and circumstances of communications that resulted in resolving the issue in dispute. Judges may decide to participate in settlement efforts by directing parties to seek settlement before proceeding with a case. As an example, administrative judges for the Federal personnel appeals authority, the Merit System Protection Board (MSPB), now routinely require agencies and

appellants to enter settlement discussions before judges will proceed to adjudicate the case.

The Department of Justice has issued guidelines that reaffirm the limits of monetary settlement that can be exercised by Federal officials in litigated cases. The authority to settle is restricted to assistant U.S. Attorney's limited to settlements under \$500,000; up to \$2 million for the Assistant Attorney General, and all authority over \$2 million resting with the Associate Attorney General (World Arbitration & Mediation Report, 1992).

Summary Jury Trial: The summary jury trial is a court-annexed, court-run program (Lambros and Shunk, 1980). The purpose of a summary jury trial is to give the parties in dispute a peek at how a jury might decide their case without going through the expense and time required for a full trial before a jury. The jury is selected from the normal panel of jurors available to the court.

The summary jury trial was pioneered by Judge Thomas D. Lambros of the U.S. District Court for the Northern District of Ohio (Lambros and Shunk, 1980). It is a short proceeding, generally one-half to one day, in which attorneys for the parties in a dispute are each given a

short period, about an hour each, to summarize their case before the jury. Introduction of evidence is limited and witnesses normally are excluded from the proceeding. After the attorneys complete their presentations, the judge gives the jury a brief explanation of the law, after which the jury goes into deliberation. The jury gives a consensus opinion, or if they are not in agreement, the views of each member are given. Jury verdicts are advisory only, unless the parties have agreed to abide by the decision of the jury. One advantage of a summary jury trial is that it gives parties who cannot resolve a dispute by other means their day in court without the cost of a full trial (Lambros and Shunk, 1980).

An example of the value of this process was evident when a 2-day summary jury trial conducted by a Federal judge for the U.S. District Court for New Mexico in 1990 resolved a multibillion dollar antitrust suit that involved a lease agreement for 300 million tons of coal. The court action had been going on since 1981 at a cost of \$60 million in pretrial expenses, and trial costs were estimated to cost at least as much. Judge Lee R. West, who conducted this summary jury trial, has conducted 117 such trials; settlement was reached in all but 38 cases (Alternative Dispute Resolution Report, 1990).

Definitions Found in 5 U.S.C. 551 and 552

Adjudication: Section 551 (7) states "'adjudication' means agency process for the formulation of an order."

Administrative Dispute Resolution Act of 1996: Public Law 104-320, Nov. 15, 1990, to authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and other purposes.

Administrative Program: An administrative program includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in the 1990 ADR Act.

Agency: Agency means each authority of the Government of the United States, whether or not it is within or subject to review by another

agency, but does not include the Congress, the courts of the United States, the governments of the territories or possessions of the United States, the government of the District of Columbia, or others as listed in 5 U.S.C. 551 (1).

Alternative Dispute Resolution (ADR):

According to the ADR Act, alternative means of dispute resolution means "any procedure that is used, in lieu of an adjudication as defined in section 551 (7) of this title, to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof."

Award: Award means any decision by an arbitrator resolving the issues in controversy.

Dispute Resolution Communication: Dispute resolution communication means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.

Dispute Resolution Proceeding: Dispute resolution proceeding means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate.

In Confidence: In confidence means, with respect to information, that the information is provided (a) with the expressed intent of the source that it not be disclosed; or (b) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed.

Issue in Controversy: Issue in controversy means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement between the agency and persons who would be substantially affected by the decision.

License: License includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

Licensing: Licensing includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

Neutral: Neutral means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.

Order: Order means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

Party: Party means, for a proceeding with named parties, a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes, and for a proceeding without named parties, a person who will be substantially affected by the decision in the proceeding and who participates in the proceeding.

Person: Person includes an individual, partnership, corporation, association, or public or private organization other than an agency.

Roster: Roster means a list of persons qualified to provide services as neutrals.

Rule: Rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the

future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Rule Making: Rule making means agency process for formulating, amending, or repealing a rule.

References

Administrative Dispute Resolution Act. Act of November 15, 1990. Public Law 101-552, 104 Stat. 2736, 1990.

Alternative Dispute Resolution Report. Two-Day SJT Settles Antitrust Action That Cost \$60 Million Over Nine Years. 9. 1990.

_____. Forest Service Considers Mediation after Resolving Timber Sale Dispute. 23. 1988.

Dennison, Mark S. Using Mediation to Resolve Land-Use Disputes. Zoning News, May 1993: 1-3.

Department of Justice, Civil Division. Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts. Washington, DC, August 1992.

Edelman, Lester, Frank Carr, and James L. Creighton. The Mini-Trial, Alternative Dispute Resolution Series, Pamphlet 1, IWR Pamphlet-89-ADR-P-1, 1989.

Harter, Philip J. Points on a Continuum: Dispute Resolution Procedures and the Administrative Process. The Administrative Law Review, 1.1 (Summer 1987):141-211.

Herrman, Margaret S. and David Ashbaugh. Which way to resolution?: Transformational and Evaluative Models of Mediation. Lecture. Fourth Annual Northwest Alternative Dispute Resolution Conference. University of Washington, 24 September 1994.

Hinchey, John W. Construction Industry: Building the Case For Mediation. Arbitration Journal 47.2 (June 1992):38-42.

Joseph, Daniel L. and Michelle L. Gilbert. Breaking the Settlement Ice: The use of Settlement Judges in Administrative Proceedings. The Administrative Law Journal, 3.3 (Winter 1989/90):571-600.

Lambros, Thomas D. and Thomas H. Shunk. The Summary Jury Trial (1980). In Catz, Robert S., compiler. Materials on Alternative Dispute Resolution - Theory and Practice, National Institute for Dispute Resolution, Washington, DC, 1986, pp. 464-480.

Lovenheim, Peter. Mediate, Don't Litigate. New York: McGraw-Hill, 1989.

McCreary, Scott T. Resolving Science-Intensive Public Policy Disputes. Diss., Massachusetts Institute of Technology, 1989.

Mentschikoff, Soia. Commercial Arbitration (1961). In Catz, Robert S., compiler. Materials on Alternative Dispute Resolution - Theory and Practice, National Institute for Dispute Resolution, Washington, DC, 1986, pp. 201-224.

Sander, Frank E.A. Varieties of Dispute Processing (1975). In Catz, Robert S., compiler. Materials on Alternative Dispute Resolution - Theory and Practice, National Institute for Dispute Resolution, Washington, DC, 1986, pp. 46-69.

The Standing Committee on Dispute Resolution, The American Bar Association. National Dispute Resolution Resource Center, Three Year Proposal, 1992-1995. Washington, DC. 1993.

Ury, William L., Jeanne M. Brett, and Stephen B. Goldberg. Getting Disputes Resolved. San Francisco, London: Jossey-Bass Publishers, 1989.

Williams, Gerald R. Legal Negotiation and Settlement. In Catz, Robert S., compiler. Materials on Alternative Dispute Resolution - Theory and Practice, National Institute for Dispute Resolution, Washington, DC, 1986, pp. 152-165.

World Arbitration & Mediation Report. Justice Department Issues ADR Guidelines. 10. 1992.

_____. AAA Announces 'Mediation and Low Offer Arbitration' Service. 5. 1994a.

_____. Parties may agree to 'Binding Mediation,' Michigan Court Rules. 5. 1994b.

Section 2. Potential Applications for ADR in BLM

Attached are the results of a survey of BLM offices that was conducted by the Washington Equal Employment Opportunity staff in 1994. The results show potential areas where alternative dispute resolution processes could be used in BLM. This list is not a complete list of potential uses of ADR, but is offered as starting point.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management

ALTERNATIVE DISPUTE RESOLUTION PROGRAM PLAN

Survey of Potential Applications
for Alternative Dispute Resolution (ADR) Methods
in the Bureau of Land Management (BLM)

Washington, D.C.
January 1995

Survey of Potential Applications
for Alternative Dispute Resolution (ADR) Methods
in the Bureau of Land Management (BLM)

NOTE: This conflict inventory was compiled in January, 1995, from responding Washington Office, State, and Center Directors as requested by Instruction Memorandum No. 95-44, Survey of Potential Applications for Alternative Dispute Resolution Methods in the Bureau of Land Management.

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Program Title: Cadastral Survey

Typical Disputes: Cadastral Survey (CS) is the official survey arm of the Federal Government for all public lands. No subdivisions of public lands may be conveyed or disposed of until an official CS survey is completed and accepted. The types of survey disputes include land location, total area, and method of survey.

Typical Disputing Parties: Individual allottees entitled to lands under Native Allotment Act of 1906, 1872 Mining Law, and Homesteading; the State of Alaska, Native Corporations, and Tribes. Federal land management agencies such as Bureau of Land Management (BLM), the Forest Service, the National Park Service, the Fish and Wildlife Service, and the Military.

Current Resolution Procedures: CS uses a four-step resolution process. For individual allottees, CS reviews all actions from initial application to final survey. CS negotiates all possible legal resolutions. In the case of Native allottees, the Bureau of Indian Affairs often participates in negotiations. Informal on-site hearings are held and post-hearing reports are provided. On-site village meetings are conducted, and written legal agreements are provided to disputants. Coordination, negotiation, dispute resolution, and fact-finding techniques are utilized in order to compose legal land title recovery documents.

Applicability of ADR Methods: ADR methodology already employed in this program area.

Program Title: Conveyance Management

Typical Disputes: Issues related to informal, evidentiary, fact-finding hearings; Native village agreement development/negotiation/dispute resolution; individual case projects and discretionary actions (i.e., title recovery).

Typical Disputing Parties: Native Corporations; State government personnel; legal services representatives, other Federal agencies; Office of the Solicitor.

Current Resolution Procedures: Informal hearings; village meetings; coordination; negotiation, conciliation, fact-finding.

Applicability of ADR Methods: ADR techniques are appropriate for this workload.

Program Title: Equal Employment Opportunity

Typical Disputes: Illegal employment discrimination based on factors such as age, color, physical or mental handicap, national origin, race, religion, sex, as well as reprisal for participation in an Equal Employment Opportunity (EEO) administrative process protected by law; disparate impact or treatment; sexual harassment.

Typical Disputing Parties: Members of protected groups specified by Title VII, Civil Rights Act of 1964 and subsequent related legislation.

Current Resolution Procedures: Individuals who allege unlawful employment discrimination are required to undergo EEO counseling prior to filing a formal Complaint of Discrimination which is investigated and adjudicated by the agency and subject to appellate review by the EEO Commission. Complainants have options for litigation in U.S. District Court.

Applicability of ADR Methods: ADR methods appear to be applicable to the EEO program at all stages of the complaints process.

Program Title: Forestry

Typical Disputes: Contract disputes involving rehabilitation or slash removal, or "view shed" disturbance; environmental concerns over the sale of lumber.

Typical Disputing Parties: BLM agents and contractors; local land owners; large and small environmental groups.

Current Resolution Procedures: Large environmental groups typically file protests with the Interior Board of Land Appeals (IBLA), interrupting the removal time for a period of up to two years. Informal discussions, one-on-one negotiation with smaller and/or local groups, contractors, and landowners have resolved many protests at the local level.

Applicability of ADR Methods: Arbitration of protest by large environmental groups could prove more effective than present IBLA procedures. Other ADR methods already have been employed in resolving other disputes.

Program Title: Hazardous Materials Management

Typical Disputes: Contract disputes relative to procurement type actions and hazardous waste removal contracts.

Typical Disputing Parties: BLM personnel; contractors; vendors.

Current Resolution Procedures: The file is reviewed to determine if the dispute/protest is filed with Washington Office Procurement or the General Accounting Office. Time frames are specified in the Federal Acquisition Regulations Part 33, and procedures are initiated with a formal file review to make a determination.

Applicability of ADR Methods: Although contract administration procedures include clearly defined contract resolution procedures, ADR methods may be used when the contracting officer has authority to settle the issue.

Program Title: Human Resources Management

Typical Disputes: Performance standards and ratings; availability of training opportunities, classification of positions; pay; personnel actions; cash and honor awards; qualifications ratings and reviews; challenged disciplinary actions and adverse actions; reasonable accommodation determinations, and labor-management relations issues.

Typical Disputing Parties: Employees, supervisors, managers, applicants for employment; union management.

Current Resolution Procedures: Cooperation/negotiation between supervisors and employees; statutory appellate processes, such as administrative grievance/Merit Systems Protection Board appeals; management-directed review of decisions or actions; mediation, arbitration, negotiated grievance procedures.

Applicability of ADR Methods: ADR methods applicable where statutory limitations permit and where breakdowns in communication are a factor in the dispute.

Program Title: Lands

Typical Disputes: Denial of applications for right of way, permits, Recreation for Public Purposes; land exchange process; appraisal values; decision precluding use activities; trespass; damage settlement; review of land use plans.

Typical Disputing Parties: Landowners; permittees; applicants; other land "users;" agents of the BLM.

Current Resolution Procedures: Various forms of informal discussion, review, and appeals processes (locally and through the IBLA). Arbitration has also been used.

Applicability of ADR Methods: ADR methods would be helpful in order to resolve issues such as these early in the dispute process.

Program Title: Mineral Exchange Appraisals

Typical Disputes: Issues involving mineral exchange property appraisals.

Typical Disputing Parties: Proponents of the exchange; Federal mineral economic specialists; Federal program managers.

Current Resolution Procedures: Information and appraisals are exchanged in a negotiated attempt to find the most technically correct estimated market value.

Applicability of ADR Methods: Currently used methods, such as information exchange and negotiation, are recommended ADR procedures.

Program Title: Property Management

Typical Disputes: Bidders for surplus property who complain that property is not as functional as anticipated.

Typical Disputing Parties: Employees, contractors, survey board members, reviewing officials.

Current Resolution Procedures: Disputes usually settled through negotiation. If conditions are not clear, bidder receives the option of returning item.

Applicability of ADR Methods: Negotiation has been successfully applied in these cases.

Program Title: Minerals

Typical Disputes: Mining claimants do not provide proof of labor/holding fees on a timely basis. Trespass situations; mining operations which adversely impact adjacent landowners; mining operation not reclaiming land appropriately after mineral removal; and disapproval of applications to drill for oil and gas. Policy issues related to specific permits and approval actions which may involve more than one management level of the organization. Issues may include State coordination or disputes over technical adequacy; claim disputes; mining in recreational areas; validity disputes.

Typical Disputing Parties: Mining claimants and operators; claimants and other claimants; claimants and BLM employees; BLM agents and others; private parties removing mineral material from private or government land; representatives of environmental groups; land managers; other public lands users.

Current Resolution Procedures: Varies with the particular situation. Informal resolution or specified regulatory and/or appellate procedures are employed. Many decisions are appealable through the IBLA.

Applicability of ADR Methods: ADR methods are potentially applicable for certain disputes which have not reached a formal regulatory process, i.e., administrative appeal or legal action. Some cases (i.e., those involving claimants who do not provide proof of the timely payment of labor/holding fees) would not be appropriate for ADR, because those decisions are non-negotiable based on the law. Other situations could benefit from the use of ADR methods.

Program Title: Oil and Gas

Typical Disputes: Environmental Impact Statement (EIS)/Resource Management Plan complaints about EIS process; assessing and mitigating impacts; mineral development disputes between extractive industries; disputes involving environmental groups versus the oil and gas industry; issues involving bonding, unit approvals, monthly/quarterly well reports, and lease suspensions; drainage and diligence drilling requirements; wells proposed for development in mining areas.

Typical Disputing Parties: Industry (oil and gas and mining) representatives and operators; applicants; general public; agricultural interests; recreation and environmental groups; other Federal, state and local agencies; disciplines within the BLM (i.e., Resource Management Team members such as geologists, engineers, land law examiners, and Resource Area personnel(i.e., environmental scientists, wildlife specialists, managers).

Current Resolution Procedures: Varies with the particular situation. Comments are solicited in some cases, and unilateral decisions made in others. Informal mediation is sometimes attempted, but it is generally determined that the first company initiating development a contested parcel of land has prior rights. Court action is required in some cases. BLM generally solicits comments from both sides of a dispute but makes a final decision based on the original proposed action approved by the BLM. Non-BLM disputants are generally not conciliatory and tend to maintain their initial positions.

Applicability of ADR Methods: ADR methods are potentially useful in resolving EIS/RMP conflicts, and negotiation/mediation skills could be applied in land use decisionmaking, creating win-win situations and improving relations between groups, reducing conflicts, and minimizing the number of disputes with which management must deal. Some ADR techniques are now being employed, but increased application is appropriate.

Program Title: Planning

Typical Disputes: Concerns raised by the external public regarding the planning process.

Typical Disputing Parties: External public lands users; land and facility managers.

Current Resolution Procedures: Various, based on the individual situation.

Applicability of ADR Methods: Yes. With the increase in public involvement in the planning process, mediation skills are becoming a necessity.

Program Title: Procurement Management

Typical Disputes: Claims and disputes arising from the administration of contracts.

Typical Disputing Parties: Contractors; vendors; BLM contracting officers.

Current Resolution Procedures: A formal process is established under the Contract Disputes Act of 1978, and is implemented in the Federal Acquisition Regulations (FAR). Issues not resolved between the contractor and the Contracting Officer may be raised to Boards of Contract Appeals or the U.S. Court of Federal Claims.

Applicability of ADR Methods: The FAR includes guidance on using ADR procedures, and the Federal Acquisition Streamlining Act of 1994 provides further encouragement to use ADR procedures with small businesses. ADR methods may be used at any time that the contracting officer has authority to settle the issue in controversy and can be applied to a portion of a claim.

Program Title: **Property Accountability**

Typical Disputes: Issues related to responsibility for lost or missing government property; inventory losses or movement; the assignment of new property.

Typical Disputing Parties: Property Survey Boards; employees; custodial officers; property requisitioners.

Current Resolution Procedures: Board of Survey investigates the circumstance of loss and recommends assignment of pecuniary responsibility; searches are conducted for missing property; policy statements issued on accountability issues.

Applicability of ADR Methods: The Board of Survey procedure is mandated by regulation.

Program Title: **Public Lands Access**

Typical Disputes: Access locations; cost of access.

Typical Disputing Parties: Public lands users; Federal, State, and County land and facility managers.

Current Resolution Procedures: Various, based on the individual situation.

Applicability of ADR Methods: Yes. Mediation skills are becoming a necessity.

Program Title: Range/Grazing Management

Typical Disputes: Livestock permittees and others regarding implementation of grazing decisions/- agreements, often related to loss of grazing privileges. Other issues: threat of deteriorating rangeland conditions and habitat damage to threatened/-endangered species (plant or animal); sub-leasing, trespass; grazing in wilderness areas, and riparian area conflicts.

Typical Disputing Parties: Livestock permittees and "other affected interests" as defined in 43, CFR; allottees and other public lands users; allottees and BLM employees.

Current Resolution Procedures: Varies, depending upon the individual situation. Complaints or appeals are received primarily in one of three ways: informal, formal, and Congressional inquiry. There is the Coordinated Resource Management Plan which is a national plan to address related issues that cannot be resolved informally.

Applicability of ADR Methods: ADR is potentially applicable. Some offices already employ some methods, i.e., conciliation and facilitation.

Program Title: Realty

Typical Disputes: Access and easement issues; appraised land values; land exchanges.

Typical Disputing Parties: Applicants and other land users; applicants and BLM employees.

Current Resolution Procedures: Varies, depending upon the individual situation.

Applicability of ADR Methods: ADR methods are sometime applied to these types of disputes but the potential for their application is much greater.

Program Title: Recreation Site Management

Typical Disputes: Issues related to the types of facilities allowed on managed lands, and the level of management imposed at recreational sites; competing priorities; allocation of a limited resource.

Typical Disputing Parties: Public lands users; lands and facility managers; groups promoting handicap accessibility.

Current Resolution Procedures: Various, based on the individual situation.

Applicability of ADR Methods: Yes, to improve communication.

Program Title: Resource Use and Protection

Typical Disputes: Concerns regarding "what" should be protected and from whom it should be protected.

Typical Disputing Parties: Public lands users; land and facility managers, Native American tribal organizations which identify an interest.

Current Resolution Procedures: Various, based on the individual situation.

Applicability of ADR Methods: Yes. ADR methods have potential for improving communication between parties.

Section 3. Other BLM ADR Programs

The ADR processes that are appropriate for preventing and resolving disputes pertaining to natural resources and public land management are also used in a variety of other administrative programs:

▲ **Procurement and Contracting:** Contracting officers are encouraged to use ADR processes such as negotiation, mediation, and arbitration to resolve disputes with contractors. See Information Bulletin No. BC-96-048, Use of Alternative Dispute Resolution, July 1996, for information regarding the use of ADR.

▲ **Equal Employment Opportunity (EEO):** The EEO program has established a mediation program to assist agency managers and employees in resolving EEO complaints. The EEO program has trained many employees to serve as mediators for this program. See Instruction Memorandum No. 96-46, Issuance of Policy on the Utilization of Alternative Dispute Resolution (ADR) in the Bureau of Land Management and the Implementation of the Equal Employment Opportunity/Alternative Dispute Resolution (EEO/ADR) Pilot Program Plan, February 2, 1996, or your local EEO Officer for information regarding this program.

▲ **Labor Management Relations:** A number of BLM offices have negotiated contracts with employee unions. These negotiated contracts typically contain arbitration clauses as a means for resolving disputes among management,

the unions, and those employees who are in the bargaining units. These contracts are specific for each office that has a union, and each has specific negotiated language; therefore, it is essential to contact the specific office for information regarding dispute resolution procedures for that bargaining unit.

▲ **Value Disputes in Land Exchanges:** In 1988, the Federal Land Exchange Facilitation Act was enacted. This Act amended Section 206 of the Federal Land Policy and Management Act (FLPMA). The Act applies to the Forest Service as well as the BLM. Among other things, the Act requires the use of arbitration if the parties to the land exchange cannot reach agreement on value within 180 days of receipt of the appraisal reports. The only exception is if the parties agree to use some other dispute resolution method. Methods for resolving potential disputes concerning value are usually covered in the initial agreement between the parties to pursue a land exchange. See the following message or contact Dave Cavanaugh, Lands and Realty Group, WO 350, (202) 452-7774, for additional information on this use of ADR processes.

From: Dave Cavanaugh
To: ILMNCA01.ILMNCB01.jschumak
Date: 5/13/97 7:01am
Subject: Arbitration of land values - Reply

Ray referred your message to me. I am the point-of -contact in WO 350 for policy regarding resolving disputes concerning value.

In 1988 The Federal Land Exchange Facilitation Act was enacted. This Act amended Section 206 of FLPMA. The Act is applicable to the Forest Service as well as the BLM.

Among other things, the Act required the use of arbitration if the parties to the land exchange could not reach agreement on value within 180 days of receipt of the appraisal reports. The only exception was if the parties agreed to use some other dispute resolution method. Methods for resolving potential disputes concerning value are usually covered in the initial agreement between the parties to pursue a land exchange.

This provision was passed by Congress since it was felt that disputes concerning value were holding-up worthwhile exchanges. Land exchanges are voluntary and require mutual agreement among the parties. It was recognized that appraising was an art not a science and that reasonable people may disagree as to the appropriate market assumptions and the resulting values. Therefore, it was agreed that a method was necessary to resolve reasonable disputes.

The exchange process attempts to build a trust relationship that results in an exchange that is mutually beneficial. The goal is avoid polarizing the process so that the parties do not waste their time or money. It was anticipated that the parties to the transaction would reach agreement on schedules, shared costs, appraisal responsibilities and that the parties genuinely wanted to pursue the exchange. This evolving relationship would facilitate reaching agreement on value.

We are a few cases where we have used mediation or other process to reach agreement. We have had varying degrees of success, most initiated with very little expertise in dispute resolution. In one case involving the Forest Service the process may have been altered to bring about a predetermined outcome.

In many cases the BLM offices are reluctant to use this tool, opting instead to requiring the values be based on the approved appraisal. This is due in part to their unfamiliarity with the dispute resolution process.

Unfortunately, most of our land acquisition experience in the Government is based on eminent domain or condemnation. This is a vestige of a time when Congress granted condemnation authority for building large public improvement projects. Land acquiring agencies were granted condemnation authority and if we could not acquire the property through negotiations we would take property through a condemnation process. Agency philosophy was to offer an amount based on the approved appraisal on a take-it-or -leave-it

basis. If the property owner did not accept the offer, the agency would condemn the property and it was left to the courts to set the amount of just compensation.

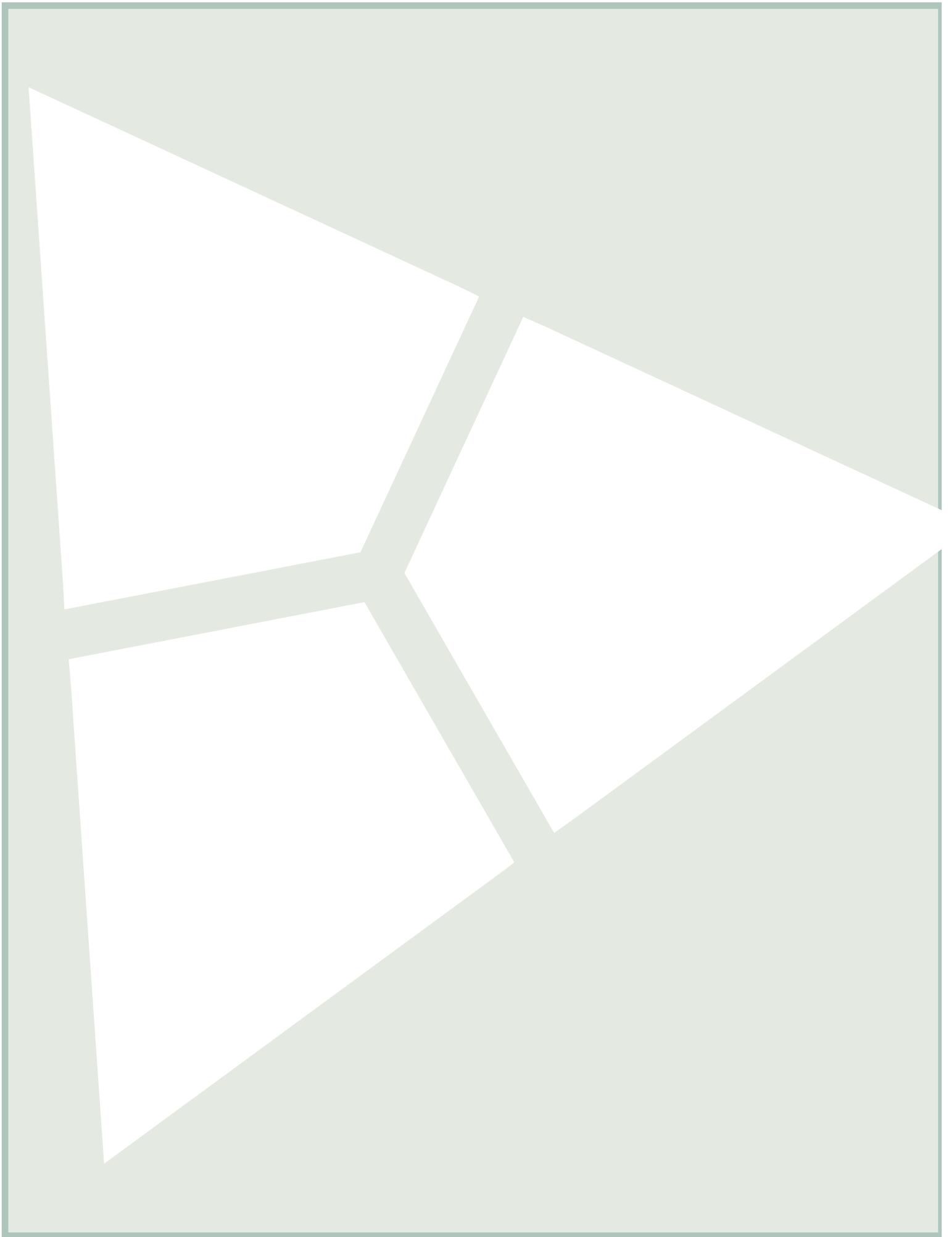
Agencies abused this authority and Congress in 1970 passed the Uniform Relocation and Real Property Acquisition Policies Act. This Act directed agencies to reduced litigation and seek amicable settlements with property owners. Agencies were obligated to offer an amount which it believed to be just compensation and it shall not be less than the agencies approved appraisal. Congress recognized that the final settlement may be different from the approved appraised value. The Act did not specify any dispute resolution methods.

Congress has been reluctant to grant eminent domain authority on small acquisition projects, electing instead to require the agencies to only acquire property if they can reach agreement. Agreements in excess of the approved appraisal (on Land and Water Conservation funded projects, not land exchanges) must be sent to the Committees on Appropriation for approval. This requirement is part of Reprograming Procedures established by Congress. This was required because certain agencies were paying substantially more than amounts appropriated by Congress.

I believe appropriate use of dispute resolution methods for voluntary transactions would facilitate land acquisition and exchanges. It is my hope that in the future this will be a normal practice when confronting reasonable disagreements on value.

If you have any thoughts or questions on this, give me a call at 202-452-7774 or send me a E-Mail.

CC: rbrady,dbeaver



Section 4. Levels of ADR

ADR processes may be used at the agency level for both dispute prevention and dispute resolution. They may also be used at other levels, such as when a dispute advances to an administrative appeal system or to the Federal courts.

ADR Within the Agency

▲ **Dispute Prevention:** The use of collaborative processes can be initiated by agency managers, generally early in the process of agency decisionmaking, to obtain input and assistance from the stakeholders before disputes arise. Collaborative processes often use ADR processes such as negotiation, facilitation, and mediation to make the collaborative process work.

▲ **Dispute Resolution:** Agency managers can initiate ADR processes such as negotiation, facilitation, and mediation to resolve existing disputes. Arbitration may be used to resolve human resources and business practice disputes; however, the arbitration process has limited, if any, use in resolving natural resources disputes.

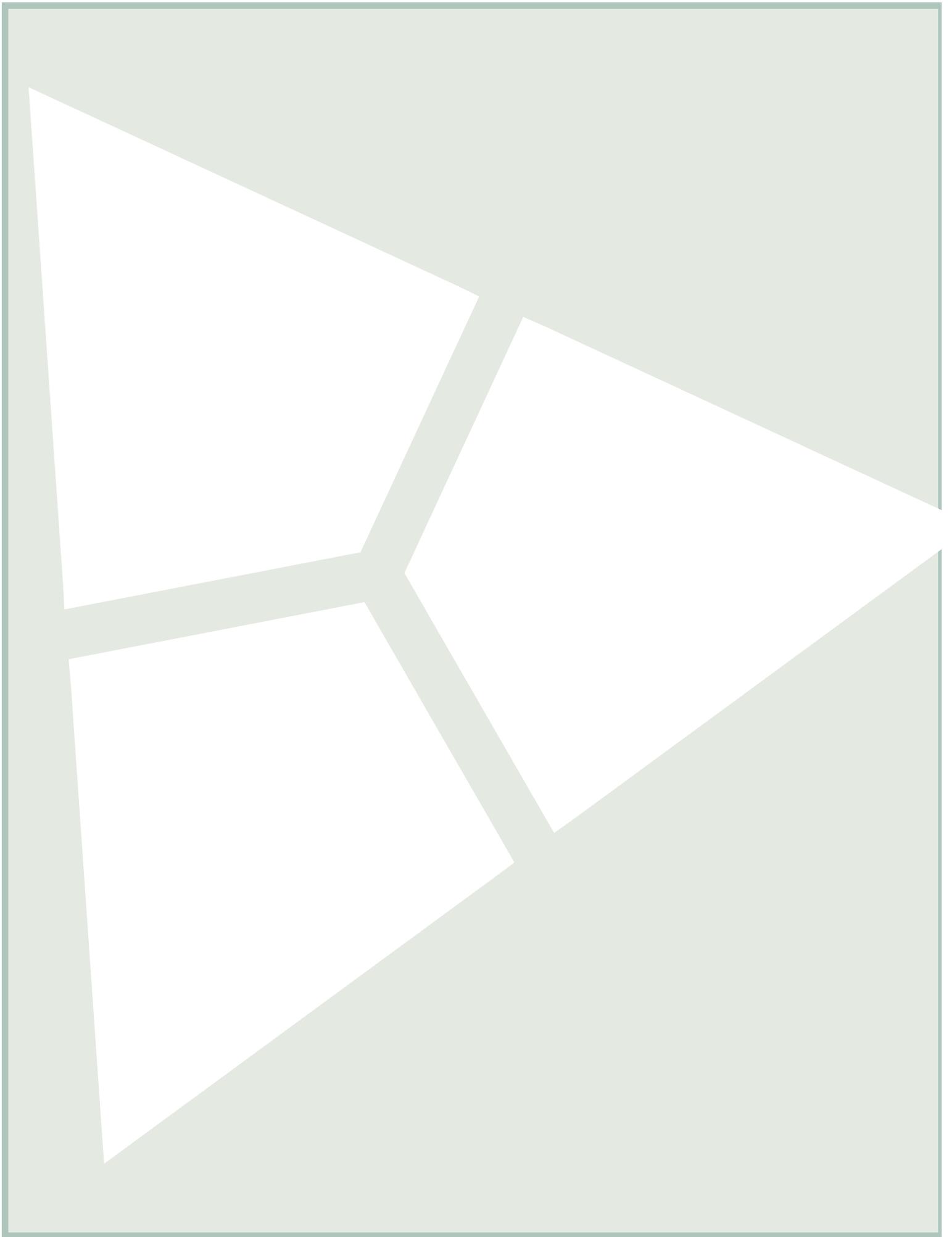
ADR in the Administrative Appeals Systems (Interior Board of Land Appeals, Merit Systems Protection Board, Equal Employment Opportunity Commission, etc.)

▲ **Dispute Resolution:** Agency managers may encourage/suggest using ADR processes

such as negotiation, mediation, factfinding, or settlement and administrative law and administrative judges may elect to use, or encourage agency managers and appellants to use, an ADR process such as mediation, factfinding, or settlement to resolve the dispute before proceeding with adjudication of the case. Some judges may order settlement conferences.

ADR in the Federal Courts

▲ **Dispute Resolution:** U.S. attorneys may seek to use ADR processes such as mediation, early neutral evaluation, factfinding, settlement, minitrials, or summary jury trials, or the presiding judge may order use of one or more of these ADR processes to resolve the dispute before proceeding with adjudication of the case.



Section 5. When Is Using ADR Appropriate?

An important initial step in ADR is determining when its use is appropriate. Some disputes are not suitable for resolution through the use of ADR, while others are “ripe” for resolution depending on the specific stage of the dispute. There are some disputes that involve fundamental questions of constitutionality or deeply held values that may never be ready for resolution through an ADR process. There are many other disputes that do not fit in these categories that also may not be “ripe” for an ADR process. In some cases, the debate over an issue is so fractious that the parties simply are not ready to come into substantive negotiations with other parties. Disputes of this type may become suitable for resolution through an ADR process if, and when, the parties to the dispute become weary of the fight, run out of money, or have other events that cause a change in their willingness to engage in substantive negotiations. Gauging the mood of a dispute is fundamental to an agency manager’s decision to use, or propose the use of, an ADR process.

It can be helpful to obtain the services of a neutral ADR practitioner to assist management in assessing the willingness of the parties to engage in an ADR process. This assessment is a vital phase of the convening process, which is addressed in greater detail in Section 9, *Guidelines for Convening an ADR Event*.

There are a number of key factors that agency managers should look at in their initial situation assessment:

- ▲ Are the stakeholders knowledgeable about ADR? BLM can substantially improve stakeholder knowledge by following BLM training guidelines.
- ▲ Has the agency used ADR (successfully or unsuccessfully) for similar disputes? Can lessons learned be applied to an ADR assessment for the present dispute? Past successful ADR events are an obvious benefit, and past unsuccessful ADR events are not always looked upon solely as disasters. Research shows that most parties to ADR events that were not successful in resolving a specific dispute also felt that some benefit was gained from participating in the ADR process.

- ▲ Can the issues in dispute be identified with sufficient clarity to allow the parties to negotiate a resolution of their differences successfully? Absolute clarity is not essential since those issues that are thought to be clear often change in focus and importance after the ADR process has begun.

- ▲ Do you know who the stakeholders are, and if not, is it likely you will be able to identify the players early in the convening process? An unidentified stakeholder who is not included is a potential agreement buster.

- ▲ Do you know the spokespersons for each faction of a dispute? Again absolute knowledge is not critical to making a decision about using an ADR process, but some clarity is essential early in the convening process. Spokespersons can change or evolve after the commencement of an ADR event.

▲ Do you have enough time for the ADR event to be conducted? It takes time to convene an ADR event and for the parties to conduct their negotiations. Time requirements vary significantly. Experience in using ADR processes can reduce the time required to convene and conduct an ADR event. Agency experience using ADR for various common disputes probably has generated general time patterns; however, each dispute will have its own time requirement. Time requirements are not necessarily barriers to using an ADR process. Deadlines can assist the parties substantially in reaching resolution, provided that the minimum amount of time needed to conduct an adequate assessment, convene the process, and conduct negotiations is available. All ADR events need to have reasonable timelines established.

▲ Do you suspect underlying issues are the real source of the dispute? It is not uncommon for a party in a dispute to present one issue as the basis of the disagreement, when in reality, there are other concerns that are the real basis for the dispute. The mediation process is particularly useful in identifying and resolving underlying issues.

▲ Are one or more parties obviously tiring of the conflict or adversarial process?

▲ Do the parties have a good relationship and level of trust on most matters, but a real dispute over an issue has reared its ugly head? Negotiation, mediation, and facilitation processes are particularly suited to maintaining good relations between parties when it is to the parties' benefit to do so.

▲ Has one or more of the parties suggested or recommended that an ADR process be used? Knowledge about ADR processes is growing throughout the country, and it is likely that other stakeholders may suggest the use of an ADR process to prevent or resolve a dispute.

▲ Has the entire congressional delegation from your state sent you a letter suggesting that you have a public participation problem and recommending that you contract for the services of a third-party neutral to resolve the issues? While this question is asked somewhat facetiously, situations like this can and have occurred, which underscores the importance of proper situation assessment.

Section 6. Policy and Legal Guidance

The use of ADR by agencies of the Federal Government is authorized by Public Law 104-320, the Administrative Dispute Resolution Act of 1996. In 1998, the President issued a memorandum to agency and department heads encouraging the use of ADR and negotiated rulemaking. Even when disputes have advanced to an administrative appeal system or to the Federal courts, the use of ADR is still encouraged, as stated by the Interior Board of Land Appeals (IBLA) in its decision regarding *Clive Kincaid v. BLM Utah State Director*, dated October 17, 1989.

PUBLIC LAW 104-320—OCT. 19, 1996

ADMINISTRATIVE DISPUTE RESOLUTION ACT
OF 1996

Public Law 104-320
104th Congress

An Act

Oct. 19, 1996
[H.R. 4194]

To reauthorize alternative means of dispute resolution in the Federal administrative process, and for other purposes.

Administrative
Dispute
Resolution Act of
1996.
5 USC 571 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Administrative Dispute Resolution Act of 1996”.

SEC. 2. AMENDMENT TO DEFINITIONS.

Section 571 of title 5, United States Code, is amended—

(1) in paragraph (3)—

(A) by striking “, in lieu of an adjudication as defined in section 551(7) of this title,”;

(B) by striking “settlement negotiations,”; and

(C) by striking “and arbitration” and inserting “arbitration, and use of ombuds”; and

(2) in paragraph (8)—

(A) in subparagraph (B) by striking “decision,” and inserting “decision,”; and

(B) by striking the matter following subparagraph (B).

SEC. 3. AMENDMENTS TO CONFIDENTIALITY PROVISIONS.

(a) **LIMITATION OF CONFIDENTIALITY APPLICATION TO COMMUNICATION.**—Subsections (a) and (b) of section 574 of title 5, United States Code, are each amended in the matter before paragraph (1) by striking “any information concerning”.

(b) **DISPUTE RESOLUTION COMMUNICATION.**—Section 574(b)(7) of title 5, United States Code, is amended to read as follows:

“(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.”.

(c) **ALTERNATIVE CONFIDENTIALITY PROCEDURES.**—Section 574(d) of title 5, United States Code, is amended—

(1) by inserting “(1)” after “(d)”; and

(2) by adding at the end thereof the following new paragraph:

“(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.”.

(d) EXEMPTION FROM DISCLOSURE BY STATUTE.—Section 574 of title 5, United States Code, is amended by amending subsection (j) to read as follows:

“(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).”.

SEC. 4. AMENDMENT TO REFLECT THE CLOSURE OF THE ADMINISTRATIVE CONFERENCE.

(a) PROMOTION OF ADMINISTRATIVE DISPUTE RESOLUTIONS.—Section 3(a)(1) of the Administrative Dispute Resolution Act (5 U.S.C. 571 note; Public Law 101-552; 104 Stat. 2736) is amended to read as follows:

“(1) consult with the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution under subchapter IV of chapter 5 of such title; and”.

(b) COMPILATION OF INFORMATION.—

(1) IN GENERAL.—Section 582 of title 5, United States Code, is repealed.

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 582.

(c) FEDERAL MEDIATION AND CONCILIATION SERVICE.—Section 203(f) of the Labor Management Relations Act, 1947 (29 U.S.C. 173(f)) is amended by striking “the Administrative Conference of the United States and other agencies” and inserting “the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code.”.

SEC. 5. AMENDMENTS TO SUPPORT SERVICES PROVISION.

Section 583 of title 5, United States Code, is amended by inserting “State, local, and tribal governments,” after “other Federal agencies,”.

SEC. 6. AMENDMENTS TO THE CONTRACT DISPUTES ACT.

Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) is amended—

(1) in subsection (d) by striking the second sentence and inserting: “The contractor shall certify the claim when required to do so as provided under subsection (c)(1) or as otherwise required by law.”; and

(2) in subsection (e) by striking the first sentence.

Certification.

SEC. 7. AMENDMENTS ON ACQUIRING NEUTRALS.

(a) EXPEDITED HIRING OF NEUTRALS.—

(1) COMPETITIVE REQUIREMENTS IN DEFENSE AGENCY CONTRACTS.—Section 2304(c)(3)(C) of title 10, United States Code, is amended by striking “agency, or” and inserting “agency, or to procure the services of an expert or neutral for use”.

(2) COMPETITIVE REQUIREMENTS IN FEDERAL CONTRACTS.—Section 303(c)(3)(C) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)(C)), is amended by striking “agency, or” and inserting “agency, or to procure the services of an expert or neutral for use”.

(b) REFERENCES TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES.—Section 573 of title 5, United States Code, is amended—

President. (1) by striking subsection (c) and inserting the following:
 “(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall—

“(1) encourage and facilitate agency use of alternative means of dispute resolution; and

“(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.”; and

(2) in subsection (e) by striking “on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individual”.

SEC. 8. ARBITRATION AWARDS AND JUDICIAL REVIEW.

(a) ARBITRATION AWARDS.—Section 580 of title 5, United States Code, is amended—

(1) by striking subsections (c), (f), and (g); and

(2) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively.

(b) JUDICIAL AWARDS.—Section 581(d) of title 5, United States Code, is amended—

(1) by striking “(1)” after “(b)”; and

(2) by striking paragraph (2).

(c) AUTHORIZATION OF ARBITRATION.—Section 575 of title 5, United States Code, is amended—

(1) in subsection (a)(2), by striking “Any” and inserting “The”;

(2) in subsection (a)(2), by adding at the end the following: “Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.”;

(3) in subsection (b)—

(A) by striking “may offer to use arbitration for the resolution of issues in controversy, if” and inserting “shall not offer to use arbitration for the resolution of issues in controversy unless”; and

(B) by striking in paragraph (1) “has authority” and inserting “would otherwise have authority”; and

(4) by adding at the end the following:

“(c) Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General and after taking into account the factors in section 572(b), shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration.”.

SEC. 9. PERMANENT AUTHORIZATION OF THE ALTERNATIVE DISPUTE RESOLUTION PROVISIONS OF TITLE 5, UNITED STATES CODE.

The Administrative Dispute Resolution Act (Public Law 101-552; 104 Stat. 2747; 5 U.S.C. 571 note) is amended by striking section 11.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—Subchapter IV of title 5, United States Code, is amended by adding at the end thereof the following new section:

“§ 584. Authorization of appropriations

“There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter.”.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 583 the following:

“584. Authorization of appropriations.”.

SEC. 11. REAUTHORIZATION OF NEGOTIATED RULEMAKING ACT OF 1990.

(a) PERMANENT REAUTHORIZATION.—Section 5 of the Negotiated Rulemaking Act of 1990 (Public Law 101-648; 5 U.S.C. 561 note) is repealed.

(b) CLOSURE OF ADMINISTRATIVE CONFERENCE.—

(1) IN GENERAL.—Section 569 of title 5, United States Code, is amended—

(A) by amending the section heading to read as follows:

“§ 569. Encouraging negotiated rulemaking”; and

(B) by striking subsections (a) through (g) and inserting the following:

“(a) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of negotiated rulemaking. An agency that is considering, planning, or conducting a negotiated rulemaking may consult with such agency or committee for information and assistance.

President.

“(b) To carry out the purposes of this subchapter, an agency planning or conducting a negotiated rulemaking may accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal if that agency’s acceptance and use of such gifts, devises, or bequests do not create a conflict of interest. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the head of such agency. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests.”.

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by striking the item relating to section 569 and inserting the following:

“569. Encouraging negotiated rulemaking.”.

(c) EXPEDITED HIRING OF CONVENORS AND FACILITATORS.—

(1) DEFENSE AGENCY CONTRACTS.—Section 2304(c)(3)(C) of title 10, United States Code, is amended by inserting “or negotiated rulemaking” after “alternative dispute resolution”.

(2) FEDERAL CONTRACTS.—Section 303(c)(3)(C) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)(C)), is amended by inserting “or negotiated rulemaking” after “alternative dispute resolution”.

(d) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—Subchapter III of title 5, United States Code, is amended by adding at the end thereof the following new section:

“§ 570a. Authorization of appropriations

“There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter.”.

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 570 the following:

“570a. Authorization of appropriations.”.

5 USC 563 note.

(e) NEGOTIATED RULEMAKING COMMITTEES.—The Director of the Office of Management and Budget shall—

(1) within 180 days of the date of the enactment of this Act, take appropriate action to expedite the establishment of negotiated rulemaking committees and committees established to resolve disputes under the Administrative Dispute Resolution Act, including, with respect to negotiated rulemaking committees, eliminating any redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) and providing public notice of such committee under section 564 of title 5, United States Code; and

Recommendations.

(2) within one year of the date of the enactment of this Act, submit recommendations to Congress for any necessary legislative changes.

SEC. 12. JURISDICTION OF THE UNITED STATES COURT OF FEDERAL CLAIMS AND THE DISTRICT COURTS OF THE UNITED STATES: BID PROTESTS.

(a) BID PROTESTS.—Section 1491 of title 28, United States Code, is amended—

(1) by redesignating subsection (b) as subsection (c);

(2) in subsection (a) by striking out paragraph (3); and

(3) by inserting after subsection (a), the following new subsection:

“(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

“(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

“(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

“(4) In any action under this subsection, the courts shall review the agency’s decision pursuant to the standards set forth in section 706 of title 5.”.

(b) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date. 28 USC 1491 note.

(c) STUDY.—No earlier than 2 years after the effective date of this section, the United States General Accounting Office shall undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary. Such a study shall be completed no later than December 31, 1999, and shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

(d) SUNSET.—The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection. 28 USC 1491 note. Applicability.

(e) SAVINGS PROVISIONS.—

(1) ORDERS.—A termination under subsection (d) shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law. 28 USC 1491 note.

(2) PROCEEDINGS AND APPLICATIONS.—(A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination.

(f) NONEXCLUSIVITY OF GAO REMEDIES.—In the event that the bid protest jurisdiction of the district courts of the United States is terminated pursuant to subsection (d), then section 3556 of title 31, United States Code, shall be amended by striking “a court of the United States or” in the first sentence.

Approved October 19, 1996.

LEGISLATIVE HISTORY—H.R. 4194 (S. 1224):

HOUSE REPORTS: No. 104-245 accompanying S. 1224 (Comm. on Governmental Affairs).

CONGRESSIONAL RECORD, Vol. 142 (1996):

Sept. 27, considered and passed House.

Sept. 30, considered and passed Senate, amended.

Oct. 4, House concurred in Senate amendment.



THE WHITE HOUSE

Office of the Press Secretary
(Palo Alto, California)

For Immediate Release May 1, 1998

May 1, 1998

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking

As part of an effort to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the United States, including the prevention and avoidance of disputes, I have determined that each Federal agency must take steps to: (1) promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques, and (2) promote greater use of negotiated rulemaking.

By the authority vested in me as President by the Constitution and laws of the United States including sections 569(a) and 573(c) of title 5, United States Code, as amended by the Administrative Dispute Resolution Act of 1996 (Public Law 104-320), I hereby direct as follows:

An Alternative Dispute Resolution Working Group, comprised of the Cabinet Departments and, as determined by the Attorney General, such other agencies with a significant interest in dispute resolution, shall be convened and is designated under 5 U.S.C. 573(c) as the interagency committee to facilitate and encourage agency use of alternative means of dispute resolution. The Working Group shall consist of representatives of the heads of all participating agencies, and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas, such as disputes involving personnel, procurement, and claims. The Working Group shall be convened by the Attorney General, who may designate a representative to convene and facilitate meetings of the subgroups. The Working Group shall facilitate, encourage, and provide coordination for agencies in such areas as: (1) development of programs that employ alternative means of dispute resolution, (2) training of agency personnel to recognize when and how to use alternative means of dispute resolution, (3) development of procedures that permit agencies to obtain the services of neutrals on an expedited basis, and (4) record keeping to ascertain the benefits of alternative means of dispute resolution. The Working Group shall also periodically advise the President, through the Director of the Office of Management and Budget, on its activities. The Regulatory Working Group established under section 4(d) of Executive Order 12866 is designated under 5 U.S.C.

569(a) as the interagency committee to facilitate and encourage agency use of negotiated rulemaking.

This directive is for the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON

###

ADR While Disputes Are On Appeal

Throughout the Bureau of Land Management, there is a belief that disputes being appealed to agencies such as the Interior Board of Land Appeals (IBLA) or the Federal courts are beyond BLM's control and BLM officials are barred from trying to settle the dispute through negotiation or other ADR procedures. The exact opposite is true. This contradiction of beliefs was discussed at length with IBLA administrative judges and their staff attorneys during a natural resource ADR training session conducted by a team of trainers from BLM in Washington, DC, in September 1999.

The IBLA judges provided BLM with the following copy of a decision regarding IBLA 88-52, Clive Kincaid v. BLM Utah State Director, dated October 17, 1989. This guidance has been repeated frequently since 1989 in a number of Board decisions.

In providing these citations, the judges, including the Chief Administrative Judge, made it very clear that they supported and encouraged the use of ADR while a dispute was pending before the IBLA. The Board, on page 224 and 234 of the Kincaid decision, states:

“When a BLM decision has been properly appealed to the Board by an adversely affected party, BLM loses jurisdiction over the case and it has no authority to take further dispositive

action on the subject matter of the appeal until the Board rules on the appeal. **However, that does not mean that BLM is precluded from entering into settlement negotiations with the appellant. The rule regarding jurisdiction precludes BLM, however, from finally disposing of the matter without regaining jurisdiction from the Board. Therefore, where negotiations are successful and the parties agree on a settlement after the filing of an appeal, the proper procedure is for BLM to request that the Board vacate BLM's decision and remand the case to it to take formal dispositive action to implement the settlement agreement.”** (Bold added for emphasis).

BLM managers are permitted to try to use ADR processes at any time while disputes are on appeal. However, BLM managers need to consult with their supporting solicitor before entering substantial negotiations because the solicitor may have updated information on the status of the case, and the solicitor is, by design, the manager's legal advisor and his or her advice should be sought regarding any action in the legal arena. The manager is, however, the client of the solicitor and the decision official. Cases on appeal in the Federal courts take on another dimension and close coordination through the solicitors with the U.S. Attorney handling the case is required before entering into substantial negotiations to settle the dispute.

CLIVE KINCAID

IBLA 88-52

Decided October 17, 1989

Appeal from a decision of the State Director, Utah, Bureau of Land Management, ordering removal of structures unintentionally placed in trespass on public land. U 62842.

Vacated and remanded.

1. Trespass: Generally

BLM may properly require the removal of structures unintentionally erected in trespass upon public land. However, a decision requiring removal of such structures, which are located in a riparian area, based on a conclusion that under BLM's Riparian Area Management Policy disposal would not be in the public interest, will be vacated where there is not a rational basis in the record to support such action.

2. Appeals: Generally—Rules of Practice: Appeals: Effect of

When a BLM decision has been properly appealed to the Board by an adversely affected party, BLM loses jurisdiction over the case and it has no authority to take further dispositive action on the subject matter of the appeal until the Board rules on the appeal. However, that does not mean that BLM is precluded from entering into settlement negotiations with the appellant. The rule regarding jurisdiction precludes BLM, however, from finally disposing of the matter without regaining jurisdiction from the Board. Therefore, where negotiations are successful and the parties agree on a settlement after the filing of an appeal, the proper procedure is for BLM to request that the Board vacate BLM's decision and remand the case to it to take formal dispositive action to implement the settlement agreement.

APPEARANCES: William J. Lockhart, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

111 IBLA 224

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Clive Kincaid has appealed from the August 26, 1987, decision of the State Director, Utah, Bureau of Land Management (BLM), ordering Kincaid to remove all structures and improvements unintentionally placed in trespass on public land and to reclaim the land within 90 days of receipt of the decision. The structures and improvements listed in the decision are a portion of a partially completed stone house, a chicken coop, a dugout, a trash heap, building material, watering furrows, and non-native trees. The basis for the State Director's decision was his conclusion that the structures and improvements are located within the riparian zone of Deer Creek.

In 1983, Kincaid purchased a 20-acre parcel of private land in the NW[^] SE[^] sec. 9, T. 34 S., R. 5 E., Salt Lake Meridian, Garfield County, Utah. That parcel was part of a larger tract of land known as the Deer Creek Ranch, which consisted of approximately 280 acres located along the course of Deer Creek in secs. 4 and 9, T. 34 S., R. 5 E., Salt Lake Meridian. Kincaid identified the eastern boundary of his parcel on the basis of an existing fence, a stone monument, and a BLM sign which reads "Leaving Public Lands." Without a formal survey of his property, Kincaid commenced construction of his house.¹

On September 29, 1986, the Cedar City District Manager, BLM, requested that Cadastral Survey perform a survey to determine the boundaries between Federal and private land in secs. 4 and 9, T. 34 S., R. 5 E., Salt Lake Meridian.² On November 24, 1986, Cadastral Survey issued special instructions for the dependent resurvey of a portion of the section lines and the subdivisional survey of secs. 4 and 9. During the course of the survey conducted from December 9 through 18, 1986, the surveyors determined that Kincaid's house had been partially constructed on public land.

On December 19, 1986, BLM issued trespass notice UT-040-05-H22 to Kincaid charging him with trespass on public lands in the NE[^] SE[^] sec.9. BLM orally advised him that the public land at issue was in the Steep Creek Wilderness Study Area (WSA). By letter dated January 19, 1987, Kincaid responded to the trespass notice, describing how he acquired his interest.

¹ It should be noted that on Apr. 29, 1986, the Garfield County Building Inspector issued a stop-work order to Kincaid because he had failed to secure the required building permit from the county prior to constructing his house (Case Record, Tab JJ).

² The request stated that

"[s]everal owners are involved in the private land. One individual (Grant Johnson) has begun a fence that is suspected of being partially on BLM land. He has been ordered to stop fence construction until an adequate survey is completed. Also, a partially built home (Clive Kincaid) may also be partially on BLM land (Steep Creek W.S.A.). Fence along southern boundary may not be on line. A survey is needed to clear up above problem as well as to determine exact boundary of this property to prevent further trespass problems."

in the parcel and how he determined the location of the eastern boundary of his property. He stated that by November 1985, he had completed 95 percent of the stone work on his house which included walls 22 inches thick. Appellant cited the difficulty of determining the boundary of the Steep Creek WSA and questioned whether his house really was in a WSA.

The Cedar City District Office did not respond to Kincaid's letter, rather it commenced preparation of an environmental assessment, and in February 1987, it issued a draft environmental assessment (DEA) for the stated purpose of resolving the trespass situation and ensuring proper management of the WSA.³ The DEA analyzed two alternatives, i.e., removal of all structures and improvements within 90 days and "no action." After circulating that draft and receiving comments from the public, the District Office issued its final environmental assessment (FEA) on June 17, 1987.

In the FEA, BLM considered four alternatives, the two set forth in the DEA and two others. Alternative A, which had been the proposed action in the DEA, required removal of all structures and rehabilitation of disturbed areas within 90 days. Alternative B provided for issuance of a temporary use permit to authorize Kincaid's use of the land until Congress acted on the designation of the Steep Creek WSA. If the land were designated as wilderness, the removal of the structures would be required. If the land were not so designated, they would be offered for exchange. Alternative C would postpone further action regarding the trespass until Congress acted on the wilderness designation, differing from alternative B only in that no further development of the land would be allowed. Alternative D was the "no action" alternative, meaning that BLM would do nothing regarding the trespass.⁴

The Cedar City District Manager issued a proposed decision record which accompanied the FEA. Therein, he selected alternative C as the preferred course of action. Kincaid filed a protest with the State Director, contending that the land at issue was not within the WSA so that it was unnecessary to wait until Congress made a decision on the wilderness status of the Steep Creek WSA before proceeding with an exchange. Thus, the only issue presented by Kincaid's protest was whether or not the land in question was actually part of the Steep Creek WSA.

³ In a letter to Reid C. Davis, Esq., dated Feb. 18, 1987, the Cedar City District Manager explained that the environmental assessment process was utilized "to address any surface disturbing activities within wilderness study areas" (Case Record, Tab R).

⁴ The FEA did not analyze a present sale or exchange because such disposition was not deemed prudent until final resolution of WSA status. A future sale was not considered because the FEA concluded that the land was located within the riparian zone of Deer Creek and the parcel therefore did not qualify for sale under BLM's riparian area management policy implemented in Utah by Instruction Memorandum (IM) UT-87-261 (May 15, 1987). However, as indicated, alternatives B and C anticipated an exchange, under the proper circumstances.

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However, the State Director's decision did not turn on that issue. Prior to making the decision under appeal, the State Director visited the site of the trespass, a visit which he characterized in his decision as "most rewarding" (Decision at 2). He continued:

What I learned that I did not fully appreciate before is that all of the structures and developments in question are located within close proximity to Deer Creek, a perennial stream that, except in time of flood, runs clear and inviting in what is otherwise a largely arid and desert-like region. The stream is undoubtedly a great natural asset and attraction to the area, not for its water alone but also for the abundant green and lush vegetation that grows along its banks. Frankly, I was both surprised and offended by the placement, indeed intrusion, of manmade structures and developments as well as stacks of building material, rubble and refuse in the area so close to the stream bank. It quickly occurred to me that all of the structures and developments in the trespass area are likely within a riparian zone that BLM is required by its own Riparian Area Management Policy dated January 27, 1987, as well as related Executive Orders 11988 and 11990, both dated May 24, 1977, to protect and that their location there is both impermissible under and in conflict with those documents. I therefore, in company with another BLM employee who accompanied me on that occasion, inspected with considerable care the entire area of trespass, and tentatively concluded that most, if not all, of the structures and developments placed therein are within a riparian zone that BLM is charged to manage and protect. I later directed other BLM employees from the State Office to visit the area, including both the Deputy State Director for Lands and Renewable Resources and the Deputy State Director for Operations, for the purpose, among others, of generally determining the extent of the riparian zone associated with Deer Creek, and whether the structures and developments here in question are within that zone. They observed, as had I, that most of the developments actually lie within the flood plain of the stream, and that all of the structures and developments are located within the area of vegetation that is created by and dependent upon the water that flows in Deer Creek. A similar observation was earlier noted by the District Manager, Cedar City, and cited by him as a matter of concern in his proposed decision. Based upon this personal observation and knowledge, and that of other BLM employees who have inspected the area, I do now find and conclude that the structures and developments here under consideration and which are located in trespass on public land are within a riparian zone that the BLM is mandated to protect.

Under the circumstances, it appears obvious that the BLM cannot permit the continuance of the trespass in question. The structures and developments are clearly an intrusion in and a detriment to the riparian zone that the BLM manages and is required to protect. Indeed, the Riparian Area Management Policy dictates retention of riparian areas unless disposal would be

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in the public interest. It is difficult to see how the public interest would be served by a transfer of the land in question to you.

(Decision at 2-3).

The State Director required the removal of all structures and improvements from public land within 90 days of the receipt of his decision. In addition, although he concluded that appellant was trespassing on public land designated as part of the Steep Creek WSA, the State Director considered that conclusion to be "irrelevant" because his decision was "based solely on the riparian zone considerations" (Decision at 3). Thus, the State Director, in resolving the protest, abandoned the basis for the actual initiation of the environmental assessment process (the WSA status of the land) and the conclusion reached by the District Manager as a result of that process.⁵

Kincaid filed an appeal of that decision, and, claiming surprise by the State Director's shift in rationale from WSA issues to riparian area issues, requested that we remand the case to provide him with an opportunity to confront those issues at the State Office level or to have a hearing on issues of fact. By order dated December 9, 1987, we denied Kincaid's request, noting that he would have the opportunity to address the riparian issues in his statement of reasons (SOR) in support of his appeal. In the order, we limited the issues in the appeal to (1) whether structures and improvements were placed in trespass on public land, and (2) whether BLM properly required appellant to remove them because they are in the riparian zone of Deer Creek.

We need not concern ourselves further with the trespass issue, since in his SOR, Kincaid states: "In order to save further expenditure appellant has subsequently accepted BLM's cadastral survey" (SOR at 8). The remaining issue is whether the State Director properly required appellant to remove his improvements because they are within the riparian zone of Deer Creek.

In order to address this issue, we must first confront the question of whether appellant's improvements are, in fact, within a riparian area.

⁵ We note that the record shows that by memorandum dated Apr. 29, 1987, the Cedar City District Manager forwarded to the State Director certain alternatives developed by the District Office staff in conjunction with the trespass. The description of those alternatives included the statement that "[t]he lands in trespass are in a riparian zone. The District Manager expressed his preference for the alternative identified therein as Alternative A, which in the FEA was the preferred alternative, alternative C (Case Record, Tab TTT). In a response dated June 2, 1987, the Deputy State Director, Lands and Renewable Resources, informed the Cedar City District Manager to "[c]hange the alternatives in the EA to those identified in Insert A" (Case Record, Tab BBB). Insert A is not included as a part of the record in this case, but presumably those alternatives were the ones which appeared in the FEA issued on June 17, 1987.

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Although appellant concedes that some of the improvements lie within areas that may be properly classified as riparian, he challenges that characterization with respect to the area where the house is located. The BLM Director's Riparian Area Management Policy dated January 22, 1987 (SOR, Exh.R), defines riparian area as follows:

Riparian Area - an area of land directly influenced by permanent water. It has visible vegetation or physical characteristics reflective of permanent water influence. Lake shores and stream banks are typical riparian areas. Excluded are such sites as ephemeral streams or washes that do not exhibit the presence of vegetation dependent upon free water in the soil. [Emphasis in original.]

For such areas, the objective of the policy "is to maintain, restore, or improve riparian values to achieve a healthy and productive ecological condition for maximum long-term benefits." In order to meet this objective, the policy statement states that "the Bureau will to the extent practical *** [r]etain riparian areas in public ownership unless disposal would be in the public interest, as determined in the land use planning system."

Appellant has submitted a base map and overlays to illustrate his contention that the land on which his house is situated should not be considered riparian in character (SOR, Exh. B). A broad band of light green on overlay No. 1 shows what appellant calls the hydric riparian or streamside community (SOR at 31). He contends that beyond this community there is a noticeable absence of ground cover, with the predominant vegetation being sagebrush and pinion-juniper, although within the riparian community and extending beyond it are deciduous trees commonly associated with water. His stone house is situated within a stand of cottonwood trees. Appellant explains the presence of those trees, the largest of which, he alleges, are probably over 100 years old, as follows:

Clearly these [cottonwood] trees did not expand up the bank and away from the stream. This grove was apparently deposited in the late 1800's when the stream course was further west and before serious erosion and headcutting took the stream to its present depth and location. This explains both the age and the decadence of the trees, as well as their association with xeric shrubs. These trees should be considered a relict population.

The reason that any of these trees have managed to survive at all is not because of their association with Deer Creek, but because of the spring and runoff that drains from an arroyo to the west which is substantially higher than [the] creek, thus filtering some water through the otherwise dry bench of sand. After artificial irrigation (by diesel pump) during the summers of 1983 - 86 these trees have responded with a remarkable increase in foliation. However, this alluvial benchland is not a viable long-term

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riparian community unless it is irrigated and thus the mature trees will continue to decline rapidly.

(SOR at 32-33). In support of these observations, appellant has submitted photographs as Exhibit C to his SOR.

The FEA makes several references to the riparian character of the area and describes the affected environment as follows:

The affected public lands are in a small valley in the Deer Creek drainage. Deer Creek itself is about 40 feet east of the trespass dwelling. The soils are quite sandy. The vegetation is a riparian type. Typical plants are cottonwood, willow, rushes, and sedges. Riparian vegetation in desert country is very important for wildlife and livestock values. It also helps maintain water quality. These green belts through the red rocks are very scenic and attract recreationists.

(FEA at 4).

In a September 25, 1987, memorandum, a BLM hydrologist and a BLM wildlife biologist reported to the Cedar City Assistant District Manager for Resources, BLM, the results of their study of the riparian-floodplain values of the lands in question. During their study, they bored holes in the soil to bedrock in order to obtain data on groundwater-riparian vegetation interaction. Like Kincaid's analysis, their report notes a change in riparian vegetation at a point approximately 7 feet above the bottom of the stream channel. They stated that vegetative cover was 95 to 100 percent below that point, and that Kincaid's house was above that point. However, they explained:

The groundwater measurement holes were drilled to help determine if the area where the house is located is in a riparian zone. The intent was to meet the test of the Bureau's Riparian Policy which states, "A riparian zone is an area directly influenced by permanent water." The bored holes would prove the occurrence or absence of permanent water in the zone.

They concluded, based on the results of their test bores, that the house was within the Deer Creek riparian zone because it "sits in an area influenced by permanent water." The report additionally concluded that the house was not in the 100-year floodplain.

Appellant's arguments concerning the status and location of the cottonwood trees does not convince us that his house is outside the riparian area. Cottonwood trees could not survive without a permanent source of water. The fact that some of the older trees surrounding appellant's house are dying, and that irrigation has caused others to flourish, does not establish the nonexistence of a riparian area. Accordingly, we agree with BLM's determination that the lands in question are within the riparian zone of Deer Creek.

[1] We now turn to the question of whether the record supports the State Director's decision that application of BLM's riparian management policy requires removal of appellant's structures. Clearly, the structures which lie entirely on public land more greatly intrude in the riparian area and we find no reason why they should not be removed. Inasmuch as appellant has asserted that these structures are easily removable, we do not, nor does appellant, consider them to be the focus of the controversy in this appeal; rather, the matter at issue concerns the removal of the house.

In his SOR, Kincaid notes that the riparian management policy, relied on by the State Director, had not even been mentioned in the DEA, the focus of that document being the WSA status of the land. Kincaid points out, however, that the FEA considered other alternatives and analyzed the effect of the riparian management policy, concluding that while that policy, as identified in I.M. No. UT 87-261, dated May 15, 1987, would preclude sale of the lands, an exchange would still be feasible.⁶ In fact, Kincaid asserts, both alternative B and alternative C in the FEA contemplate an exchange if Congress does not designate the Steep Creek WSA as a wilderness.⁷ For alternative B, BLM stated in the FEA at page 3:

If Congress does not designate the subject land as wilderness they would be offered for exchange to Mr. Kincaid. Any such exchange would have to result in the federal government receiving lands with floodplain and riparian values greater than those given up. The exchange must also be on a value for value basis.

For alternative C, BLM concluded that if Congress did not designate the areas wilderness, "BLM would offer to exchange the land as described for Alternative B" (FEA at 3). BLM further stated in the FEA at page 5:

The property is located in the riparian area of Deer Creek. It is Bureau policy to retain and maintain riparian areas in a healthy condition for their multiple resource values. Riparian areas can be exchanged for land with higher riparian values. [Emphasis added].

Finally, BLM made the following evaluation of an exchange under the discussion of Environmental Consequences:

Riparian habitat and a floodplain area would be disposed of to a private individual. However, a larger amount of riparian land would be acquired. Thus, federal control of these critical land

⁶ The State Director's decision cited the more general Bureauwide riparian management policy and the Executive Orders, but not the Utah State Office Instruction Memorandum relied on in the FEA.

⁷ While the quote is found under the section related to alternative B, as noted above, for purposes of an exchange, alternative B and alternative C are identical.

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use areas would be increased, therefore, this action would be consistent with the Bureau's Riparian Area Management Policy. Since the structure itself is not within the base floodplain, the transfer would be in compliance with floodplain regulations.⁸

(FEA at 7). The only factor identified as requiring postponement of an exchange was wilderness interim management policy.

The extent to which the State Director may have considered the possibility of an exchange is not clear from his decision. In its answer, BLM recognizes that the riparian policy provides for an exchange for lands of higher riparian value, but seeks to place the burden on appellant by stating: "Appellant has never offered any specific lands" (Answer to SOR at 5). However, in his SOR at pages 34-37, appellant had set forth a detailed discussion of why an exchange (with various parcels described and depicted on overlay No. 4) would be completely consistent with the goals and objectives of BLM's riparian management program as implemented through the Utah State Director's own guidelines in I.M. No. UT-87-261 (May 15, 1987). Although those guidelines disfavor disposition of riparian land, they make the following provision for exchanges:

Exchanges with private parties will not be permitted unless it can be definitely shown that riparian areas of superior public values are being acquired, riparian areas are being enhanced, or that the areas being exchanged are small, isolated and cannot be managed through agreement with State agencies, other Federal agencies, or interested conservation groups.

BLM's statement that appellant had not offered any land is not responsive to his argument regarding an exchange.

Following submission of BLM's answer, appellant filed a "Motion for Submission of Supplemental Statement." An attachment to that submission (Affidavit of Andrew F. Wiessner, dated November 11, 1988) detailed the efforts of a representative of appellant in 1988 to negotiate a settlement of the trespass. Therein, the representative states that (1) he met with the individual who was the Utah State Director at the time of issuance of the decision under appeal; (2) that individual did not rule out the possibility of an exchange; (3) that individual referred him to the new Cedar City District Manager; (4) he met with the Cedar City District Manager and other BLM officials; (5) a tentative exchange proposal was agreed upon; (6) negotiations were terminated when he received a letter dated August 1, 1988, from the Cedar City District Manager stating:

When the State Director's decision was appealed to the Interior Board of Land Appeals (IBLA), administrative authority of this

⁸ Alternative B provided for the issuance of a temporary use permit to authorize the trespass until Congress acts on the wilderness designation for the Steep Creek WSA.

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case transferred from BLM to the Department of the Interior.⁹ Until the IBLA issues a decision on the appeal BLM is precluded from negotiating a settlement of this matter.

Counsel for BLM did not challenge any of the statements in the affidavit; rather, he responded to appellant's motion by stating:

The decision which is here under appeal specifically considered the possibility of an exchange * * * and concluded that such an exchange would not be in the public interest, but that these lands should remain under BLM management.

(Answer of Feb. 10, 1989, at 2). Counsel also stated that the Cedar City District Manager was clearly correct in terminating negotiations with appellant's representative because jurisdiction over the matter was removed from BLM and resided with the Board after the filing of the appeal, citing *Sierra Club*, 57 IBLA 288, 291 (1981).

Counsel's representation concerning the State Director's consideration of an exchange is not borne out by a review of the State Director's decision. Although the State Director concludes that "the Riparian Area Management Policy dictates retention of riparian areas unless disposal would be in the public interest" (Decision at 3), his analysis of whether or not the public interest would be served is limited to his conclusory statement that "[i]t is difficult to see how the public interest would be served by a transfer of the land in question to you" (Decision at 3). Thus, while the decision, by implication, overrules the District Manager's proposed decision, by finding that any disposition of the land is not in the public interest, there is no rationale in the decision to support that finding. The District Manager arrived at his proposed decision following a review of all pertinent information, including the public comments received on the DEA. Therein, he stated that his decision "accomplishes the Bureau of Land Management's responsibilities under * * * the Bureau's Riparian Area Management Policy" (Proposed Decision Record at 2).

As noted above, the real focus of this appeal concerns appellant's house and the State Director's determination that it should be removed from public land. The FEA, however, had rejected that alternative noting that it was "likely that the structure would simply be relocated onto the property owner's private land" (FEA at 6). Removal would be inconvenient and expensive for appellant, and the benefit to the public might be only minimal in that appellant could move his house less than 100 feet east and be entirely off public land but still be within the riparian zone of Deer Creek, as identified by BLM. Additionally, by directing removal of the house, the State Director was foregoing an opportunity to acquire substantially greater acreage of unarguably higher riparian quality.

⁹ The District Manager obviously meant the Board of Land Appeals, rather than the Department of the Interior, since BLM, as well as the Board, is part of the Department of the Interior.

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[2] Also, the statement that negotiations with appellant's representative were properly halted due to the appeal is incorrect. When a BLM decision has been properly appealed to the Board by an adversely affected party, BLM loses jurisdiction over the case and it has no authority to take further dispositive action on the subject matter of the appeal until the Board rules on the appeal. Melvin N. Berry, 97 IBLA 359, 361 (1987); Sierra Club, *supra*; AA Minerals Corp., 27 IBLA 1 (1976). However, that does not mean that BLM is precluded from entering into settlement negotiations with the appellant, as the Cedar City District Manager apparently believed. In fact, the Board encourages such action. Thus, in this case it was entirely proper for BLM to have negotiated with appellant during the pendency of the appeal. The rule regarding jurisdiction precludes BLM, however, from finally disposing of the matter without regaining jurisdiction from the Board. Therefore, where negotiations are successful and the parties agree on a settlement after the filing of an appeal, the proper procedure is for BLM to request that the Board vacate BLM's decision and remand the case to it to take formal dispositive action to implement the settlement agreement. In this case, BLM could have pursued negotiations regarding an exchange, and, if successful, requested that the Board vacate the State Director's decision and remand the case to it to execute the agreement.

Based on our review of the record, we must conclude that the State Director's decision is not supported by a rational basis and for that reason, we vacate that decision.¹⁰

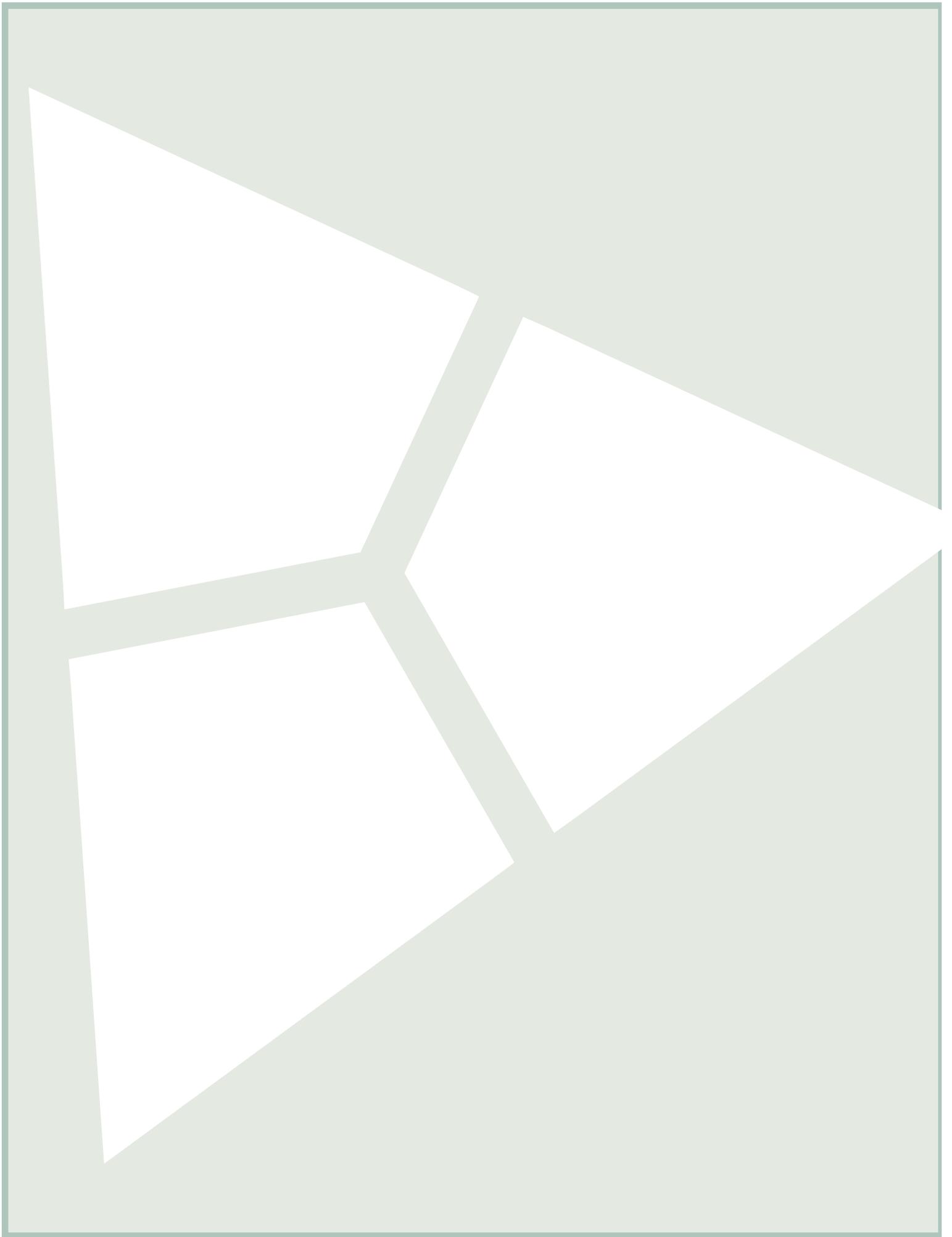
Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded for further action consistent with this opinion.

Bruce R. Harris
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

¹⁰ Appellant continues to maintain that the lands in question are not within the Steep Creek WSA. That issue, however, was not before this Board because the State Director specifically declined to base his decision thereon.



Section 7. Guidelines for Procuring Neutrals

Procurement Guidelines

Hiring third-party neutrals through noncompetitive procedures was made substantially easier by passage of Public Law 104-320, the Administrative Dispute Resolution Act of 1996. The Act addresses the expedited hiring of neutrals by amending the Competition in Contracting Act (CICA), 41 U.S.C. 253(c)(3)(C), to exempt the procuring of neutrals in administrative dispute resolution from competition.

The Federal Acquisition Regulation (FAR), Part 6, "Competition Requirements," now has specific language under 6.302-3, "Industrial Mobilization; Engineering, Developmental, or Research Capability; or Expert Services," that states full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order to acquire the services of an expert or neutral person for any current or anticipated litigation or dispute [(a)(2)(iii)]. This authority may be appropriate when it is necessary to acquire the services of either a neutral person, e.g., mediators or arbitrators, to facilitate the resolution of issues in an alternative dispute resolution process [(b)(3)(ii)]. The exemption does not apply, however, when acquiring the services of a "true" facilitator who is responsible for arranging and conducting meetings, such as internal meetings, that do not involve

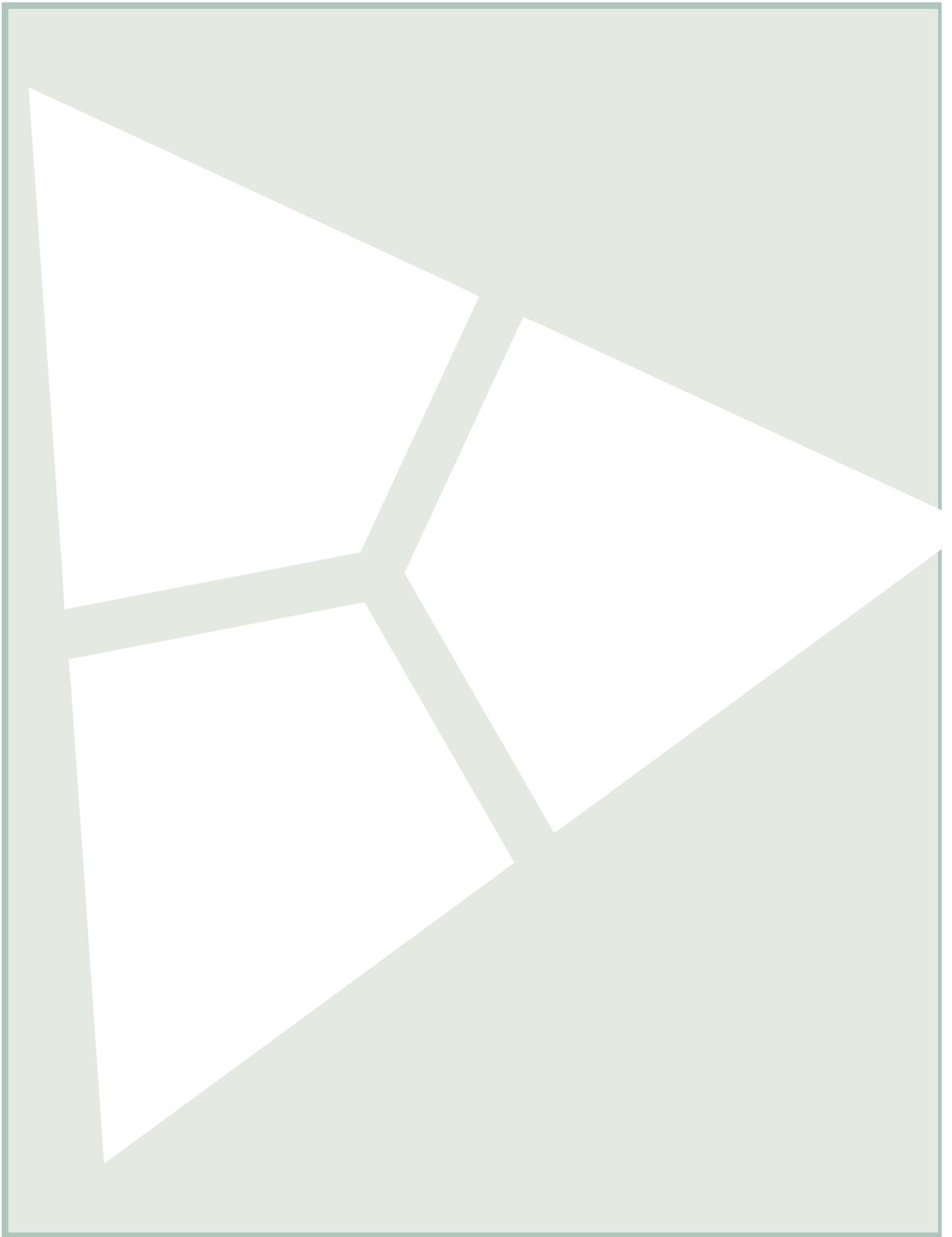
mediation, arbitration, or other alternative dispute resolution processes.

If the situation allows for competing the hiring of this neutral(s) without sacrificing the opportunity to utilize an ADR process, then the parties may agree to competition. This competition can be based on agreed-upon criteria/qualifications.

In either case, requirements should be coordinated with procurement personnel as early as possible. If you have any questions, please contact your local procurement staff or John Sherman, Procurement Analyst, at the National Business Center, (303) 236-9441.

Note to Procurement Request Initiators

When writing a justification for other than full and open competition as required under FAR, Part 6.303-1, both Public Law 104-320, Administrative Dispute Resolution Act of 1996, and FAR, Part 6, "Competition Requirements," section 6.302-3, "Industrial Mobilization; Engineering, Developmental, or Research Capability; or Expert Services," paragraph (b)(3)(ii) should be cited.



Section 8. Federal Advisory Committee Act

Provisions of the Federal Advisory Committee Act (FACA) need to be understood by BLM employees in the ADR context, particularly when negotiation and facilitation are used to gather public input for decisionmaking, as in the land use planning process. ADR processes such as mediation, when used to resolve a specific dispute between BLM and one or more parties, are not for the purpose of obtaining advice or recommendations, even though a mediation event requires “consensus” by the parties in order to resolve the dispute. Also, the Administrative Dispute Resolution Act, Public Law 104-320, specifically allows for some ADR processes to be conducted in confidence. Even though the law permits some ADR processes to be shrouded in confidentiality, potentially adverse consequences of shielding discussions from the public should be carefully weighed.

The attached documents are intended to provide guidance for BLM employees in evaluating when FACA is a factor. The first document was produced by the Boise Field Solicitor’s Office; the second was produced by the Department of the Interior’s Office of the Solicitor, Division of General Law. Since ADR processes are flexible in their application, any doubts about the applicability of FACA should be discussed with the appropriate Solicitor’s Office. FACA violations can generally be avoided by observing two principles: keep the doors open to anyone for all meetings that are part of a collaborative decisionmaking process initiated by BLM, and ensure that the public is adequately advised of the time, place, and intent of the meetings.

Steering Clear of FACA Problems

Confusion about the Federal Advisory Committee Act (FACA) is widespread these days throughout BLM. At a time when we're being encouraged more than ever to collaborate and involve the public in our decisions, along comes a new emphasis on FACA and suddenly, much of what we planned or have done in the past appears to be in violation of the law.

Nobody wants to violate the law and yet we need to involve the public. FACA and decisions by the courts do spell out some situations where the law does not apply; that's the good news. BLM managers and specialists need to be as familiar with circumstances where FACA is not applicable as they are with when FACA is in effect. Here's a summary that might help you recognize when FACA doesn't fit. We've underlined parts that are especially important to note.

1. First, some definitions taken right from FACA itself. The term "Advisory Committee" means any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof (hereafter referred to as committee) which is:
 - A. Established by statute or reorganization plan,
 - B. Established or utilized by the President,
 - C. Established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes ... any committee which is composed wholly of full-time officers or employees of the Federal Government.

The last sentence provides the first instance where FACA is not applicable: to any group wholly composed of federal employees. Additionally, recent interpretations of FACA hold that groups composed of state or tribal government employees are also exempt from FACA.

2. One-on-one meetings between BLM and an individual, regardless of who initiates the meeting, are not violations of FACA. A meeting initiated by a group for the purpose of expressing the group's view is not considered a violation of FACA as long as the group was not formed by the federal agency and is not used recurrently as a preferred source of advice or recommendations.
3. If the meeting is solely to exchange facts or information and not reach a consensus or receive recommendations from representatives of a variety of groups, then FACA doesn't apply.
4. Meetings with permittees are generally not subject to FACA. You have no worries if the meeting is held to talk about operational procedures. If the permittees

seek to give you consensus-based recommendations, then you're approaching the fine line of FACA and need to be careful.

5. If BLM is invited to a meeting by an outside, unsolicited pre-existing group, then FACA is not a factor. The reverse of this is that if the group was formed to advise BLM on particular issues, then FACA needs to be considered.

6. If BLM invites a group of people in to receive their individual opinions, as opposed to reaching a consensus or group advice or recommendation, then the meeting is not in conflict of FACA.

7. If a contractor forms a group to receive advice or recommendations, then that group is not subject to FACA. BLM, however, cannot suggest to the contractor that the sub-group be formed.

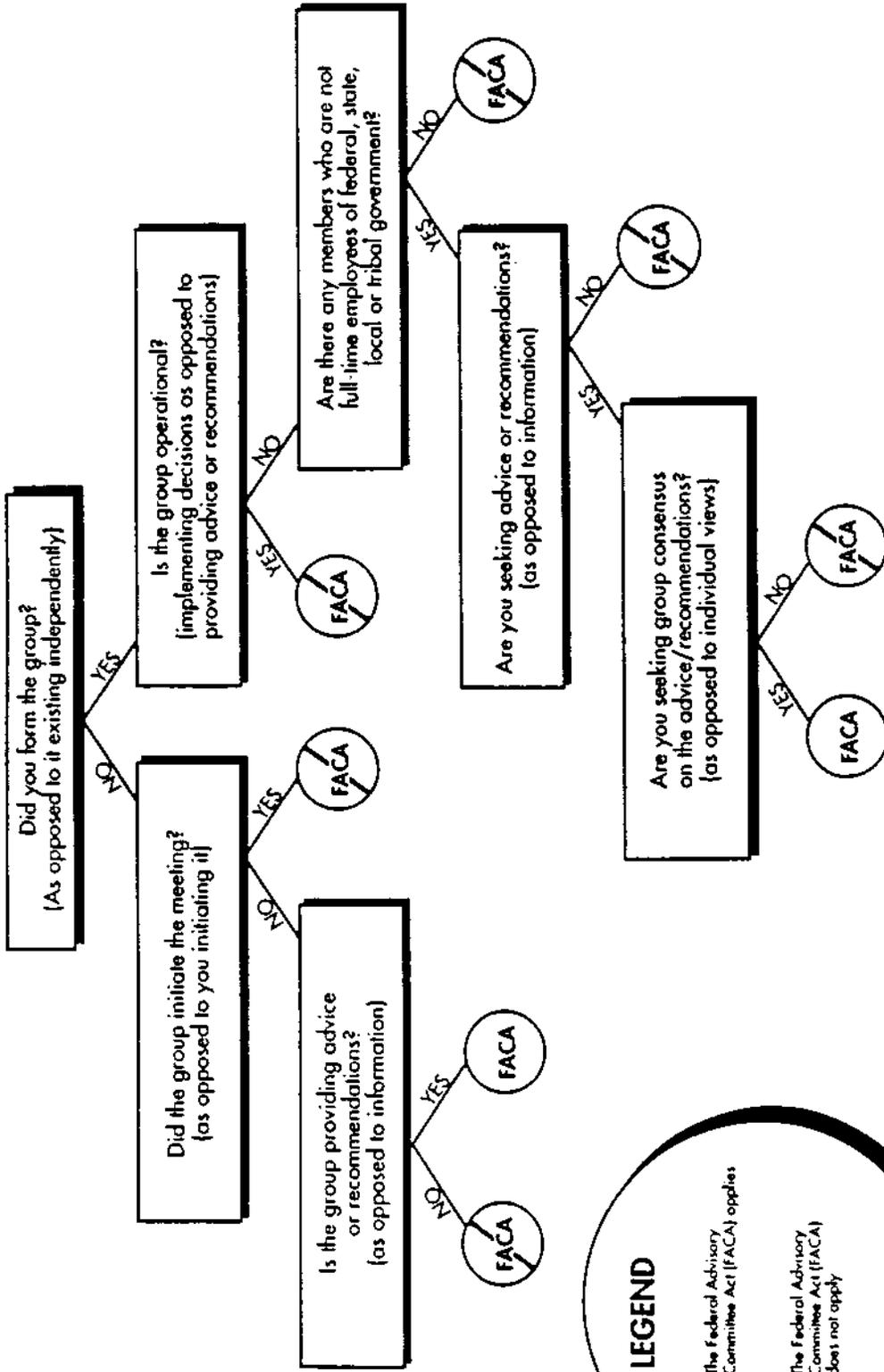
8. This is rare for BLM, but a local civic group whose primary function is to render public service to a federal program is not affected by FACA. For example, the foundations that work with individual national parks are not in violation of FACA.

9. Finally, any state or local committee, council, board, commission or similar group established to advise or make recommendations to state or local officials or agencies are not covered by FACA.

No one will go to jail for FACA violations. It is a civil law, not a criminal law. But if we are challenged on the basis of FACA and lose, it may mean tossing out months or years of work and starting over. Ignoring FACA can be costly and decrease our competency and credibility in the eyes of the public.

If any doubt exists about an activity's legality under FACA, then you should get in touch with Kenneth Seby or Kathleen Carr at the Field Solicitor's office, 334-1911.

FACA DECISION TREE



LEGEND

The Federal Advisory Committee Act (FACA) applies

The Federal Advisory Committee Act (FACA) does not apply

THE FEDERAL ADVISORY COMMITTEE ACT - HOW IT AFFECTS
THE DEPARTMENT OF THE INTERIOR'S INTERACTIONS WITH THE PUBLIC^{1/}

I. Introduction.

Congress passed the Federal Advisory Committee Act ("FACA") in 1972 to control the growth and operation of the numerous boards, committees, commissions, councils, and similar groups that had been established to advise officers and agencies in the Executive Branch of the Federal Government. FACA's stated purposes are to eliminate unnecessary advisory committees, limit the formation of new committees to the minimum number necessary, keep the functions of the committees advisory in nature, hold the committees to uniform standards and procedures, and keep the public informed of their activities. 5 U.S.C. Appendix § 2. To guard against biased proposals from private interested parties, FACA procedures open to public scrutiny the manner in which many outside groups provide advice to the Federal Government.

Thus, FACA governs many of the ways agencies of the Federal Government interact with outside groups. In some instances, it is

^{1/} This document was prepared by the Office of the Solicitor, Division of General Law. It is intended to be generic FACA guidance with only limited specific references to how the Act affects the particular programmatic concerns of the Department of the Interior's various bureaus.

clear that FACA applies to a given situation.^{2'} In other instances, it is equally clear that certain forms of Departmental interactions with the public are not covered by FACA. Then, there are gray areas where it is not always clear whether FACA applies.^{3'}

It is important to be as aware as possible of what FACA covers so that agency activities can be structured appropriately, and useful contacts and communications with outside groups and individuals can occur consistently with applicable law to the greatest extent possible. We hope that, with the information contained in this guidance, the amount of interaction with the public can be maximized, consistent with the dictates of FACA, and the likelihood that the Department will run afoul of FACA will be minimized.

II. General Principles.

An advisory committee is defined as:

^{2'} For example, as of October 1995, the Department of the Interior has approximately 111 chartered advisory committees subject to FACA. Of these committees, about 68 are required specifically by other statutes.

^{3'} As will be evident from the text of this document, the law under FACA is evolving. The Division of General Law has developed this guidance to address the legal ramifications of various types of interactions between the Department of the Interior and non-federal groups and individuals. There are many issues under FACA, however, for which there is as yet no legal precedent, or where the effect of the existing precedent remains unclear. Accordingly, in order to give guidance in the gray areas, we have had to use our best judgment as to how the courts would likely resolve these issues. Because of the evolving nature of the law and the absence of clear legal precedent in many areas, certain courses of action, as discussed more fully throughout this document, cannot be deemed to be risk-free.

[A]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is--

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government

5 U.S.C. Appendix § 3(2).

In analyzing FACA issues, it may be helpful to think about advisory committees as involving three basic components:

- (1) A group
- (2) Established or utilized by the Executive Branch
- (3) To obtain advice or recommendations for the Executive Branch.

In this context, a group that is "utilized" is a group that is organized directly by the Federal Government, or is a group that is closely tied to, or controlled largely by, the Federal Government.

Using this framework, one can describe, in general terms, the types of meetings that fall within the scope of FACA and those that do not. Attached as Appendix 1 is a "plain English" statement of general principles describing the groups and meetings that fall within and outside the scope of FACA based on the above framework. It should be emphasized, however, that this statement represents a very basic approach to FACA issues. The statement is intended only as short hand guidance and should not be used outside the context of the full discussion of FACA principles presented in this document.

III. The FACA Framework.

When a group comes within the definition of an advisory committee, FACA requires that the group be chartered, and that it operate in accordance with the terms of FACA. See Appendix 2 for the steps involved in establishing advisory committees under FACA.

FACA specifically excludes from the definition of advisory committees:

- a.) any committee which is composed wholly of full-time officers or employees of the Federal Government;

- b.) any local civic group whose primary function is that of rendering a public service with respect to a Federal program; and
- c.) any State or local committee, council, board, commission or similar group established to advise or make recommendations to State or local officials or agencies.

5 U.S.C. Appendix §§ 3(2)(C)(iii), 4(c).

In guidelines promulgated by the General Services Administration (GSA), there are several examples of meetings or groups not covered by FACA, in addition to those explicitly exempted by the statutory language discussed above:

- 1.) Any committee established to perform primarily operational as opposed to advisory functions, as long as the committee's functions do not become primarily advisory. Operational functions are those specifically provided by law.
- 2.) Meetings with an individual.

- 3.) Any meeting initiated by a Federal official with more than one individual for the purpose of obtaining the advice of the individuals present and not for the purpose of using the group to obtain consensus advice or recommendations. FACA may be implicated, however, if the agency accepts the group's deliberations as a source of consensus advice or recommendations. See discussion in Part IV(D) and note 8, infra.
- 4.) Any meeting initiated by a group with a Federal official for the purpose of expressing the group's view, as long as the Federal official does not use the group "recurrently" as a preferred source of advice or recommendations. See discussion in Part IV(D) and note 8, infra.
- 5.) Meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of

the advisory committee. (We have interpreted this exemption as permitting non-members of the advisory committee to be on the subgroups).

- 6.) Any meeting with a group initiated by a Federal official for the purpose of exchanging facts or information.

41 C.F.R. § 101-6.1004.^{4'}

A. General Analysis

It is important to analyze both the kind of contact anticipated and the nature of the group when scrutinizing interactions with outside groups for application of FACA. Thus, questions arising under FACA generally fall into two categories:

^{4'} We note, as a measure of caution, that in 1989 the Supreme Court, in its only opinion addressing FACA, refused to defer to the GSA regulatory definition of the term "utilized" as used in FACA, because it was not issued contemporaneously with the enactment of FACA, and Congress had not authorized GSA to issue a regulatory definition of an advisory committee having the force and effect of law. Public Citizen v. United States Department of Justice, 491 U.S. 440, 465 n. 12 (1989). The Supreme Court recognized, however, that GSA was statutorily empowered to prescribe administrative guidelines, advice, assistance and guidance to advisory committees to improve their performance. Id. At least one other court has followed the Supreme Court's lead. In Ass'n of American Physicians and Surgeons, Inc. v. Hillary Clinton, 998 F.2d 898, 913 (D.C. Cir. 1993), the D.C. Circuit declined to defer to the GSA guidelines regarding exceptions from FACA on the ground that all agencies, not GSA alone, are charged with interpreting FACA.

a.) Is the anticipated interaction (e.g., a meeting) with outside groups or individuals subject to FACA?

b.) Is the group with which the agency expects to make contact subject to FACA?

Relevant to the first inquiry are factors such as the purpose of the meeting; the frequency with which such meetings are expected to occur; and whether a consensus opinion or individual views are sought. Alternatively, some situations involve determining whether an agency's interactions with loosely organized groups with ill-defined identities and internal procedures are subject to FACA. Other groups with which agencies interact are very well organized, with established memberships. Also relevant is who organized or controls the group. Factors such as these are essential to determining whether FACA applies to a given communication.

B. What Does "Established or Utilized" Mean?

FACA contains no definition for the term "established or utilized." Courts have interpreted "established" to have its ordinary meaning in the context of advisory committees; committees established by a Federal agency are created intentionally and are easily identifiable. While GSA's guidelines include a definition of "utilized", the Supreme Court in 1989 refused to defer to that

definition. See Public Citizen v. United States Department of Justice, 491 U.S. 440, 463-4 n. 12 (1989). Nonetheless, both the Supreme Court and the GSA guidelines share the common understanding that FACA applies to outside groups used by the Federal Government "in the same manner" as the Government would use Government-established advisory committees to obtain advice or recommendations. 491 U.S. at 462-63; 41 C.F.R. § 101-6.1003. That is, FACA governs the receipt of advice or recommendations from groups closely tied to the Federal Government, thereby enjoying a "quasi-public status." Thus, the Supreme Court interpreted "established or utilized" to exclude the receipt of advice or recommendations from groups not organized by the Federal Government or brought into being or controlled largely by the Federal Government.

Whether a group not organized by the Federal Government is sufficiently closely tied to the Federal Government so as to produce a "quasi-public status" leads to yet more questions as to when this test is met. FACA likely will apply, however, where a group or committee is subject to "strict management by agency officials." 491 U.S. at 461, 463; Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C. Cir. 1990). Therefore, we believe that meetings with preexisting groups that were not formed by and are not controlled by the Department (such as through funding, setting meeting agendas, or appointing members), and which have continuing

functions unrelated to these Federal advice-giving activities probably are not subject to the requirements of FACA.

It is clear that agencies have a great deal of latitude to structure their interactions with groups so as to avoid the need to charter an advisory committee under FACA. In its most recent iteration of this analysis, the Court of Appeals for the D.C. Circuit closely examined the structure and form of the groups created by the President to produce a legislative proposal for health care reform. The court held that "[s]ince form is a factor, it would appear that the government has a good deal of control over whether a group constitutes a FACA advisory committee.... In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." Ass'n of American Physicians and Surgeons, Inc. v. Hillary Clinton, 998 F.2d 898, 914 (D.C. Cir. 1993).

Accordingly, in structuring its interactions with the public, agencies should consider all the factors a court would consider in determining whether the agency has established or "utilized" an advisory committee. These factors include: the purpose of the meeting(s); the frequency of meetings; who attends; whether participants change or remain constant over the course of multiple meetings; whether group input from participants, as opposed to expression of individual views, is an objective or result (even if

"consensus" is not obtained); and the degree of control exercised over the group.

As a result of legislation enacted in 1995, it is unnecessary to consider these factors for some meetings among Federal officials and state, local and tribal government officials.⁵⁷ Unfunded Mandates Reform Act of 1995, Public Law 104-4, section 204(b). It is important to note that this exception, while broad, does not extend to all meetings with state, local and tribal officials. The precise scope of this limitation on FACA's reach is discussed in section IV(A), below.⁵⁸

⁵⁷ As originally enacted, FACA contained no exception for meetings with states or tribes. The legislative history of FACA reveals that, of the three bills introduced in the Senate in 1971, only the first contained an express exception for meetings with state agencies. None of the ensuing bills considered, including the House and Senate bills that were sent to conference in 1972, contained a state exception. There are no recorded debates about the state exception or other indications why the exception was dropped as FACA took shape.

In 1991, a bill was introduced in the Senate to amend FACA to exclude committees composed of state or local employees meeting with Federal employees where directed by statute. This bill was never enacted.

⁵⁸ Prior to the enactment of Public Law 104-4, courts had identified potential constitutional ramifications to our system of federalism arising from the applicability of FACA to the relationship of the Executive Branch to the states. Courts generally have avoided addressing directly such constitutional questions, however, and have not construed FACA as containing a constitutionally-required exception for meetings with states. See Aluminum Company of America v. National Marine Fisheries Service, Civ. No. 94-698-MA, D. Or., slip op. at 15 (Dec. 8, 1994); Natural Resources Defense Council v. U. S. Environmental Protection Agency, 806 F. Supp. 275, 278 (D.D.C. 1992).

IV. Does FACA Apply?

Based on the language of FACA itself, the recently-enacted Section 204(b) of Public Law 104-4, the applicable case law and the GSA guidelines, the following represents our views on the applicability of FACA to various types of interactions between Federal agencies and the public.

A. Meetings with State, Local and Tribal Officials.

Section 204(b) of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, provides that FACA

"shall not apply to actions in support of intergovernmental communications where --

(1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and

(2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established

pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

This provision became effective on March 22, 1995. On September 21, 1995, the Office of Management and Budget issued guidelines and instructions required by section 204(c) of Public Law 104-4. These guidelines make it clear that "the exemption applies to all Federal agencies subject to FACA," and "to the entire range of intergovernmental responsibilities or administration." Further, OMB states that the exemption should be read broadly in accordance with the statute's legislative intent.

As the guidelines and instructions recognize, the new legislation clearly allows a wide range of intergovernmental meetings and communications to take place outside of FACA. Nevertheless, the statutory language raises new questions of interpretation of FACA's applicability that must be addressed. In order to ensure that intergovernmental communications are safely outside FACA, the conditions set forth in the statutory language must be met. We address each in turn.

(i) "... meetings are exclusively between ... (intergovernmental officials)." (Section 204(b)(1)).

While the inclusion of the word "exclusively" might suggest that no one other than intergovernmental officials may be present during a

meeting, such a requirement would be far more restrictive than FACA itself, which has as one of its basic tenets the importance of open meetings. We do not believe such a result was intended. We believe the statutory language can be read harmoniously with FACA, in a manner that continues to honor the plain meaning of the language, if it applies to the participants at the meeting. Accordingly, we advise that agencies should continue to open meetings to anyone, but only the participants need be intergovernmental officials.

(ii) "... elected officers (or their designated employees with authority to act on their behalf)" (Section 204(b)(1)).

It is likely that only a small number of meetings will be held directly between Federal officials and state, local or tribal elected officials. For all practical purposes, most regular agency consultations tend to take place with program offices of the state, local or tribal governments. We believe, consistent with OMB's guidelines and instructions, that this provision exempts such consultations from FACA. OMB has directed agencies to consult at all levels, explaining that the FACA exemption applies where the non-Federal governments are "acting through their elected officers, officials, employees" Based on OMB's guidance, we do not believe it is necessary to take extraordinary steps to ascertain the delegated authority of employees of state, local or tribal offices with whom agencies consult.

(iii) "... acting in their official capacities" (Section 204(b)(1)).

We expect that, in most instances, state, local and tribal officials will be acting in their official capacities in meeting with Departmental employees. Where a non-Federal official is representing an entity other than his or her employer, however, such as a national association of state, local or tribal employees, this criterion may not be met (though it is possible that the non-Federal employee still may be representing his or her office.) We advise, therefore, that prior to setting up meetings, Departmental employees should determine whom the state, local or tribal officials will represent in attending the meeting.

(iv) "... such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration." (Section 204(b)(2)).

This broad provision addresses the substance of meetings exempted from FACA. The OMB guidelines and instructions state repeatedly that the scope of meetings covered "should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration." Therefore, we believe that most meetings held between Departmental employees

and state, local or tribal officials will be exempt from FACA where the purpose of the meetings is to discuss matters pertaining to Federal programs in areas where coordination with state, local or tribal governments is necessary or desirable. Such meetings include, but need not be limited to, seeking consensus or advice, or to exchanging views or information. They may be used to facilitate any interaction relating to intergovernmental responsibilities or administration.

B. Meetings with Individuals.

FACA itself and GSA guidelines make clear that one or more Federal officials may meet with an individual, for the purpose of exchanging information or obtaining advice or recommendations from that individual without implicating FACA. This applies regardless of whether the individual or the Federal official initiates the meeting, and there is no limit to the number of meetings that can take place.

Carrying this one step further, the guidelines recognize that Federal officials may initiate a meeting with more than one individual where the purpose of the meeting is to obtain advice and recommendations from each individual and not to achieve a consensus. Because the focus of FACA is whether there is a "group" giving advice, when an agency meets with a number of individuals it should emphasize that the agency is seeking only the attendees'

individual views, and the attendees should be discouraged from attempting to reach a consensus, or otherwise making recommendations as a group. For example, if the attendees were asked to determine what advice they could agree on and/or disagree on, that process could make the deliberations subject to FACA. Further, if the agency calls the meeting and the group insists on providing consensus advice, the agency's acceptance and consideration of the consensus advice also would likely implicate FACA. See Alabama-Tombigbee Rivers Coalition v. Department of the Interior, 26 F.3d 1103 (11th Cir. 1994).

In view of the foregoing, a bureau may hold a series of public focus groups, forums, or "roundtable" discussions to listen to individual views. These sessions should be structured in such a way as to obtain a wide variety of viewpoints instead of consensus among groups. In such cases, group deliberations should be discouraged or minimized; the absence of consensus alone may not be enough to avoid the requirements of FACA if the group acts and deliberates as a group.

C. Meetings with Ad Hoc Groups.

GSA guidelines also recognize that if an ad hoc group (such as a group of citizens concerned about a Departmental program) initiates a meeting with Federal officials to present its views on a subject

(presumably including the giving of advice), that meeting would not be subject to FACA. 41 C.F.R § 101-6.1004(j). This section contains a proviso, suggesting that FACA would apply if the agency "uses the group recurrently as a preferred source of advice or recommendations." In light of Public Citizen, discussed above in section III(B) and in the following section, the word "uses," as with the word "utilized," is interpreted to mean "in the same manner" as the Government would use a committee of its own establishment. Accordingly, Departmental offices should be aware of the extent to which their relationship with the newly formed group may be deemed to be an "establishment" of that group, thereby making FACA applicable. Factors that may suggest that a group has been established include: if the group becomes the bureau's preferred source of public input; if the group establishes working committees with a bureau to carry on assignments between regularly scheduled meetings; or if the agenda becomes a joint effort by the bureau and the group to address continuing problems. Further, even where a meeting is requested by an outside group, if the bureau funds the meeting or controls the agenda of the meeting, we believe the applicability of FACA would become more likely because the group would now begin to look like it is being organized or controlled by the Federal Government.

D. Meetings with Preexisting Groups.

The Supreme Court has recognized, in the context of the Department of Justice receiving advice from an American Bar Association (ABA) committee on the qualifications of potential judicial nominees, that meetings between Federal officials and preexisting groups may not be subject to FACA. Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989). There, the Court found that the ABA committee was not covered by FACA because it was not "utilized" as Congress contemplated in the law. The Court found that the term was included in the law to make it clear that the law covered not only advisory committees established by an agency, but also committees closely tied to the Federal government and subject to "strict management by agency officials." 491 U.S. at 461; Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C. Cir. 1990). Therefore, under Public Citizen we believe that there are good arguments to support the proposition that meetings with preexisting groups that were not formed by and are not controlled by the Department (such as through funding, setting meeting agendas, or appointing members) are not subject to FACA.²¹ The bureaus have wide latitude to meet and work with such groups as long as there is no appearance of close ties or "strict management by agency officials." Public Citizen, 491 U.S. at 461; see Center for Auto Safety v. Federal Highway Administration, No. 89-1045 (D.D.C, Oct.

²¹ Where a group has continuing functions unrelated to providing advice to the agency, there is additional evidence of lack of Federal control.

12, 1990) (RCL). In Center for Auto Safety, the American Association of State Highway and Transportation Officials (AASHTO), a preexisting incorporated association of state government transportation agencies, created a task force to make revisions to AASHTO publications that previously had been adopted by the Federal government as highway design standards. Federal Highway Administration (FHWA) employees participated in drafting the revisions. The court found, relying on Public Citizen, that AASHTO was not subject to FACA, but agreed with the plaintiff that FHWA participation on the task force raises "the specter of secret advice channels to the agency and of agency capture by an outside consultant". However, the court found no evidence that FHWA received advice from AASHTO and that AASHTO's process for development of its policy is for its own benefit, and is not for the purpose of channeling advice to FHWA.^{5/}

^{5/} Plaintiffs in Center for Auto Safety argued that the facts of the case were distinguishable from those in Public Citizen. In Public Citizen, Department of Justice employees played no active role in the ABA meetings, whereas in Center for Auto Safety, Department of Transportation employees participated actively in the deliberations of the preexisting group. While this distinction may have been what caused the court to be concerned about the "specter of secret advice," the Supreme Court seems not to have made any such distinction in its analysis. Therefore, Center for Auto Safety may well be overly conservative in its view of the law. Nevertheless, because a court could conclude that regular use of a preexisting group for the non-public receipt of advice rises to the level of "close ties" to an agency, we advise that a determination be made to use a pre-existing group as a regular source of advice only after consultation with the Solicitor's Office.

E. Public Meetings.

Where Federal officials hold public or town meetings that are open to all, such meetings generally do not implicate FACA. The meetings should be widely advertised and should provide an opportunity for the public to submit written and verbal comments. Federal employees should not conduct or use public meetings to develop consensus advice from groups. A discussion led by a facilitator may produce a perception that a consensus is sought from those in attendance. Thus, if a bureau uses a facilitator at a public meeting, it should be careful to avoid encouraging broad conclusions or recommendations. It also should be remembered that where an agency has established or utilized a group in a way that renders the group and its meetings subject to FACA, but the agency has not complied with FACA's procedural requirements, merely opening the meetings of the group to the public will not prevent a violation of FACA.

F. Permit and Contract Administration.

Meetings with permittees and contractors concerning routine matters directly related to the particular permit or contract are normally not a problem under FACA. See Food Chemical News v. Young, 900 F.2d 328, 331 (D.C. Cir. 1990) (FACA does not apply to "'persons or organizations which have contractual relationships with Federal agencies;'" quoting H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess.

2, reprinted in 1972 U.S. Code Cong. & Admin. News 3508, 3509). FACA considerations could arise, however, if a meeting of a group of permittees or contractors is used for broader input on general matters of policy or management that may affect the permit and/or contract relationship, and if individuals other than permittees and contractors participate. Of course, a meeting with one permittee or contractor would not present a FACA problem even if the scope of the meeting goes beyond the contract/permit at issue.

G. Scientific Peer Review.

Peer review by individuals is not subject to FACA, but peer review by a group is subject to FACA. In 1994, the Court of Appeals for the 11th Circuit upheld a district court's injunction barring the Department from using a peer review report issued jointly by a group of non-Federal scientists initially brought together for their individual views. Alabama-Tombigbee Rivers Coalition v. Department of the Interior, 26 F.3d 1103 (11th Cir. 1994). Caution must therefore be exercised when soliciting peer scientific review from non-Federal scientists. It may be necessary to call a meeting of those who would serve as individual peer reviewers, such as when voluminous records must be reviewed and exist only in a single location. In such cases, bureaus should limit group discussions to factual information, avoid group discussions of substantive issues and ensure that only individual written reviews are obtained.

H. Departmental Employees Representing the Agency on Outside, Non-Federal Committees.

These are normally not subject to FACA. If, however, the committee is being used to solicit or develop recommendations to take back to the bureau, a court may find the activities subject to FACA. See the discussion, however, under section IV(D), above.

I. Liaison Activities.

FACA is not implicated solely by reason of a Federal employee serving as a liaison to an outside group, or allowing an outside group to designate a liaison to a bureau. If the role of liaison actually includes the utilization of a group to obtain advice or recommendations, FACA may apply. See the related discussions under sections IV(C), (D), above.

J. Operational Activities.

Where meetings with non-Federal entities are for operational, rather than advisory, purposes, FACA does not apply. The recent language contained in Section 204(b) of Public Law 104-4, discussed above, greatly relieves the burdens of compliance with FACA for most meetings with state, local and tribal government officials. Prior to enactment of Public Law 104-4, the clearest example of operational relationships exempt from FACA were statutory "primacy"

relationships with states, wherein states are authorized to enforce Federal laws, such as the relationship between OSMRE and certain states under the Surface Mining Control and Reclamation Act (SMCRA). See Natural Resources Defense Council v. U. S. Environmental Protection Agency, 806 F. Supp. 275 (D.D.C. 1992).^{9'} Now, where state, local or tribal governments are involved exclusively, the existence of statutory relationships such as primacy is no longer a determinative factor in applying FACA.

Where the meetings in question do not involve exclusively Federal, state, local and tribal officials or employees, however, it may be necessary to determine the extent to which the meeting is operational rather than advisory, and therefore outside the scope of FACA. As noted in the GSA guidelines, FACA does not apply to

^{9'} In NRDC, the court held that EPA had not established an advisory committee by inviting nine governors to participate in a "Governors' Forum on Environmental Management" to address the ability of states to carry out delegated program activities under the Safe Drinking Water Act. EPA and states share responsibility for implementation of the Safe Drinking Water Act, but EPA may delegate primary enforcement authority (primacy) to states meeting certain program criteria. Even where primacy exists, EPA retains a role in implementation through monitoring state programs for compliance with federal standards, providing technical assistance and funding.

The court found that plain statutory language gave states a critical and independent role in implementation. The court also found that the Governors' Forum did not appear or operate like an advisory committee, inasmuch as the group was chaired by one of the governors, no Federal funds were used to support the group, meetings and agendas were not controlled by EPA, the membership was not fixed, and the group's future activities were not known. Based on these factors, the court found that the governors were acting "operationally as independent chief executives in partnership with the Federal agency," rather than as an advisory committee. NRDC v. EPA, 806 F. Supp. 275, 277 (D.D.C. 1992).

meetings between bureau officials and outside entities and individuals for the purpose of carrying out operational functions that are specifically provided for by law. While there is much latitude here, the legislative authority for the joint operational responsibilities should be clear and not simply inferred from a general statutory charge to cooperate or consult with the outside entities. For additional guidance, refer to discussions of ad hoc and preexisting groups, above, and partnership agreements, below. Ultimately, the facts surrounding each statutory relationship will determine whether related consultations are likely to be subject to FACA.

K. Partnership Consultations.

Partnerships are agreements between DOI or a bureau and groups or individuals executed for the purpose of obtaining the non-Federal partner's support for DOI or bureau initiatives or programs. Partners generally are, or come from, groups that will be affected by the direction taken by policies or program management. Often the groups lack identities that are clearly distinguishable from the Federal agency mission.^{10/} Many partnership agreements historically have included opportunities for the cooperating partner to provide their input to decisionmakers in the form of advice and recommendations reflecting their particular interests.

^{10/} See the "established or utilized" discussion in section III(A), above.

Consultations such as these may be subject to FACA. The determination whether FACA applies will depend, in large part, on the identity and nature of the group (see Section IV(C) above) and the extent to which the consultations are advisory in nature. Partnerships that do not include opportunities for general consultation, but rather involve only the provision of support such as funds, labor, materials, or promotion for a particular project or program, more closely resemble operational activities, discussed above. Because a partnership can imply a consultative relationship, bureaus should be careful to avoid allowing partnership agreements with groups lacking clearly separate identities to be used recurrently as preferred sources of advice and recommendations.

L. Alternatives for Environmental Analyses Developed by Interested Citizens and Groups.

Some interdisciplinary teams working in the NEPA process have invited outside individuals or groups to develop and submit alternatives, such as in "scoping" and similar processes. FACA may be applicable if the outside submitters attend meetings and the activity becomes a consensus-building exercise whereby non-Federal participants join a bureau in developing alternatives for the bureau's consideration. However, the mere acceptance by a Federal team of solicited alternatives does not implicate FACA. Thus, individual written submissions of alternatives developed by non-

Federal persons generally can be solicited, outside of FACA, along with other information solicited as part of a scoping process. Scoping notices to the public may include the solicitation of alternatives from commenters. As in many environmental decisionmaking processes in which non-Federal participants play a role, restricting attendance at scoping and other meetings related to the development of environmental analyses is likely to generate public suspicion that FACA is being violated. Therefore, careful consideration should be given to opening these meetings to the public.

M. Contractor Activities.

The question whether a contractor can use a group to conduct the contractor's work has been addressed by the District of Columbia Circuit. Food Chemical News v. Young, 900 F.2d 328 (D.C. Cir. 1990). The answer depends on the circumstances surrounding the formation of the group and the agency's use of the advice the group provides. If the group is first formed by an agency, and then a contractor is retained to conduct the work of the group and channel the group's advice back to the agency, or if the agency suggests to the contractor that the group be formed and the contractor does so and channels the group's advice back to the agency, the group's deliberations likely are subject to FACA. On the other hand, if the contractor is retained first, and the contractor decides to assemble the group for its own benefit, this would not implicate

FACA. It is important that the idea for the group originate with the contractor and not the agency. The difference is that the agency establishes the group in the first instance, but the contractor establishes the group in the second.

For further information consult such standard references as: the Act itself; the section 204(b) of the Unfunded Mandates Reform Act of 1995, Public Law 104-4; OMB's recent guidelines and instructions regarding section 204(b) of Public Law 104-4; the Departmental Manual (308 D.M.); GSA Guidelines at 41 C.F.R. 101-6.1001 - 101-6.1035 (1990); and GSA's March 21, 1994 Memorandum on the application of the FACA to Intergovernmental Contacts.

[REDACTED]

Appendix 1

General Principles

Outside FACA

Potential FACA Problems

I. Statutory Exemptions

Meetings where the group is comprised of full-time federal officers or employees. FACA, Sec. 3(2)(c)(iii).

Any local civic group whose primary function is that of rendering a public service with respect to a federal program. FACA, Sec. 4(c).

Any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies. FACA, Sec. 4(c).

Meetings held exclusively between Federal officials and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), to exchange views, information or advice relating to the management or implementation of Federal programs established pursuant to public law that share inter-governmental responsibilities. Public Law 104-4, Sec. 204(b).

Meetings held with additional individuals other than those specified in Public Law 104-4, or where non-Federal officials lack sufficient designated authority to act on behalf of elected officers.

Appendix 2

What Is Required for an Advisory Committee Covered by FACA?

A. What does FACA require to establish an advisory committee?

Before establishing an advisory committee, the President or Federal government must, in accordance with FACA and the GSA guidelines:

1. determine the advisory committee to be in the public interest;
2. determine that the functions of the committee could not be performed by an existing committee or by one or more Federal agencies;
3. ensure that the committee will be:
 - (a) fairly balanced in terms of the points of view represented, and
 - (b) fairly balanced in terms of the functions to be performed;
4. ensure the advisory committee will not be inappropriately influenced by any special interest;
5. provide adequate staff and resources; and
6. publish notice in the Federal Register.

B. What does FACA require to charter an advisory committee?

Before an advisory committee can begin meeting, its charter must be published, reviewed and approved. The charter sets out information about the committee, including:

1. the committee's objectives and scope of activity;
2. the agency or official to whom the committee reports;
3. a description of the duties, and if the duties are not solely advisory, a specification of the authority for such functions;
4. an estimated annual operating cost;
- 1 5. estimated number of meetings; and
6. estimated termination date of the advisory committee.

C. What does FACA require for the operation an Advisory Committee?

To ensure public access to the work of the advisory committee, FACA requires that:

1. except for fairly limited circumstances, all meetings of the full committee must be open to the public;
2. a notice of meetings is published in the Federal Register at least 15 days before the meeting;
3. interested individuals who are not members are allowed to submit statements to the committee and, if the agency's guidelines permit, speak at the meeting;

Outside FACA

Potential FACA Problems

II. Not A Group

- a. Meetings with a single individual.
- b. Meetings with more than one individual where advice of individual attendees is sought.
- c. Public meetings, roundtable discussions, and the like to solicit individual views.

Meetings with more than one individual (group) where the individuals provide consensus advice or otherwise act as a group.

Public meetings, roundtable discussions or the like where meetings are used to develop consensus or group advice.

III. Not "Established" or "Utilized"

- a. Meetings initiated by a group to provide the group's view (including advice).
- b. Meetings with "pre-existing" groups not closely tied to Federal Government.
- c. Where a contractor, on its own initiative, decides to create an advisory group to provide it assistance in preparing, for example, a report for an agency.

Group-initiated meetings where the group is used recurrently as a preferred source of advice.

Meetings with "preexisting groups" where factors suggest close ties or management by Federal Government.

Where the agency directed or suggested that the contractor establish an advisory group.

Outside FACA

Potential FACA Problems

IV. Not Advice or Recommendations

- a. Meetings with groups for the purpose of exchanging facts or information.
- b. Meetings with groups that perform primarily operational functions specifically provided by law, as opposed to advisory functions.
- c. Meetings with permittees or contractors to discuss routine matters directly related to the particular permit or contract.
- d. Meetings of subgroups of chartered FACA committees where purpose of the meeting is to do research for, or prepare proposed position papers for the committee.

Operational groups that become primarily advisory in nature.

Meetings with permittees or contractors which are used to obtain broader input on general policy matters.

The subgroup may not make any recommendations directly to the agency; it must operate through the chartered advisory committee, which must consider and deliberate the subgroup's product in the course of a public meeting of the advisory committee.

Section 9. Guidelines for Convening an ADR Event

by John R. Schumaker, Ph.D.

This section is designed to provide guidance for agency-initiated ADR events, particularly those requiring voluntary participation. The concepts discussed in this section are applicable for any unit of government, any organization, or any individual who proposes to convene an ADR event. Specific guidance for government agencies is provided in the document produced by the Society of Professionals in Dispute Resolution at the end of this section (reproduced with permission from SPIDR).

Many ADR events require voluntary participation. Other ADR events are mandated by court rule, business agreements, or contracts, and are convened in accordance with applicable court rules, contracts, or regulations. It is incumbent upon agency personnel to have the skills to effectively convene an ADR event. These skills are equally as valuable for processes that are voluntary as they are for processes that are mandated, in which the conveners generally work with only one ADR process and have relatively clear procedures for convening the process.

Once the appropriate agency manager has decided to consider using an ADR process, much work will be required to carry out the intent of the manager (see the paragraph on situation assessment below). Convening activities are described by Susskind and Cruikshank

(1987) as the prenegotiation phase of the consensus-building process. The objective of the prenegotiation phase is to set the stage effectively to convene a particular ADR event. Prenegotiation includes many preliminary activities such as ADR process selection, participant (stakeholder) identification, stakeholder education, meeting arrangements, and ADR practitioner selection. This preliminary work in the prenegotiation phase can be referred to as the convening function, and I refer to the agent responsible for carrying out the function as the convener.

Some ADR processes or programs clearly describe the convener function and provide instructions on how this function is accomplished. The Negotiated Rulemaking Act (Reg-Neg) and supporting literature from the Administrative Conference of the United States describe the role of the convener in the Reg-Neg process and provide guidance on how to select a convener (Pritzer and Dalton, 1990).

Natural resource and public land management presents an opportunity to use a wide variety of ADR processes, hence agency conveners need to be familiar with a wide range of ADR processes. A well-trained convener is especially important where the appropriate ADR process is voluntary and where the parties to an issue or dispute are not familiar with ADR processes

and procedures. It is not enough to decide to use an ADR process such as facilitated collaborative decisionmaking for public meetings or mediation, and to assume that all stakeholders will know what this means or that all parties will agree to participate in the proposed process, if their voluntary agreement is required. The convener, with his or her special knowledge and skill, is responsible for ensuring that the ADR event is convened properly.

A convener can be the agency manager, any person designated by the manager for a specific situation, or anyone mandated by policy or regulation for a particular program area such as land use planning or person(s) from academia or the private sector. The neutrality of the convener and the perception of neutrality of the convener by all the stakeholders must be evaluated carefully. In some cases, an agency employee close to the issue and manager can serve effectively as the convener. In other cases, the convener should be an agency employee organizationally distant from the issue and manager, an employee of another agency, or a private neutral. One role of the convener is to get the ADR process accepted and begin the process of building trust with the stakeholders; hence, managers need to weigh carefully the neutrality issue when designating a convener.

Duties of the Convener

The duties and responsibilities of the convener include, but may not be limited to, the following functions (see Appendix A for a checklist for conveners). Effective accomplishment of the functions of the convener require a series of judgment calls by both the manager and the convener. Each factor or function is discussed in detail:

▲ **Assess the situation:**

The first essential step is to conduct an assessment of the situation to determine what

type of dispute or potential dispute exists, who is likely to be involved, if the dispute or potential dispute is ripe for resolution, and the likelihood that an ADR process is the appropriate means of dealing with the situation. Agency managers may use their own resources or enlist the assistance of personnel in other agencies, academia, or the private sector to conduct the assessment. In complex public land management situations, managers should consider using private sector neutrals to assist them and their staff in the situation assessment, and subsequently to use private sector neutrals to conduct the selected ADR process.

The authority of agency managers to select or influence the selection of an ADR process decreases as authority over a dispute rises in the hierarchy of adjudication systems. At the beginning of the dispute-development scale, also referred to as the struggle spectrum, which is described by Keltner (1987), agency managers have significant control over if, when, and what type of ADR they may propose to use to prevent and resolve disputes. At the upper end of the dispute-development scale or struggle spectrum, agency cases in the Federal courts are managed by the Department of Justice, and U.S. attorneys, along with the presiding judge and attorneys for the opposing party, make decisions regarding the use of ADR processes. Guidance from the Attorney General states that U.S. attorneys may, but are not required to, seek the consent of agency managers to use an ADR process (Department of Justice, 1992).

▲ **Recommend using the ADR process that is most applicable to the situation (preventive collaborative decisionmaking or a dispute resolution process):**

Identifying the issues and stakeholders can be key factors in deciding which ADR process to

use. When agency decisionmaking is in the formative stages, such as in the early stages of a resource management plan, a forest plan, or modifying plans, facilitated public meetings may be the ADR process of choice. This is typically referred to as collaborative decision-making or consensus building. If an issue involves an administrative or court challenge to a decision that has been announced by the agency, other processes such as mediation may be more appropriate. A wide range of ADR processes and variations of these processes are available for consideration (Schumaker, 1995).

If the substance of a dispute is relatively clear, the manager may want to elect to move directly to a process such as negotiation or mediation. If the issue is unclear, the manager may want to use a factfinder or other investigative approach to get a clearer view of the issues being disputed and the stakeholders who may be involved. Conveners need to understand the concepts and objectives of each ADR process so they can make effective recommendations about selecting an ADR process. The scope of a dispute and the number of stakeholders involved are also factors in determining the type of ADR process to use.

▲ **Identify all stakeholders:**

Increasing demands for the allocation of natural resources increase the number and variety of individuals and groups (the stakeholders) that are affected by and interested in influencing natural resource and public land management decisions. An effective way to preclude negative responses and gain positive support for management objectives, including for determining management objectives, is to include all stakeholders in the decisionmaking processes at the earliest point possible. Failure to include a legitimate stakeholder could provide an individual or group with a valid basis for challenging decisions with administrative

appeals and court actions. Careful analysis of potential issues and interests is necessary to ensure all stakeholders are identified.

Stakeholder identification is not always a routine, simple process. Stakeholders may range from a variety of local and regional groups or individuals to national and international interests. Careful analysis of groups that have national, regional, and local organizations is essential because these multilevel groups, while seeming the same, may be fractured and have different goals based on their level in the organization. Fortunately, most agencies already have extensive, generally well-maintained lists of stakeholders kept by the public affairs staffs and program managers. While these lists are very valuable and should be reviewed early in the stakeholder identification process, lists should not be accepted as gospel. Each dispute is unique and stakeholders may differ.

Stakeholder identification can be a critical step in resolving what seems to be a two-party dispute such as the implementation of a project approved in a land use plan. As many resource managers have probably discovered, resolution between the agency and one group may have adverse effects on other stakeholders, so a settlement between the agency and the group can easily lead to disputes with other interests. Successful managers learn when to limit negotiations and when to widen the circle of involvement.

▲ **Determine whether the ADR process is voluntary:**

As stated, the use of ADR processes (generally those used to resolve specific disputes) requires agreement of the parties involved in the dispute. Other processes, such as facilitated collaborative decisionmaking during the development of a resource management plan

or an environmental impact statement (EIS), can be used by the agency without the consent of the parties. If a significant stakeholder or group of stakeholders declines to participate, it suggests the assessment process missed some very important information and the process should be reviewed.

▲ ***Coordinate the selection of a third-party neutral (if needed):***

Selecting facilitators, mediators, factfinders, and other neutral parties can be a critical step early in conducting an agency-initiated ADR event. In some cases, it is appropriate for the agency to preselect the neutral, while in other cases the stakeholders need to participate in selecting the neutral. Often, it will be appropriate for the agency to select the neutral(s) to facilitate a large multiparty event such as the development of a resource management or forest plan, while it may be essential to share with the stakeholders in selecting a mediator for a small-party dispute. Agency employees, even those who are trained and skilled in ADR processes, generally should not be selected to serve as a neutral in these situations.

▲ ***Contact all stakeholders, explain the agency's desire to use an ADR process, and educate parties about the ADR process:***

Mere identification of the stakeholders is not sufficient. Many stakeholders will not be knowledgeable of ADR processes and may be wary of agency proposals to use an ADR process. A key responsibility of the convener is to contact all stakeholders to educate them about the ADR process the agency proposes to use. The timing of this contact is a judgment call and correct timing could be a key factor in the success of the ADR event. The number of stakeholders, public knowledge of the issues or dispute, prior experience with dispute resolution processes, the level of public trust in agency management, and consent requirements are but a few of the

factors that will determine when and how much stakeholder education is needed.

▲ ***Obtain agreement to use an ADR process:***

Since many ADR processes require agreement by all parties, agency managers may be required to obtain the consent of every stakeholder before an ADR process can be initiated. Agreements to participate in an ADR process may involve a simple oral agreement to meet to negotiate an issue. On the other hand, voluntary participation may be dependent on a complex, detailed set of predetermined ground rules and identification of issues that require the signature of many individuals and group representatives.

▲ ***Explain the confidentiality provisions related to the chosen process:***

Some ADR processes, generally small-party cases, operate under strict confidentiality rules. In other cases, the premise of confidentiality is unworkable, particularly when the provisions of the Federal Advisory Committee Act must be followed. Media coverage and press releases are issues that often need to be addressed before an ADR event begins. The media issue also can be addressed as part of the ground rules developed and agreed upon by the participants after the ADR event has begun.

▲ ***Obtain agreement on how the cost of an ADR event will be paid:***

In the ideal world, costs of the services of neutrals for an ADR event and other costs such as facilities would be shared equally by all parties. However, costs for dispute prevention events such as collaborative decisionmaking for land use planning or an EIS are typically borne by the Federal agency or company responsible for the project. Other public land management disputes may involve parties with ample resources and parties who cannot afford to share the cost of convening an

ADR event. The convener or the facilitator/mediator needs to assess the capability of each stakeholder to share in the expense. Adjustments in sharing payment for neutrals and other expenses can be negotiated for those who cannot afford to pay their full share or who are opposed to doing so for other reasons. This negotiation can occur before the event begins or during the process of developing ground rules. The convener also needs to be aware of Federal procurement regulations to ensure these rules are followed. The Administrative Dispute Resolution Act, Public Law 104-320, provides guidance on the expedited hiring of ADR neutrals. See Section 7, *Guidelines for Procuring Neutrals* for guidance.

▲ ***Handle meeting arrangements:***

The convener or the neutral, if one has been selected, generally is responsible for selecting meeting sites and times and coordinating all other activities essential to conducting a successful ADR event. Stakeholder schedules and locations need to be considered. A variety of meeting arrangements can be used, including electronic means. The joint Bureau of Land Management and U.S. Forest Service Upper Columbia Ecosystem Management Team conducted a real-time facilitated public scoping meeting in 1995 using interactive satellite conferencing techniques at nine locations in the Upper Columbia Basin in order to involve all stakeholders in the scoping process. Private sector facilitators were used to facilitate the meeting at each remote site. The Nuclear Regulatory Commission has developed an electronic meeting process on the Internet called Rulenet that can be used to augment face-to-face meetings. A detailed explanation of Rulenet can be found by typing "rulenet" in the search bar of most Internet search engines.

▲ ***Monitor the progress of the ADR process, be prepared to recommend changes in the***

ADR process if needed, and ensure guidelines or laws such as the Federal Advisory Committee Act are followed:

Just because an ADR event is off and running does not mean the process will stay on track or accomplish its objectives. The agency may want to establish time limits for the ADR event. The convener and management officials need to review progress of the ADR event continually and be prepared to make procedural adjustments as needed. This can be a very sensitive issue. Actions that might appear to suggest manipulation by agency management need to be carefully evaluated. The convener may also act as an advisor to the neutral and the stakeholders to ensure applicable Federal law is followed. Another role of the convener may be to set up subsequent meetings or obtain needed information for the stakeholders. The convener may serve as the recorder and reporter for the ADR event, although this function can also be accomplished by the neutral who manages the event. Finally, the convener might be responsible for obtaining necessary signatures and overseeing final publication of agreements and other documents (McCreary, 1989).

Summary

The process of resolving large- and small-party natural resource disputes can be as tricky as negotiating minefields in Bosnia. However, skill and hard work by knowledgeable agency managers and their staffs can go a long way in ensuring that ADR processes used to prevent or resolve disputes work effectively. A good foundation for using an ADR process can be laid by a skilled convener. Success often leads to other successes, so as agency managers adopt or expand their use of ADR processes, it is important that their initial efforts be successful. This can be accomplished by following the concepts outlined in this section.

Appendix A: Checklist for Conveners

Have you conducted an assessment to determine if an ADR process is appropriate?

Will you or someone else do the work necessary to convene the ADR process?

your staff _____ university staff _____
staff from another agency _____ other _____
private neutral _____

Have you clearly identified the issue or dispute and the stage of the issue or dispute?

Which ADR process will be used (preventive collaborative decisionmaking or a dispute resolution process)?

negotiation _____ early neutral evaluation _____
facilitation _____ summary jury trial _____
mediation _____ minitrial _____
arbitration _____ other _____
factfinding _____

Have you identified all who are involved in the dispute: the stakeholders, the blockers, the supporters?

Does the process require voluntary participation?

If applicable, have you determined how you will comply with the Federal Advisory Committee Act?

Will you use a third-party neutral and is it necessary to coordinate the selection with the other stakeholders?

Have you contacted all stakeholders to explain the agency's desire to use an ADR process and have you educated the parties about ADR processes?

If needed, have you obtained agreement(s) to use the ADR process?

Have you determined if confidentiality is important to the process and how to achieve it, if needed?

Will other stakeholders share in the expense of the ADR process, and if so, have you reached an agreement on cost?

Who will make meeting arrangements? Have you considered the needs of all stakeholders in setting the time, place, frequency, and duration of the proposed meetings?

Have you determined how you will monitor the progress of the ADR process and are you prepared to recommend changes in the ADR process if needed?

References

Administrative Dispute Resolution Act. 1996.
Public Law 104-320.

Department of Justice, Civil Division.
Guidance on the Use of Alternative Dispute
Resolution for Litigation in the Federal
Courts. Washington, DC, August 1992.

Keltner, John W. (Sam). Mediation, Toward A
Civilized System of Dispute Resolution.
Annadale, VA: ERIC Clearinghouse, 1987.

McCreary, Scott T. Resolving Science-Intensive
Public Policy Disputes. Diss., Massachusetts
Institute of Technology, 1989.

Pritzer, David M. and Deborah S. Dalton.
Negotiated Rulemaking Sourcebook. Office
of the Chairman, Administrative Conference
of the United States, Washington, DC, 1990.

Schumaker, John R. Alternative Dispute
Resolution, Employee Knowledge and
Attitudes in Six Federal Natural Resource
Management Agencies. Diss., University of
Idaho, 1995.

Susskind, Lawrence and Jeffrey Cruikshank.
Breaking the Impasse: Consensual
Approaches to Resolving Public Disputes.
New York: Basic Books, 1987.

Best Practices for Government Agencies

Guidelines for Using Collaborative Agreement-
Seeking Processes

Report and Recommendations of the
SPIDR Environment/Public Disputes Sector Critical Issues Committee
Adopted by the SPIDR Board January 1997

These recommendations have been prepared by a committee supported by a grant from the William and Flora Hewlett Foundation, and jointly sponsored by the Hewlett Conflict Resolution Theory Center at Georgia Tech and the SPIDR Environment/Public Disputes Sector. The Committee included practitioners from within and outside government, government program managers, and university researchers.

This report focuses on best practices for users in the United States. While it may be applicable in other countries, it may need to be tailored to the political frameworks and particular institutions in those contexts.

This is intended as the first in a series of cooperative efforts between theoreticians and practitioners to serve the needs of the emerging practice of conflict resolution in the public policy arena. This report has been reviewed and improved immeasurably by practitioners and government agency dispute resolution managers.

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INTRODUCTION

These guidelines for best practice are proposed by the Society of Professionals in Dispute Resolution for federal and state government-sponsored collaborative approaches that seek agreement on issues of public policy. The processes these guidelines address have the following attributes:

- participants represent stakeholder groups or interests, and not simply themselves,
- all necessary interests are represented or at least supportive of the discussions,
- participants share responsibility for both process and outcome,
- an impartial facilitator, accountable to all participants, manages the process, and
- the intent is to make decisions through consensus rather than by voting.

Who Can Benefit from These Recommendations?

The recommendations in this report are directed primarily towards federal and state officials to help ensure successful use of collaborative processes for decision-making. They may also be useful to local government, although consideration must be given to how stakeholder-based processes may effect more inclusive citizen participation strategies.

Background

Negotiation and consensus building have long been used to resolve policy conflicts. Governments, businesses, interest groups and individuals negotiate and use cooperative approaches to decision making every day, whether formal or informal, by choice or out of necessity. These activities are not new.

What is relatively new is the intentional application of these processes, assisted by an impartial facilitator, to a wide range of multi-party, multi-issue disputes and controversies. In the 1970s mediators began helping parties settle environmental disputes, usually over site-specific issues, but also over land use and the allocation of natural resources. The use of collaborative efforts has evolved to developing policies and regulations for a broad array of issues. From about 40 cases in the 1970s, the number grew to over 400 during the 1980s, and the trend is continuing. An approach that began as a foundation-funded experiment has increasingly become a component of governmental decision making.

Reasons for this growth vary, but these factors stand out. First, consensus-based agreement seeking processes have proven successful in a wide array of applications, particularly where several agencies or levels of government have jurisdiction, power is fragmented, and there are a variety of stakeholders with conflicting views, (e.g., resolving complex multi-party issues, developing regulations, policy making, strategic planning.)

Second, the American public has lost confidence in the ability of government to solve problems and has demanded more say in policy making which has accelerated the use of consultation and consensus-building as ways of working out decisions that can be implemented. Consensus-based approaches have the advantage of building agreements that last. The focus on collaboration and seeking mutually acceptable outcomes contributes to improved understandings among participants, which in turn enables them to work out differences and arrive at better solutions. These consensus-based approaches are increasingly being viewed as a cornerstone in reinvention efforts that call upon governments to become more efficient and effective.

Current Uses of Collaborative Processes: Concerns and Questions

Along with the growth in use of these processes, a number of concerns and questions have emerged regarding the appropriate use of these processes. These include:

Concerns about how collaborative processes are used by agencies who are the authorized decision maker(s):

- How can regulatory agencies share control over processes and products while retaining their mandates?
- How do the cultures of bureaucratic agencies adjust to decision making by consensus?
- By seeking consensus among stakeholders, might public officials in some cases essentially be avoiding the tough decisions they have been mandated to make?
- If public officials purport to be seeking agreement with stakeholders, but actually only seek advice or input, might they contribute to cynicism about government?

Concerns about participation:

- Who decides who can participate and how is it decided?
- How might increasing reliance on collaborative processes affect the ability of some groups to participate? Could they be spread too thin?
- How can agencies prevent participants from feeling co-opted or coerced?
- What if all interests cannot be identified? What if some interests cannot be represented? Does the collaborative process still go forward?
- If agreement is reached, will traditional opportunities for public comment be diminished?

Concerns about the proper use of mediators and facilitators:

- In the eyes of other participants, can an agency staff person serve as an impartial facilitator?
- When government agencies hire the mediator, how can selection and procurement be conducted to ensure the mediator's credibility with all parties?
- How can the mediator be accountable to all when under contract with an agency?

Concerns about maintaining the effectiveness of collaborative processes:

- How will governments' need for routine, consistency, and due process affect collaborative processes? Will governments prescribe, bureaucratize, and mandate an approach that has succeeded to date largely by being adaptive, flexible, and voluntary?
- Given the workloads and time pressures some government agencies are under, will more be expected from collaborative processes than they can deliver? Will there be enough time, money, and staff for such processes to succeed?
- How can consensus-based efforts produce effective, practical decisions that satisfy more than just the lowest common denominator?
- Will sufficient attention be given to strategies and resources needed to implement agreements reached?

Terminology of Collaborative Processes

As the use of collaborative approaches for resolving public issues has expanded, so has the terminology for naming and describing them. As a first step in sorting out the terminology, the Committee distinguished agreement-seeking processes from two other primary purposes for discussions between government agencies and the public—information

exchange and advice. Given these objectives, the following chart highlights the differences in outcomes that can be expected:

PURPOSE	OUTCOMES
1. Information exchange	Improved communication and understanding; lists of concerns and/or options; better definitions of problems or issues
2. Feedback/Consultation	Opinions or suggestions for action are obtained; plans or drafts are refined
3. Agreement-seeking or decision-making	Agreements on actions or policies are reached; consensus is developed

Only processes in the third category are the subject of this report, but even labels for them abound. Some derive from labor/management bargaining. Others combine words that describe some attribute of collaborative consensus-based public policy processes. The list below gives a sense of the hybrids that may be found.

cooperative decision making	collaborative decision making
collaborative agreement-seeking processes	environmental conflict resolution
collaborative consensus-based forums	consensus-building
consensus-based processes	joint decision-making
shared decision-making	environmental mediation
negotiated processes	multi-party negotiations
mediated negotiation	mediated approaches
mediated agreement-seeking processes	public policy mediation
policy dialogue	joint problem-solving
facilitated consensus forum	facilitated joint decision making
collaborative agreement-seeking processes	facilitated negotiations
negotiated rulemaking	regulatory negotiation

The imprecise nature of these terms underscores the need for participants in each case to define their process clearly. As for labeling a particular process, participants usually refer to it in concrete, case-specific terms, such as "resolving the Westside urban growth issue", "trying to establish a new state policy for nursing homes", "the airport noise negotiations", or "the harbor development roundtable." Regardless of the label, type of public issue being discussed, or venue within which it occurs, the essential activity is the same—people representing different interests trying to find a solution that works for all through negotiation, assisted by someone acting impartially who manages the process.

Central to this activity is a search for consensus, a concept that in itself can generate controversy, and that participants should also define for themselves. Commonly, the term is used in the practical sense of, "Do we have an agreement everyone can live with—and that is doable?" Politicians often recognize a similarly practical but lower threshold for consensus, as in, "Do we have enough agreement to keep us out of trouble and to allow us to move forward?" The important principle is that these processes do not operate by voting or majority rule. Either the parties reach agreement (according to their definition) or they do not. If they do not, they may decide to explain how they disagree, but a majority/minority report is not a desired product of a collaborative effort.

Finally, this report employs the term *facilitator* for someone who manages a negotiated process. While *facilitator* and *mediator* are sometimes used interchangeably, *facilitator* is a more general term than *mediator*. Facilitators manage meetings for purposes other than negotiating agreements. Facilitators may also need to be mediators for these processes.

RECOMMENDATIONS FOR BEST PRACTICE

The recommendations that follow are directed towards overcoming the concerns and problems that have been identified. They propose a set of best practices for use of collaborative decision-making processes.

Recommendation 1: An Agency Should First Consider Whether a Collaborative Agreement-Seeking Approach Is Appropriate

Before a government agency or official decides to sponsor an agreement seeking process, it should consider its objectives and the suitability of the issues and circumstances for negotiation. In particular, before the sponsoring agency convenes a collaborative process, it is essential for the agency to determine internally its willingness to share control over the process and the resolution of the issue.

The decision to try to resolve a public issue by bringing together representatives of affected interests entails several important preliminary steps. The first is for agency staff to consider whether the issues might be suitable for negotiation, and if so, whether negotiation might meet the agency's objectives and responsibilities.

There are many factors to be taken into account in making the determination: suitability of the issues, ripeness for decision, time available, political climate, and the nature of past and present controversies over the issues among the key interests. Appendix 1 provides a check list of factors to be considered as part of an initial screening.

If after an initial screening negotiation appears plausible, agency staff and management next should discuss whether they are willing to negotiate. An important consideration is the relationship of such a collaborative approach to the agency's statutory decision making responsibility:

- What would be the role of the agency in the talks? Would the negotiations occur primarily among stakeholders with agency staff in the role of technical advisor? Or should the agency participate as a negotiating entity? Collaborative processes have succeeded under both options, but the agency's role should be clear.
- What form might an agreement take to be consistent with the agency's responsibility as final decision maker? For example, in some collaborations, consensus is expressed as an agreement that the agency translates directly into regulation or other official action. In others, the product is a consensus recommendation which the agency then considers in making a decision.

Misunderstanding between the agency and stakeholders can occur if the agency calls a meeting for one purpose, but tries to achieve another. One example is convening a process for information sharing and then expecting agreements to emerge. Another is holding meetings under the guise of consensus building, when information gathering is the sole and intended purpose, or portraying a public relations (opinion changing) initiative as a

collaborative process. Misuse of collaborative processes diminishes the likelihood of their future use. The same cynicism that sometimes marks public reaction to government's efforts to solve problems can extend to improperly used collaborative processes.

If agency management supports the idea of negotiation, then the next step is to begin discussing the possibility of a collaborative approach with representatives of other stakeholders.

Recommendation 2: Stakeholders Should Be Supportive of the Process and Willing and Able to Participate

In order for an agreement-seeking process to be credible and legitimate, representatives of all necessary parties—those involved with or affected by the potential outcomes of the process—should agree to participate, or at least not object to the process going forward. If some interests are not sufficiently organized or lack resources and these problems cannot be overcome, the issue should not be addressed through collaborative decision-making.

When decisions are made in consensus-based forums, influence from non-agency parties increases. To preserve the legitimacy of the process, all interests must be adequately represented and have joint control over the shape of the process and its outcomes. Because collaborative decision-making processes have such potential power, they should be used only when people representing necessary interests can be sufficiently identified and are willing and have the resources to participate effectively. To proceed otherwise could undermine the effectiveness of collaborative processes.

Determinations about representation are easiest when stakeholders are obvious, and when they are prepared to participate effectively in the discussions. Reaching agreement may be difficult, but at least there is no question about the legitimacy of the process. When the issues at stake affect all of society, or at least a large segment of it, the identification and organization of stakeholders is much more difficult. If some interests are obvious but others are not so clear, or if interest groups are disorganized or lack sufficient power, time, or money to participate effectively, there are real dilemmas to be confronted about whether or not it is appropriate to convene a collaborative decision-making process.

The agency should specifically examine whether other agencies, levels of government, and elected officials have a stake in the issues and seek their support for the process. The involvement of other governmental entities is often critical to successfully resolving the issues and implementing the agreements.

The burden of assuring that participants have the ability to participate effectively falls most heavily on the sponsoring agency. Training or orientation in how the process works, and support systems—expertise, information resources, or financial support to enable participants to get to meetings or to communicate with their constituencies—can be provided if acceptable to all parties as part of the process.

Recommendation 3: Agency Leaders Should Support the Process and Ensure Sufficient Resources to Convene the Process

Agreement-seeking processes need endorsement and tangible support from

actual decision-makers in the sponsoring agency or agencies with jurisdiction and, in some cases, from the administration or the legislature. The support and often the involvement of leadership is necessary to assure other participants of the commitment of authorized decision makers who will be responsible for implementation. Their support helps sustain the process through difficult periods and enhances the probability of reaching agreements.

Sponsoring agencies also need to ensure that there are sufficient resources to support the process from its initiation through the development of an agreement. As part of the pre-negotiation assessment, sponsors need to determine how they will meet evolving resource needs and provide funds and staff to accomplish the goals of the negotiation.

In order to undertake an agreement-seeking process, agency leaders need to believe the issue is of high enough priority for them to lend their support and the resources needed to achieve a useful and implementable outcome. If leaders are aware of obstacles that could stand in the way of success, including political obstacles, they need to be willing to address those obstacles and help create the kinds of incentives that make it worthwhile for other stakeholders to participate.

When leaders show visible support, including consistent involvement in meetings and substantive discussions, other participants are reassured that their investment of time and resources is worthwhile. If agency leaders do not provide support, caution should be exercised in initiating collaborative agreement-seeking processes. Without this support, the likelihood of success is greatly diminished.

The sponsoring agency needs to ensure that it is appropriately represented at the table, and is prepared to support its representative. It is also important for the sponsoring agency to be consistent, and to the extent possible, to speak with one voice throughout the process (especially as the time for decision-making on key issues.) Agencies should develop internal support for initiating and participating effectively in agreement-seeking processes.

Multi-party negotiations can require considerable staff time and funds. Participants may need technical assistance beyond what the agency can provide. Negotiators collectively may want the advice of outside experts. If a key party lacks sufficient staff or other resources, it may be important to provide them with organizational or technical assistance within the process. If resources cannot be secured to assist key parties to participate, either as part of the process, or by agreement or with help from the other parties, then the agency should use means other than collaborative agreement-seeking to reach a decision.

Recommendation 4: An Assessment Should Precede a Collaborative Agreement-Seeking Process

Before a government agency or official initiates an agreement-seeking process, it should assess whether the necessary conditions are present for negotiations to take place. Presence of the factors in recommendations 1-3 are best ascertained as part of a deliberate assessment.

There are three phases to successful agreement-seeking process: Phase 1, the assessment and preparation, or pre-negotiation phase, involves determining whether the necessary factors to ensure legitimacy are present as well as planning and preparing for the process.

Phase 2 involves engaging in negotiations to try to reach agreement. Phase 3 involves implementing the agreement.

During the pre-negotiation phase, an assessment is conducted to help the agency and other participants determine whether or not to proceed. Potential participants need to agree to participate before an agency decides to pursue an agreement-seeking process. It is here at the beginning of the process when an experienced facilitator may be of greatest service. Unfortunately, agencies often call on the facilitator only after they have invited all the participants and scheduled the first meeting.

Primary factors contributing to the legitimacy of agreement-seeking processes include willingness by all key parties to participate, appropriate structure and management of the process, and existence of sufficient resources both to support the process and to develop an implementation plan. The assessment involves ascertaining whether these factors are present. A facilitator often plays an integral role at this stage, consulting with the agency to help clarify its objectives, and interviewing potential parties to ascertain their views. This phase provides an opportunity for the facilitator to develop agreements among all participants about the scope of the issues, objectives and design of the process, role of consensus as decision rule, and timelines. The assessment is thus essential for evaluating the factors in recommendations 1 through 3. While the assessment can take weeks, experience demonstrates that it is key to success and saves time overall. (See Appendix 2 for guidelines for conducting an assessment.)

Recommendation 5: Ground Rules Should Be Mutually Agreed Upon by All Participants, and Not Established Solely by the Sponsoring Agency

All participants should be involved in developing and agreeing to any protocols or ground rules for the process. Once ground rules have been mutually agreed upon, the facilitator should see that they are carried out, or point out when they are not being followed and seek to remedy the problems. Any modification to ground rules should be agreed upon by all participants.

Ground rules should clearly state the purpose and expectations for the process and the end product, how the process will be conducted and decisions made, the roles of the participants, including the sponsoring agency, the role of the facilitator, and other matters that are important to assure participants of the fairness of the process. Appendix 3 contains guidelines for formulating ground rules.

Jointly agreed upon ground rules or protocols establish joint ownership and control over the process. Without this sense of parity and investment amongst all participants, it will be more difficult to instill confidence in the legitimacy of either the process or the outcomes. Ground rules also guide and empower the facilitator. These procedural safeguards are a straightforward mechanism to help ensure that the process is, and is perceived, as credible.

Recommendation 6: The Sponsoring Agency Should Ensure the Facilitator's Neutrality and Accountability to all Participants

It is preferable for all parties to share in selection of the facilitator. When that is not possible, an agency has a responsibility to ensure that any

facilitator it proposes to the participants is impartial and acceptable to all parties. The facilitator should not be asked by the sponsoring agency, or any other participant, to serve as their agent, or to act in any manner inconsistent with being accountable to all participants.

The impartiality and process management skills of a facilitator are particularly important in agreement-seeking processes. It is here that the facilitator serves as an advocate for and guardian of the underlying principles of collaborative agreement-seeking processes. Appendix 4 provides a list of best practices that govern facilitator or mediator conduct in agreement-seeking processes.

When the issue at hand is highly contentious or when participants have limited trust in other participants, a facilitator plays a particularly important role in establishing and maintaining the credibility of the process. A credible process is often either established or undermined in the early stages by such factors as how and by whom the facilitator is selected, how and by whom the participants are identified and invited, and how and by whom the process is planned and structured. Under these conditions, a facilitator for an agreement-seeking process should be independent of the sponsoring agency.

If an agency considers using a facilitator from within government (whether inside or outside the sponsoring agency) several questions should be asked: Is it likely participants will regard the facilitator as unbiased and capable of being equally accountable to all participants? Will the facilitator be able to act independently, or will he or she be under the direction of the agency? Will participants feel comfortable consulting or confiding in the facilitator when the going gets tough?

If an outside facilitator is to be engaged by the agency, that decision should be made early enough to enable them to conduct the pre-negotiation assessment and planning. Ideally, participants in the process should be involved in selecting and paying the facilitator. For many policy-making processes, however, it is common for the agency to pay the facilitator. Other participants need to be aware of this arrangement and comfortable that it does not jeopardize the impartiality of the facilitator.

When a government agency engages a facilitator for a public policy dispute, the participants may not be involved in the selection process because of procurement requirements or because participants have not yet been identified. Under these circumstances, ground rules can include procedures to enable participants to review the facilitator's qualifications, to evaluate performance, and/or to replace the facilitator at any time during the process if participants feel that she or he is biased or ineffective.

The selection criteria for facilitators or mediators should be based on experience, skill and ability, and acceptability to participants, and not solely on costs. Lump sum or fixed price contracts may not be the best mechanisms for hiring this kind of professional. Until the assessment is complete and a process designed, it is very difficult to predict the exact number of hours of effort needed to work with participants toward reaching agreement. Procurement mechanisms ought to be made flexible enough to allocate additional time and funds as warranted, with a minimum of time and effort, so as to not slow down or halt the negotiation process.

Contracts should be negotiated and executed before the facilitator begins any work. Facilitators and sponsoring agencies should assume that all contracts could be read by all participants without destroying trust on any side. Contracts should assure that the facilitator has latitude to act independently of the sponsoring agency and should not constrain his or her ability to communicate with all participants.

Recommendation 7: The Agency and Participants Should Plan for Implementation of the Agreement from the Beginning of the Process

There are two aspects of implementation: formal enactment and actual implementation. Planning for implementation is integral to the process.

One of the key reasons agencies decide to sponsor collaborative agreement seeking processes is to improve implementation. Many agreements developed through collaborative processes are in fact a set of recommendations that need formal adoption. Implementation can be problematic if steps are not taken from the beginning to ensure linkages between the collaborative process and the mechanisms for formalizing the agreements reached.

The implementation phase of an agreement should be taken into account as part of the assessment and preparation phase. The likelihood for successful implementation is greater when those responsible for implementing the agreement are part of the process, or are kept informed about the process. The agreement itself should set out clear steps and stages for implementation: clarifying tasks, resources, deadlines, and oversight responsibilities.

Recommendation 8: Policies Governing These Processes Should Not Be Overly Prescriptive

Policymakers should resist enacting overly prescriptive laws or rules to govern these processes. In contrast to traditional processes, consensus-based processes are effective because of their voluntary, informal and flexible nature.

The kinds of processes encompassed by these recommendations occur within the framework of traditional policymaking practices in a representative democracy. They are adjuncts to—not replacements for—traditional practices. Collaborative approaches are based on participants willingness to come together voluntarily to explore ways to reconcile competing and conflicting interests. This kind of exploration is not likely to happen in an atmosphere where people are required to participate or where their manner of participation has been narrowly prescribed.

Therefore, when legislation, rules and guidelines are developed concerning these processes, they should be limited to encouraging the use of collaborative agreement-seeking processes, and setting broad standards for their use. Overly prescriptive or burdensome guidelines can act as a disincentive to participation. Flexibility in designing and carrying out these processes is a factor necessary to their success. While there are situations when enabling legislation or rules can play a role in overcoming agency reluctance to initiate mediated approaches, over-codifying them will diminish the effectiveness of these flexible tools.

CONCLUSION

These recommendations are intended to help agencies and practitioners conduct more effective collaborative agreement-seeking processes. They represent an effort to harvest lessons from the experience of facilitators and mediators over the past two decades and apply them to the challenges and barriers to success that have been observed. It is hoped the recommendations will help lay a foundation for widespread adoption of these approaches by ensuring their quality and integrity.

Appendix 1

Agency Checklist for Initial Screening to Determine Whether to Proceed

If the following factors are present, an agency can proceed toward the assessment phase:

- 1. The issues are of high priority and a decision is needed.**
- 2. The issues are identifiable and negotiable. The issues have been sufficiently developed so that parties are reasonably informed and willing to negotiate.**
- 3. The outcome is genuinely in doubt. Conflicting interests make development or enforcement of the proposed policy difficult, if not impossible, without stakeholder involvement.**
- 4. There is enough time and resources. Time is needed for building consensus among conflicting interests, and resources are necessary to support the process.**
- 5. The political climate is favorable. Because these kinds of negotiations discussions occur in the political context, leadership support and issues of timing, e.g. elections, are critical to determining whether to go forward.**
- 6. The agency is willing to use the process.**
- 7. The interests are identifiable. It will be possible to find representatives for affected interests.**

APPENDIX 2

Guidelines for Conducting the Assessment and Preparation Phase of an Agreement-Seeking Collaborative Process

The sponsoring agency should seek the assistance of a facilitator experienced in public policy collaborative processes to conduct this phase of the process before initiating other activities. The following tasks should be accomplished:

1. The agency and facilitator should jointly evaluate whether the objectives of the sponsoring agency are compatible with and best addressed by a collaborative process.
2. Develop a statement outlining the purpose of the collaborative process, and its relationship to the sponsoring agency's decision-making process for communication to other potential parties.
3. Assess whether sufficient support for a collaborative process exists at the highest possible levels of leadership within the sponsoring agency.
4. Identify parties with an interest in the objectives and issues outlined by the sponsoring agency, and examine the relationships among the various interest groups and the agency.
5. Interview potentially affected interest groups and individuals to clarify the primary interests and concerns associated with the issues, and related informational needs.
6. Assess deadlines, resources available to support the process and the political environment associated with the issues and stakeholder groups.
7. Evaluate the influences of racial, cultural, ethnic and socio-economic diversity, particularly those that could affect the ability of interest groups to participate on equal footing.
8. Identify if assistance is needed by any interest group(s) to help prepare for or sustain involvement in the process.
9. Clarify potential obstacles to convening the process (e.g., non-negotiable differences in values, unwillingness of key stakeholders to participate, insufficient time or resources).
10. If no major obstacles are apparent, propose a design for the process including the proposed number of participants (based on the range and number of major interest groups); the process for identifying and selecting stakeholder representatives; structure of the process (e.g., a committee with work groups); projected number and frequency of meetings; a preliminary overview of the process (e.g., identify issues, clarify interests, joint fact-finding, brainstorm options); summary of resources anticipated and available to support the process; potential roles of the sponsoring agency, other participants and the facilitator; proposed meeting protocols; draft agenda for the first meeting; etc.
11. Prepare a report highlighting the results of the assessment as the basis for the sponsoring agency to decide whether or not to proceed. This may include actions by the sponsoring agency to respond explicitly to requests from other interest groups to include additional objectives or issues in the process. Under most conditions, the assessment report should be shared with the

other process participants as well.

12. Pursue commitments of potential participants based on the assessment, proposed agency objectives, preliminary process design and their willingness to participate in the collaborative process in good faith.

13. If a major stakeholder group chooses not to participate, evaluate the implications of their non-participation with the sponsoring agency and other participants, recognizing that the process may not be able to proceed.

14. Allow the participants an opportunity to concur with the sponsoring agency on the person(s) selected to facilitate the process.

15. Incorporate participant responses into the proposed process design, meeting protocols and meeting agenda for initiating the next phase of the process.

Steps 12-15 may occur as part of an organizational meeting of all parties during which the parties jointly decide to proceed and plan future phases together.

After completing the assessment and preparation phase, resolving any major obstacles to the process and obtaining the commitment of the sponsoring agency and major stakeholders to proceed, conditions are appropriate for moving forward.

Appendix 3

Formulating Ground Rules for Agreement Seeking Processes

Ground rules usually address the following issues:

- 1.** The purpose and scope of the process.
- 2.** Participation: role of agency staff; whether participation of alternates is permissible; provision for inclusion of new parties; observers; other interested parties.
- 3.** The roles of participants: whether all participants will have relatively equivalent status.
- 4.** Decision rules: the meaning of consensus as well as what will happen if consensus is not reached.
- 5.** The end product: gaining ratification; what the agency will do with the agreement, the degree of commitment by participants to abide by any agreement.
- 6.** Understandings about participants' activities in other proceedings: whether 'good faith' participation will constrain the activities of participants or their constituents in other forums, such as a legislative session, administrative hearing or judicial proceeding.
- 7.** Responsibilities of representatives for keeping their constituencies informed and gaining ratification of agreements reached at the negotiating table.
- 8.** Informing those not at the table: who will be kept informed of progress and how this will happen.
- 9.** Organization and conduct of the meetings: agendas; record keeping; responsibilities of the facilitator.
- 10.** Selection and removal of the facilitator: the role of participants in the selection, evaluation or payment of a mediator or facilitator. Provision for replacing the facilitator if the participants feel he or she is biased or ineffective.
- 11.** Withdrawal of a participant: If a participant withdraws, everyone left at the table should determine whether the process can go forward. If the participants want some other default procedure, they should agree to it beforehand and include it in the protocols.
- 12.** Communications with the media: how and by whom.
- 13.** The timetable or schedule.
- 14.** Provision for use of caucuses.
- 15.** Information: provisions for sharing information; confidentiality.

Section 10. Consensus: What Does It Mean?

One of the first decisions Federal land management managers must make in deciding what type of process they propose to use is whether they are seeking consensus from the other stakeholders (collaborative decisionmaking, consensus building), or they are only seeking stakeholder opinions about a proposed management action.

If Federal managers decide it is important to seek consensus from the stakeholders, there are several methods for defining and measuring consensus.

Consensus means whatever the parties in a dispute prevention or resolution process decide it means:

Consensus can be achieved by informal agreement among the parties through prior coordination or as the parties negotiate for small groups. For large groups, more formal definitions could be needed. Consensus arrangements may be made as part of the discussion and acceptance of ground rules (see Section 11, *Ground Rules*) or as a separate issue of business. Consensus arrangements often depend on the parties' sophistication with the ADR process and on the size of the group.

Small party situations: When only a few parties are involved (e.g., a mediated dispute), it is probably both practical and wise for the parties to agree among themselves upon a definition and process for measuring consensus. The parties may use one of the consensus definitions described below or design one for their particular situation. This decision could be part of the ground rules for the process.

Large party situations: When a large number of stakeholders are involved in a collaborative

decisionmaking process (e.g., a land use plan) and the stakeholders are not able to consistently participate in face-to-face meetings, it may be impractical for the parties to decide on a definition and process for measuring consensus. This is particularly true for meetings conducted through video and electronic means from a number of sites. In this case, agency managers could use one of the commonly accepted definitions of consensus or establish definitions specific to a particular situation.

Consensus definitions:

A. Four levels

1. I agree with the (statement, proposal, etc.) and will fully support it.
2. I can support the (statement, proposal, etc.), but I am not in complete agreement with it.
3. I do not agree with the (statement, proposal, etc.), but I will not oppose its adoption.
4. I do not agree with the (statement, proposal, etc.) and will actively oppose its adoption.

Selection of options 1, 2, and 3 by all participants usually is defined as having achieved consensus.

B. Six levels¹

1. Agree: An unqualified “yes” to the (statement, proposal, etc.). The participant is satisfied that the decision is an expression of the wisdom of the group.
2. Agree: The participant is satisfied that the (statement, proposal, etc.) is acceptable.
3. Agree: The participant can live with the (statement, proposal, etc.), but is not particularly enthusiastic about it.
4. Agree (yes, but): The participant does not fully agree with the (statement, proposal, etc.) and needs to register a view about it; however, the participant will not choose to block the (statement, proposal, etc.) and is willing to support the (statement, proposal, etc.) because of trust in the wisdom of the group.
5. Disagree: The participant does not agree with the (statement, proposal, etc.) and feels

the need to stand in the way of the (statement, proposal, etc.) being accepted.

6. Disagree: The participant feels no clear sense of unity in the group and feels the need for more work before consensus can be reached.

Selection of options 1, 2, 3, and 4 by all participants usually is defined as having achieved consensus.

These definitions of consensus can also be used to record and categorize stakeholder comments, even when the agency is not seeking consensus. The Internet-based program “RuleNet,” developed by the Nuclear Regulatory Commission, can be used to augment traditional participation techniques to gather this information electronically.

Cormick et al. (1996) provide an excellent and in-depth discussion of consensus building in the publication entitled *Building Consensus for a Sustainable Future: Putting Principles into Practice*, Ottawa, Canada, National Round Table on the Environment.

¹ Adapted from the Rulenet program of the Nuclear Regulatory Commission.

BUILDING CONSENSUS FOR A SUSTAINABLE FUTURE

Guiding Principles

An initiative undertaken by Canadian Round Tables
August 1993

This publication is not copyrighted. Reproduction of part or all of it is encouraged, provided that the ten principles are kept intact and unchanged, and that acknowledgment and reference is made to the original publisher's Round Tables on the Environment and Economy in Canada.

First edition published in 1993.

Canadian Cataloguing in Publication Data

Main entry under title:

Building consensus for a sustainable future: guiding principles: an initiative undertaken by Canadian Round Tables, August 1993

Issued also in French under title:

Forger un consensus pour un avenir viable. "These guiding principles were developed by the national, provincial and territorial round tables (on the environment and economy) in Canada."

Publication of first impression sponsored by:

The Royal Bank of Canada

National Round Table on the Environment and the Economy

Jane Hawkrigg Enterprises Ltd.

Dedication

These Guidelines, bringing together the experiences of Canadians from all regions and sectors of Canada, emphasize the importance of process in achieving the goals of sustainable development. Roy Aitken, a pioneer in sustainable development, recognized the importance of developing consensus-based processes to meet the challenges of sustainable development. As a corporate leader, as a member of the National Task Force on Sustainable Development and as a founding member of the National Round Table on the Environment and the Economy, his advocacy and actions inspired

others to pursue consensus-based processes to challenge the numerous difficult conflicts in Canada. These Guidelines are dedicated to the memory of this exceptional pioneer.

Foreword

These Guiding Principles have been developed by Round Tables in Canada to build awareness, understanding, and an interest in using consensus processes to achieve a sustainable future. Consensus processes are not new and are not

uniquely Canadian. This document reflects the experience with the use of these processes in Canada and elsewhere, and in particular, that of the Round Tables themselves. This document is not a comprehensive "how-to" for consensus processes; rather it proposes guiding principles and key steps to make consensus work. It is intended to be a living document that will change with time and new experience.

Building a sustainable future requires processes that reconcile competing interests, forge new co-operative partnerships, and explore innovative solutions. These processes need to employ the abilities of all parties to enhance the quality of life for present and future generations. Although consensus processes are not appropriate for all issues, the Round Tables believe that consensus processes are an invaluable tool which can be used to solve many complex environmental, economic, and social problems. Consensus processes can work and have been used successfully.

Developing this guide provided an opportunity for members of Canadian Round Tables to share their experiences in using consensus processes. We are pleased to acknowledge the help and the endorsement of the Canadian Standards Association and the Niagara Institute in developing the guide. It is hoped that the lessons learned from these experiences will help people respond to the challenges of achieving a sustainable future in a spirit of practical, collaborative problem solving. We recommend the use and development of consensus based processes to develop practices and policies that promote a sustainable future.

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CONSENSUS PROCESSES— *Why?*

Many of the decisions we face in the years ahead demand that we find ways to listen to opposing points of view, and find ways to accommodate deeply held and differing values. Conventional decision making mechanisms tend to exclude rather than include diverse interests and do not cope well with the complexity that issues of sustainability present.

The terms sustainability and sustainable development embrace the concept that environmental, economic and social needs are complex and require integrated decision making. More than ever, we understand how decisions made today affect the quality of life for future generations. People are demanding more meaningful input to decisions that directly affect them or the place where they live.

Consensus processes encourage creative and innovative solutions to complex problems by bringing a diversity of knowledge and expertise together to resolve issues. When used in appropriate situations, consensus processes reward expenditures in time and effort by generating creative and lasting solutions to complex problems.

Opportunities for using consensus processes exist at all stages of decision making anvil\ring

issues of sustainability - from the establishment of broad policies and regulations, to long range planning, to allocating land and resources, to resolving specific disputes, to licensing, monitoring, and enforcement.

CONSENSUS PROCESSES— *What do we mean?*

A consensus process is one in which all those who have a stake in the outcome aim to reach agreement on actions and outcomes that resolve or advance issues related to environmental, social, and economic sustainability.

In a consensus process, participants work together to design a process that maximizes their ability to resolve their differences. Although they may not agree with all aspects of the agreement, consensus is reached if all participants are willing to live with "the total package".

Consensus processes do not avoid decisions or require abdication of leadership - but call upon leaders to forge partnerships that work toward developing solutions. A consensus process provides an opportunity for participants to work together as equals to realize acceptable actions or outcomes without imposing the views or authority of one group over another.

There are many forms that a consensus process can take. Each situation, issue or problem prompts the need for participants to design a process specifically suited to their abilities, circumstances, and issues.

CONSENSUS PROCESSES— *Using them*

Consensus processes enjoy some inherent advantages over other decision making processes

in addressing the challenges of a sustainable future.

Consensus processes are designed to:

- ▲ ensure that all significant interests are represented and respected
- ▲ enable participants to deal with each other directly
- ▲ give an effective voice to all participants
- ▲ allow the parties involved to design a process appropriate to their special circumstances and needs
- ▲ provide a forum that forges new partnerships and fosters co-operative problem solving in the search for innovative solutions that maximize all interests and promote sustainability

In terms of results, consensus processes can:

- ▲ improve the working relationships between all interests participating in the process
- ▲ help build respect for and a better understanding of different viewpoints among the participants
- ▲ lead to better informed, more creative, balanced and enduring decisions because of the shared commitment to and responsibility for the process, results, and implementation
- ▲ often be used to complement other decision-making processes

Even if all matters are not resolved through consensus, the process can crystallize the discussion, clarify the underlying issues, identify the options for dealing with outstanding disagreements, and build respect and understanding among the parties affected.

GUIDING PRINCIPLES OF CONSENSUS PROCESSES

Consensus processes are participant determined and driven - that is their very essence. No single approach will work for each situation - because

of the issues involved, the respective interests and the surrounding circumstances.

Experience points to certain characteristics which are fundamental to consensus - these are referred to as the guiding principles. These principles are described in detail on the following pages.

Principle #1 - Purpose Driven

People need a reason to participate in the process.

Principle #2 - Inclusive not exclusive

All parties with a significant interest in the issue should be involved in the consensus process.

Principle #3 - Voluntary Participation

The parties who are affected or interested participate voluntarily.

Principle #4 - Self Design

The parties design the consensus process.

Principle #5 - Flexibility

Flexibility should be designed into the process.

Principle #6 - Equal Opportunity

All parties must have equal access to relevant information and the opportunity to participate effectively throughout the process.

Principle #7 - Respect for Diverse Interests

Acceptance of the diverse values, interests, and knowledge of the parties involved in the consensus process is essential.

Principle #8 - Accountability

The parties are accountable both to their constituencies, and to the process that they have agreed to establish.

Principle #9 - Time Limits

Realistic deadlines are necessary throughout the process.

Principle #10 - Implementation
Commitment to implementation and effective monitoring are essential parts of any agreement.

PRINCIPLE #1— Purpose Driven

People need a reason to participate in the process.

The parties should have a common concern and believe that a consensus process offers the best opportunity for addressing it. This belief requires an informed understanding of consensus processes and a realistic view of available alternatives. If the parties conclude consensus offers a better option to pursue their interest, then a greater commitment to the process and its outcomes will be generated.

Business, government, non-governmental organizations, and other groups can apply consensus processes to a wide range of situations including planning and policy development, and regulation, licensing, and site specific development.

PRINCIPLE #2— Inclusive not exclusive

All parties with a significant interest in the issues should be involved in the consensus process.

Care needs to be taken to identify and involve all parties with a significant interest in the outcome. This includes those parties affected by any agreement that may be reached, those needed to successfully implement it, or who could undermine it if not included in the process.

It is sometimes appropriate for those representing similar interests to form a caucus or coalition.

When decisions require government action, the appropriate authorities should participate.

The integrity of a consensus process may be compromised if the parties are not given the opportunity to determine their representatives through their own processes and mechanisms, particularly in circumstances where the direct interests of the parties will be affected by the outcome.

PRINCIPLE #3— Voluntary Participation

The parties who are affected or interested participate voluntarily.

The strength of a consensus process flows from its voluntary nature. All parties must be supportive of the process and willing to invest the time necessary to make it work. The possible departure of any key participant presses all parties to ensure that the process fairly incorporates all interests.

A consensus process may complement other processes. It asks the parties to make their best efforts to address issues through consensus. If that process fails, participants are free to pursue other avenues.

PRINCIPLE #4—Self Design

The parties design the consensus process.

All parties must have an equal opportunity to participate in designing the process. There is no "single" consensus process. Each process is designed to meet the circumstances and needs of the specific situation.

An impartial person, acceptable to all parties, can be an important catalyst to suggest options

for designing the process, but the ultimate control over the mandate, agenda, and issues should come from the participants themselves.

Designing a consensus process enables the participants to become better acquainted before they deal with difficult substantive issues.

It is important to take time at the beginning to:

- ▲ define the issues clearly;
- ▲ assess the suitability of a consensus process for each issue - as opposed to other decision-making processes;
- ▲ clarify roles and responsibilities for everyone involved;
- ▲ establish the ground rules for operating.

Communications can be helped by establishing ground rules up front, and allocating time for the participants to appreciate each other's values and interests.

PRINCIPLE #5—Flexibility

Flexibility should be designed into the process.

It is impossible to anticipate everything in a consensus process. By designing flexibility into the process, participants can anticipate and better handle change when it faces them.

A consensus process involves learning from the perspectives of all participants. Feedback must, therefore, be continually incorporated into the process.

Flexibility is important. The initial design may evolve as the parties become more familiar with the issues, the process, and each other.

PRINCIPLE #6— Equal Opportunity

All parties have equal access to relevant information and the opportunity to participate effectively throughout the process.

All parties must be able to participate effectively in the consensus process. Unless the process is open, fair and equitable, agreement may not be reached and, if reached, may not last.

Not everyone starts from the same point - particularly in terms of experience, knowledge and resources.

For example:

- ▲ the process involves time and expenses - resources that not all participants may readily afford
- ▲ the process revolves around the sharing of information on issues and impacts something to which not all participants have ready access

To promote equal opportunity, consideration needs to be given to providing:

- ▲ training on consensus processes and negotiating skills
- ▲ adequate and fair access to all relevant information and expertise
- ▲ resources for all participants to participate meaningfully

PRINCIPLE #7— Respect for Diverse Interests

Acceptance of the diverse values, interests, and knowledge of the parties involved in the consensus process is essential.

A consensus process affords an opportunity for all participants to better understand one

another's diverse values, interests, and knowledge. This increased understanding fosters trust and openness which invaluablely assists the participants to move beyond bargaining over positions to explore their underlying interests and needs.

Recognizing and addressing all relevant stakeholders' values and interests provides a basis for crafting creative solutions that are more likely to last.

Sometimes parties may be deeply entrenched in an intense conflict prior to a consensus process. Reaching a consensus agreement involves exploring and developing common interests despite differences in values.

PRINCIPLE #8— Accountability

The participants are accountable both to their constituencies and to the process that they have agreed to establish.

It is important that the participants representing groups or organizations effectively speak for the interests they represent. Mechanisms and resources for timely feedback and reporting to constituencies are crucial and need to be established. This builds understanding and commitment among the constituencies and minimizes surprises.

Given significant public concern about environmental, social and economic issues, keeping the public informed on the development and outcome of any process is important.

PRINCIPLE #9—Time Limits

Realistic deadlines are necessary throughout the process.

Clear and reasonable time limits for working towards a conclusion and reporting on results should be established. Such milestones bring a focus to the process, marshal key resources, and mark progress towards consensus.

Sufficient flexibility, however, is necessary to embrace shifts or changes in timing.

PRINCIPLE #10— Implementation

Commitment to implementation and effective monitoring are essential parts of any agreement.

Parties must be satisfied that their agreements will be implemented. As a result, all parties should discuss the goals of the process and how results will be handled. Clarifying a commitment to implementing the outcome of the process is essential.

The support and commitment of any party responsible for follow-up is critical. When decisions require government action, the participation of government authorities from the outset is crucial.

A post-agreement mechanism should be established to monitor implementation and deal with problems that may arise.

KEY STEPS IN CONSENSUS PROCESSES

Making it Work!

There are four basic steps in a consensus process:

- ▲ Assessment - Talking About Whether to Talk
- ▲ Getting Started - Talking About How to Talk

- ▲ Running the Process - Talking
- ▲ Implementing and Monitoring the Results - Turning Talk into Action

Assessment—Talking About Whether to Talk

Not all situations are appropriate for using consensus processes. Experience suggests the following questions should be asked before deciding to proceed:

- ▲ Is there a reason to participate in a process?
- ▲ Can the subject matter be addressed at this time?
- ▲ Can progress be made or issues negotiated?
- ▲ Can the major interests be identified?
- ▲ Are there representatives who can speak for these interests?
- ▲ Can meaningful deadlines be established for reaching agreements?
- ▲ Are there incentives for reaching agreement? What are the negative consequences of failing to agree?
- ▲ Are the decision makers who will be required to act on the results of this process willing to be involved or act on/respond to any agreement reached during the process?
- ▲ Can a viable process be structured? Or, is another decision-making process more applicable to resolving these issues?
- ▲ Are there preliminary matters that need to be dealt with before the process gets under way (for example, pre-negotiation to get some participants to the table)?
- ▲ Are there parallel activities occurring that must be considered (for example, a pending legal action)?

Deciding whether a consensus process should be established is a step of ten not seen by the public and can be very time consuming. It may require the use of an impartial person who can help participants focus on the issues, exploring

ways of recasting issues, pointing out linkages, and guiding the parties towards consensus.

Getting Started—Talking About How to Talk

Identifying the Participants

Starting a consensus process requires taking time to identify the participants. The task consists of two parts - identifying the interests and then identifying the appropriate representatives of those interests.

To identify the interests, focus on groups affected by the decision and those with the power to implement or block potential outcomes.

To identify the representatives, focus on:

- ▲ consulting with various agencies, organizations, businesses, etc. to develop a sense of who is viewed with credibility as a leader or accepted spokesperson
- ▲ identifying existing or potential mechanisms that will enable participants to represent their constituencies
- ▲ confirming that the participants are accountable if they represent groups or constituencies.

Designing the Process

Reaching agreement on how to proceed provides participants with an opportunity to practice and experience reaching agreement before they address substantive issues. Some initial steps that should be developed include:

- ▲ establishing clear objectives
- ▲ defining what will constitute a consensus for reaching an agreement
- ▲ structuring how the process will work, including meeting formats, work with sub-groups, caucuses, resource requirements, and ground rules.

- ▲ establishing protocols on attendance, confidentiality, and the sharing of information
- ▲ establishing the role and responsibilities of an acceptable impartial person
- ▲ identifying the participants' responsibilities to represent their constituents accurately and to keep their constituencies informed of the process
- ▲ providing checks to ensure constituents are kept informed
- ▲ agreeing on a schedule of milestones and deadlines. Interim dates can be established to address specific issues and assess progress.
- ▲ agreeing on how the participants (including government) will act upon agreements
- ▲ determining what will happen if consensus is not achieved (the fallback)

Running the Process— Talking

In this step, the participants should focus on building consensus by:

- ▲ discussing issues
- ▲ focusing on the issues rather than personalities
- ▲ genuinely listening to one another's perspectives on these issues
- ▲ reaching agreement on principles around issues and exploring what these commitments mean in practice
- ▲ developing an action plan for building the agreement
- ▲ recording agreements as they are reached

The process of talking among the parties proceeds according to the ground rules established earlier. A degree of flexibility must be maintained in order to foster consensus.

Providing participants with support and training on negotiating and consensus building, may enrich the results of "talking".

If an impartial person is involved, he or she may meet independently with the various representatives to assist in identifying and defining common ground and to prepare for joint sessions.

Implementing and Monitoring the Results— Turning Talk into Action

Along with attempting to reach agreement, a consensus process must deal implementation. Several key features need to be considered:

Who is responsible for what:

The support and commitment of the parties responsible for following up on proposed decisions and recommendations must be clearly indicated.

The timetable and funding for agreements reached:

The participants should propose a schedule for implementing the results of the process so that it is understood how long an agreed result will take to be put in place and how long it will last. It is necessary to address the costs of implementation and monitoring.

The monitoring of results:

Given that the agreement will take time to implement, the participants should deal with a process for review and revision which outlines who will be responsible for monitoring, review, and, if necessary, renegotiating parts of the agreement.

CONCLUSION

The impact that decisions involving sustainability have on the quality of life for current and future generations has prompted many people to demand the right to meaningfully participate

in decision-making processes. Consensus processes ensure that the people affected are involved from the start in identifying and agreeing on issues, sharing different perspectives, and making choices with which people can live.

Opportunities for building consensus exist at all stages of decision making around issues of sustainability - from the establishment of broad policies, to long range planning, to allocating land and resources, to resolving specific disputes,

to monitoring and enforcement. The use of consensus processes helps decision-makers to be proactive by anticipating and avoiding disputes and problems.

Consensus processes have been used successfully to address issues of sustainability. It is our hope that these principles for consensus processes will help people respond to the challenges of a sustainable future in a spirit of practical, collaborative problem solving.

These Guiding Principles were developed by the National, Provincial, and Territorial Round Tables in Canada. Further copies are available from the addresses below:

National Round Table on the Environment and the Economy,
1 Nicholas Street, Suite 1500, OTTAWA ON K1N 7B7
(613-992-7189, Fax 613-992-7385)

New Brunswick Round Table on the Environment and the Economy,
Department of the Environment, PO Box 6000, FREDERICTON
NB
E3B 5H1
(505-453-3703, Fax 506-457-7800)

Nova Scotia Round Table on Environment and Economy,
Nova Scotia Department of the Environment, PO Box 2107,
HALIFAX NS B3J 3B7
(902-424-5695, Fax 902-424-0501)

Ontario Round Table on Environment and Economy,
1 Dundas Street West, Suite 2502, PO Box 4, TORONTO ON
M5G 1Z3
(416-327-2032, Fax 416-3 27-2197)

Manitoba Round Table on Environment and Economy,
Sustainable Development Coordination Unit, 305-155 Carlton Street,
WINNIPEG MB R3C 3H8
(204-945-1010, Fax 204-945-0090)

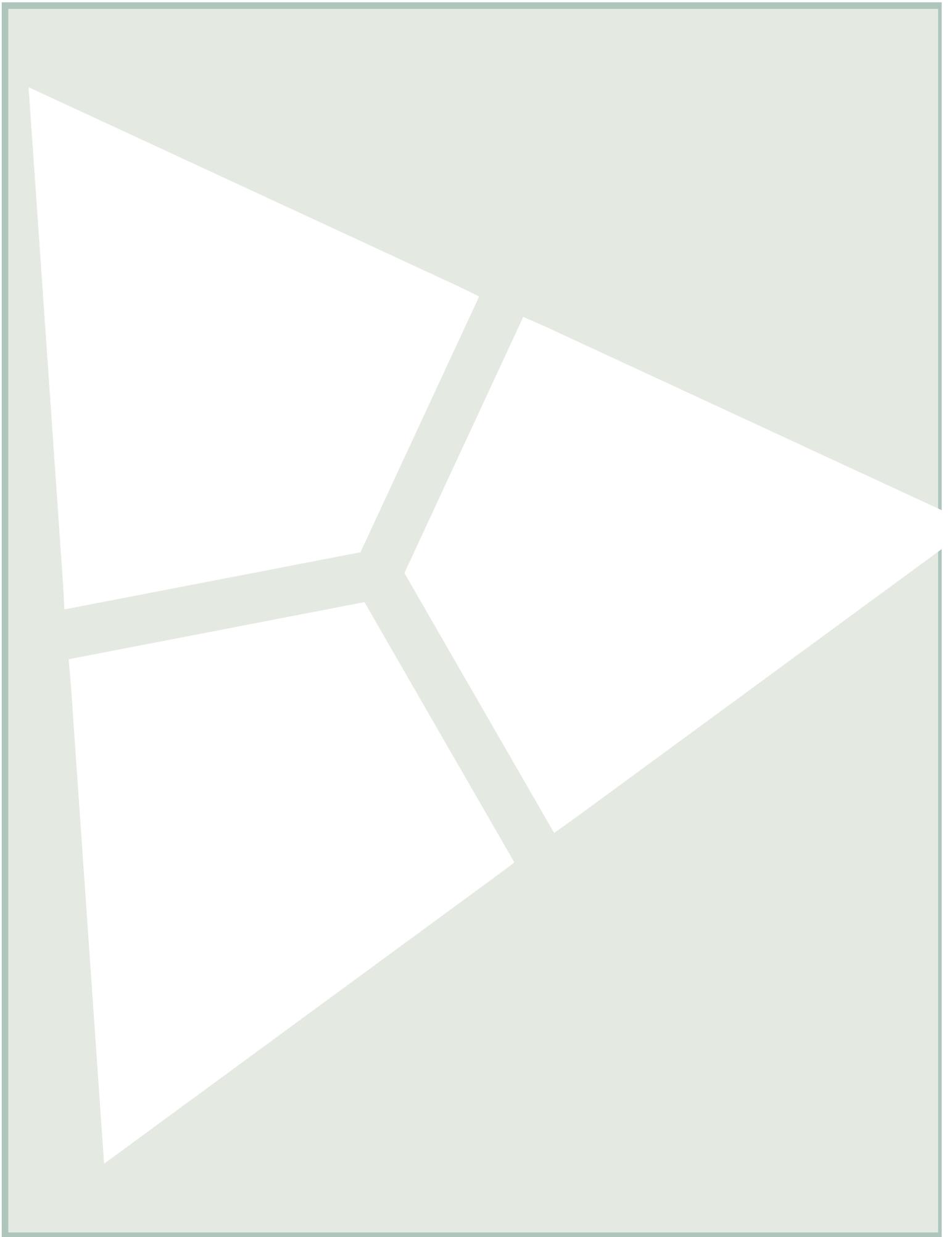
British Columbia Round Table on the Environment and the Economy,
560 Johnson Street, Suite 229, VICTORIA BC V8W 3C6
(604-387-5422, Fax 604-356-9276)

Prince Edward Island Round Table on the Environment and the Economy,
PEI Department of the Environment, PO Box 2000,
CHARLOTTETOWN PE C1A 7N8
(902-368-5274, Fax 902-368-5544)

Yukon Council on the Economy and the Environment,
Executive Council Office, Government of Yukon, PO Box 2703,
WHITEHORSE YT Y1A 2C6
(403-667-8138, Fax 403-668-4936)

Alberta Round Table on Environment and Economy,
Suite 400, 9925_109 ST. EDMONTON AB T5K 2J8
(403-427-4193, Fax 403-427-0388)

Newfoundland and Labrador Round Table on the Environment and the Economy,
Confederation Building, West Block, PO Box 8700,
ST. JOHN'S, NF A1B 4J6
(709-729-0030, Fax 709-729-1930)



Section 11. Ground Rules

Ground rules are used in virtually all ADR processes. Ground rules are used to set the structure and conditions for a specific ADR event, provide guidelines for conduct, establish limits on the time allocated to each speaker, address issues of media relations, set definitions for consensus and how it will be measured, address confidentiality, and other measures as determined by the parties. Ground rules can either be determined and agreed upon at the beginning of an ADR event or developed during the convening process.

Agreement on the ground rules may be pivotal in some cases and basically routine in others. The agency representative or third-party neutral who conducts the ADR event uses ground rules to maintain order and the pace of the process. In many cases, mere referral to the ground rules is sufficient to cause a wayward party to alter his or her conduct to comply with the ground rules. Trained ADR practitioners have a number of means to encourage the parties to comply with the ground rules for a specific event.

In processes such as small-party negotiation, facilitation, and mediation, the parties may be substantially involved in determining what the ground rules will be. In negotiations, the parties are clearly in charge of determining the conditions under which the negotiations will be conducted. As one moves up the dispute resolution spectrum, the neutrals take a more active role in laying out the ground rules. In facilitated discussions that involve a large number of participants, e.g., public meetings about land use planning, it is normally necessary for the facilitator for the agency conducting the meetings to set the ground rules for the meetings. This does not mean that the ground rules are locked in concrete. Agencies and third-party neutrals must be vigilant to the conditions of the specific case and be prepared to develop or adjust ground rules for the case.

Even in situations when the agency or the third-party neutral develops the ground rules, it is essential that the parties to the specific ADR event be given an opportunity to review the ground rules and be asked to agree and abide by them.

Ground rules should be tailored for each ADR event, and most can be determined during the assessment phase of the convening process. Many clauses, such as conduct and respect for all parties, are routine, and other subjects, such as media coverage and confidentiality rules, can require detailed negotiation.

Following are some common issues for ground rules:

- ▲ **Speaking issues:** Ground rules may address the order in which presentations are made, how long these presentations should last, and who will speak for each interest. Ground rules may also establish a requirement that speakers stay on the theme of the issues in dispute and refrain from dredging up lengthy past histories and other nonpertinent issues.
- ▲ **Conduct of the parties:** Ground rules often require the parties to agree to show courtesy to each other, to refrain from using vulgar or inflammatory language, to adhere to all the

ground rules, and to listen without interrupting the other parties when it is the other side's turn to speak.

▲ **Consensus:** Ground rules can be used to define consensus, when consensus polls are to be taken, and how nonconsensus positions will be addressed (see Section 10, *Consensus: What Does it Mean?*)

▲ **Documentation:** If note taking is needed, ground rules may establish who keeps notes, in what format, and for what purpose. The parties can establish rules for the manner in which the ADR event is to be recorded, who will do the recording, if and how the notes will be retained, and how the recorded dialogue will be disseminated, if at all. If the agreements require followup documentation, ground rules for who will be responsible for finalizing the document, getting required signatures, and distributing the agreements may be necessary.

▲ **Caucuses:** The ground rules may lay out if, when, how, and where caucuses will be used. Typically they may address who can call a caucus, who participates in the caucus, i.e., whether the neutral participates or only the parties. (Caucuses with the neutral in large facilitated public ADR events can raise the issue of neutrality and violations of FACA and other open meeting concepts.)

▲ **Confidentiality:** If confidentiality is an issue, ground rules may establish how it is maintained and enforced. One technique is to get the parties to agree to only discuss their position and facts outside the ADR event. Another is to agree to sanctions for those who may purposely or inadvertently violate a confidential communication.

▲ **Media coverage:** Ground rules may be developed to control media relations. These could include designation of one member of the group or the neutral as the only party who will talk to the media during the course of the ADR event. Another technique could be to agree to restrict comments to the media until the ADR process has concluded. Still another technique could be for each party to agree to discuss only their issues, facts, and points of view with the media.

▲ **Relationship to other activities on the same or closely related issues:** An ADR event is not conducted in a vacuum. The parties may need to agree how they will act in relation to the issues in other forums, such as legislative hearings, ongoing litigation activities, and requirements imposed by their headquarters.

▲ **Breaks and adjournment issues:** Ground rules can be used to establish break times and how and by whom adjournment will be called.

Section 12. Styles of Commonly Used ADR Processes

Each ADR process has a general format or set of procedures. The objective of this section is to provide agency personnel with a brief description of the manner in which an ADR process could proceed. The mediation process is described below in detail because it represents a “midway” process in the dispute-prevention, dispute-resolution spectrum. Facilitated events follow the concepts outlined for the joint meeting mediation format, but generally are less formal in structure. The role of the facilitator is more to control the pace of the meeting and potential disruption than to become involved in guiding parties to a resolution. Arbitration shifts decisionmaking from the parties to a selected neutral, the arbitrator. The use of arbitration in the resolution of natural resource, public land management disputes is an unlikely option and therefore the process is not discussed.

It is incumbent upon all agency personnel to understand how a process works so they can be prepared to represent the agency in the best possible light. Many processes, particularly preventative processes and agency-initiated mediation, allow agency managers more flexibility in scheduling, format, and other aspects of using a particular ADR process. (Some processes, such as settlement conferences convened by a Federal district court judge or magistrate, remove virtually all flexibility from agency management, the U.S. attorneys, and other party representatives, and they all can be required to appear and participate regardless of schedule conflicts.)

Facilitation as a Tool in Collaborative Decisionmaking

In its best form, collaborative decisionmaking is initiated as a dispute prevention activity. In this context, the initiators of the activity are proactive. The initiators need to carefully assess the attitude of the stakeholders. If the climate in which they initiate the activity is not polarized, distrustful, or hostile toward the agency, there may be no need to use a neutral facilitator. In these cases, the initiator may be the Federal agency and it may be appropriate to use agency personnel to facilitate the meetings used to

collaborate with the other stakeholders. If, however, the climate is polarized, distrustful, or hostile toward the agency(s), the initiators should carefully weigh the need to use a neutral facilitator. The agency may also seek out another group or organization to take the lead in organizing the activity as a means to deal with polarized, distrustful, or hostile stakeholders. Initiators of a collaborative decisionmaking activity or who are participating with other stakeholders to organize an activity may find it

helpful to consider the elements listed in Section 9, *Guidelines for Convening an ADR Event*.

The agency may also be an invited stakeholder, invited by a citizens coalition, another Federal agency, local or State government, or other group to join in a collaborative process. The facilitator of the activity may be selected from within the group, selected /appointed from one of the agency staffs, hired as a professional facilitator, or chosen by other means such as natural selection.

Collaborative decisionmaking also may be used as a dispute resolution activity. In this context, the climate in which the activity is being initiated may be highly polarized, distrustful, or hostile toward the agency(s). In this scenario, the issue of neutrality is likely to be very significant and the use of professional nongovernment facilitators may be the prudent course of action. Depending on the number, geographical location, and availability of the stakeholders, it may be possible to involve the stakeholders in the selection of the facilitator. In activities that have a large number of people and a dispersed group of stakeholders, as commonly found in land use planning, it becomes an agency responsibility to select and retain the services of the facilitator. Agency personnel must remain vigilant and continually validate the effectiveness and acceptance of the facilitator and the processes the agency and facilitator have chosen to use.

The organization and operation of a facilitated collaborative decisionmaking activity is dependent upon the specific situation in which the activity is occurring, and the persons who are initiating the activity should consider the factors listed in Section 9, *Guidelines for Convening an ADR Event*, before initiating the activity. A specific collaborative decisionmaking

activity in a BLM office or any other Federal, State, or private sector organization may look very different from other collaborative decisionmaking activities, including those in the same district or state, or even in the same office, whenever collaborative activities are initiated about other issues or during different times. In other words, while collaborative decisionmaking activities follow certain principles, each has a life and structure of its own, born of and nurtured in the climate in which the activity occurs.

In general, facilitated collaborative decisionmaking activities involve the following:

▲ **Assessing the issues.** Formal or informal studies may be made by the initiator(s) or by ADR professionals retained to conduct the assessment. For example, in a case in Idaho, the distrust of the agency was so intense that the agency retained a professional facilitator to conduct public meetings in which focus groups assessed the issues and then recommended how to proceed to resolve issues related to the development of a resource management plan. In any case, assessment is a management function that can be carried out in many ways, but it always needs to be done.

▲ **Organizing the activity.** The facilitated activity may be organized by using a memorandum of understanding (MOU), memorandum of agreement (MOA), another form of a formal charter developed by the parties, informal agreements, or in accordance with an agency's planning guidelines. The formality of the agreement to collaborate depends on factors such as the mood and sophistication of the stakeholders, the degree of cooperation or polarization on the issue, past relationships among the parties, time factors, and legal or administrative rules and requirements such as the National Environmental Policy Act.

▲ ***Determining the tasks of the facilitator.***

Neutral facilitators may be required to do a variety of tasks from the beginning of an activity to its conclusion. These tasks may include conducting the assessment, educating stakeholders, planning and running meetings, recording and summarizing comments, drafting statements or agreements, and securing the appropriate signatures on agreements.

Mediation

Mediation involves at least three parties and is generally used to resolve rather than prevent disputes. The mediation activity may only include one person for each side of a two-party dispute and the mediator, or the mediations may involve a large number of individuals or interests and the mediator. A lot of work is required to convene a mediation event. The steps in convening are discussed in detail in Section 9, *Guidelines for Convening an ADR Event*.

The Mediator

The mediator is a neutral party who has no decisionmaking authority, and who has been selected by the parties in dispute as follows; (1) from a list developed by one or both of the parties, (2) from a standing list maintained by a court or other organization such as the American Arbitration Association, or (3) by appointment by a contract provision or court procedure. The most likely process for selection of a mediator(s) in BLM would be as described in (1) and (2) above. The mediator may be one person or a panel of several persons, typically three. The essential qualities of a mediator are that the mediator is perceived as being neutral by all parties and the mediator has the skill and knowledge to conduct the mediation process. There is an ongoing debate among ADR professionals whether or not the mediator needs to

have subject-matter knowledge about issues in dispute and be familiar with the culture in which the dispute arises. In general, a mediator who has subject-matter knowledge, and who is familiar with the culture in which the dispute has arisen probably will be more successful. This does not preclude the parties from selecting a mediator who does not meet these criteria, but who has both the trust and respect of the parties.

The Parties

An essential element of a successful mediation is the participation at the “table” by party representatives who have the authority to settle the dispute. The principles for each of the sides in a dispute should be active participants to the mediated negotiations. Attorneys for the parties may or may not speak for their clients. They may be at the table, may be in the background acting as advisors for their clients, or be assigned to wait in another room. The role of attorneys should be discussed during the convening process and can be discussed as part of the ground rules.

The Mediation Process

The mediation process has three essential parts: the opening phase, the discussion phase, and the conclusion or wrap-up phase. Also, mediation processes are conducted in three basic formats as discussed below. The formats are generally based on either precedent, sector or industry culture, or mediator style and preference, or a combination of these.

The joint meeting format: In this format, all parties to the mediation meet face to face at the same table. With the assistance and expertise of the mediator, parties move through explanations of their interests, a discussion of the issues, and eventually to agreement between the parties to

resolve their differences. At the opening of the process, the mediator explains the mediation process and how he or she plans to conduct the mediation. The mediator establishes, with the parties' agreement, the ground rules to be followed and addresses other preliminary matters such as time constraints and how to deal with them. The mediator and the parties remain in direct communication with each other and no *exparte* (one-on-one) communications are made between the mediator and either of the parties.

In a typical joint meeting format, the mediator initially asks the parties to direct all comments and discussion to the mediator. As the process proceeds, it is typical for the parties to grow more comfortable with each other and begin direct communication among themselves. If the parties in dispute willingly choose to begin constructive dialogue among themselves, the mediator withdraws from the dialogue, ever vigilant to redirect the parties' discussion back to him or her if communications between the parties begin to break down. The dialogue of the mediation may cycle through several phases in which the mediator redirects the dialogue back to the mediator. If the parties don't naturally move to begin dialogue among themselves, the mediator uses one or more techniques to encourage direct dialogue among the parties. The role of the mediator is to establish and maintain fruitful communication between the parties.

Listening to parties vent frustrations and anger is a typical part of the mediation process. The mediator must allow some venting, but still control it. It is very important for the mediator in the joint meeting format to sense when enough time has been spent on venting. The mediator will allow some venting to occur and use the ground rules to control venting so that it does not get out of hand. Most of the time in a joint meeting format is consumed by venting

and active dialogue among the parties. If the mediation is successful, the development of agreements typically occurs quickly in the very last part of the process, say the last hour of a day-long process. Some parties in postevaluations characterize the majority of the time spent as wasted and see only the last part in which they were able to reach agreement as the only value they got out of the process. They often fail to recognize the critical value of the venting and listening that takes place during the course of the mediation.

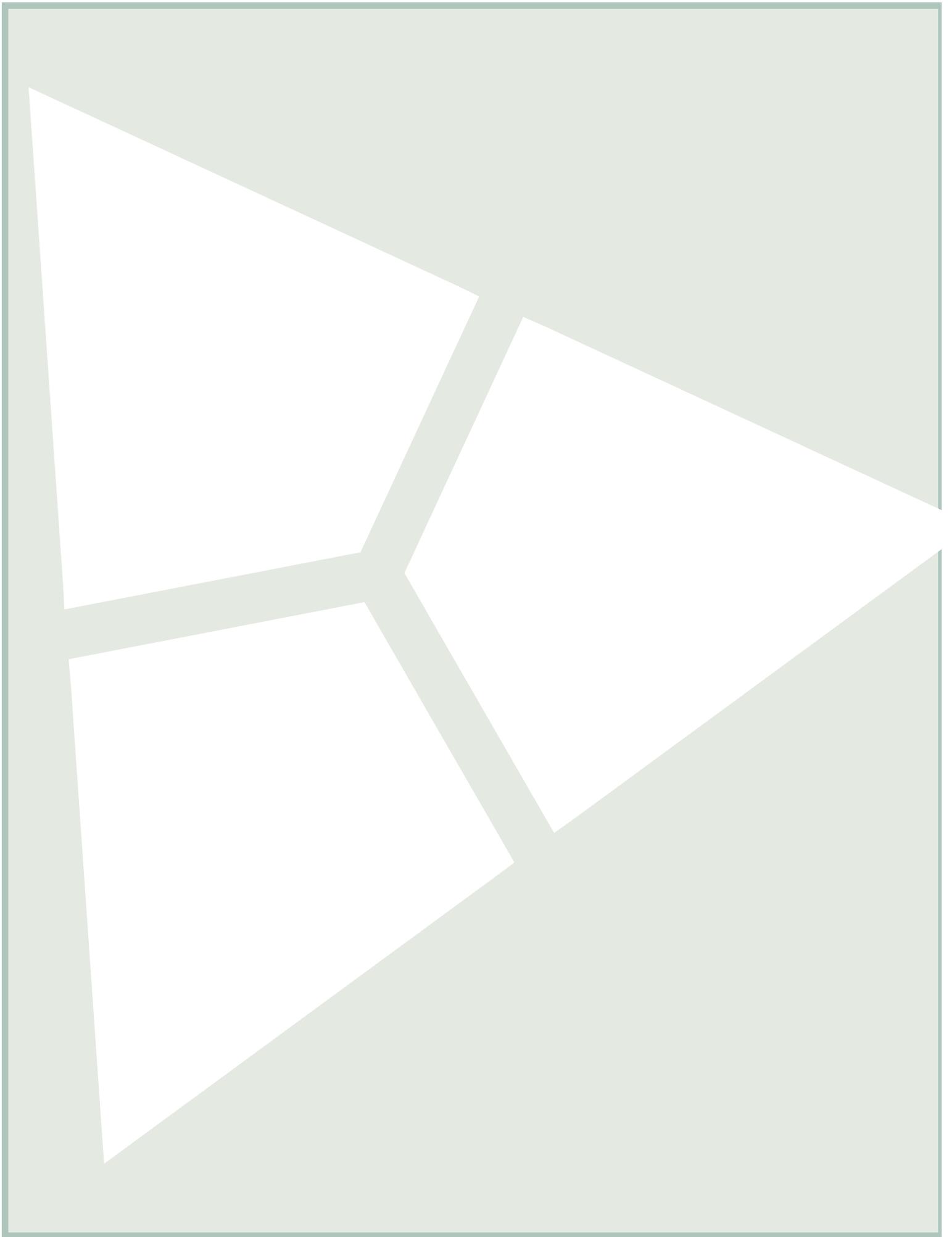
The mediation typically ends by the parties agreeing to a specific set of agreements. These agreements may be finalized in writing and signed at the end of the mediation session, or more typically, the convener, one of the parties, or the mediator will take the agreements and have them reduced in writing in a format that is acceptable to the parties. Specific time lines are often established for the conclusion of the process and agreements are made about who will get the appropriate signatures. The main point to remember in all mediations is that all decisions are made by the parties, not the mediator.

The separate room format: In this format, the parties rarely, if ever, meet face to face. The mediator shuttles between the rooms where the parties reside, carrying positions and expressing the concerns of one party to the other party. The mediator deals with the venting process by each of the parties directly with them and in confidentiality. In this process, the mediator needs to pay special attention to confidential communications expressed by the parties and develop a system to ensure that he or she does not inadvertently reveal confidential communications to the other party. This format is typical for commercial mediations, particularly when organizational guidelines, mediator styles, and cultural norms dictate the format.

This process seems to be preferred by attorney mediators. The conclusion and wrap-up of this process are similar to the process followed for the joint meeting format.

The caucus format: The caucus format is a combination of the joint meeting and separate room formats. Typically, mediations in this format begin in the joint meeting format and parties also agree to meet separately with the mediator (caucus) as the need arises. The need for caucus can be suggested by either the mediator or the parties. The mediation can also begin with separate meetings, move to joint meetings, and then to caucuses. The parties may also agree to conduct the mediation in separate rooms for the bulk of the negotiations, except perhaps for the final agreement stage. Caucus can also mean that the parties meet separately with their counsel and other advisors without the mediator to discuss offers and other matters among themselves.

When the mediator meets in caucus with one of the parties, this provides the mediator with the opportunity to ask the parties to review their positions in terms of real possibilities of success. In short, the mediator is conducting reality checks. The mediator may ask the parties to realistically review the advice their attorneys have given them about the potential of winning without negotiation, and to determine what the best option for resolution of their differences is if the mediation is not successful, the “best alternative to a negotiated agreement” (BATNA) would be. Maintenance of confidentiality of information obtained by the mediator in caucus is a critical issue, and the mediator must have a process to ensure that he or she does not violate any confidences given in caucus. The caucus is often used to allow a party to vent frustration without inflicting it upon the other party and thereby causing the other party to harden their position or withdraw from the mediation. The caucus format is concluded and wrapped up in the same manner as the other two formats.



Section 13. Sources of Private and Public ADR Practitioners

Assessment of the qualifications and suitability of an ADR practitioner for a BLM ADR event is often a difficult task. The professional ADR community has labored over how to evaluate and certify ADR practitioners. Various approaches have been tried, but none have been accepted as the best way to evaluate or predict the potential success of a particular ADR practitioner in a particular situation. Some jurisdictions have used education and training as a basis for evaluation or certification; some have used membership in an organization (e.g., a state bar association) as a principal criteria for qualification. Other groups have maintained “rated” lists of names of practitioners and limited selection of practitioners to those who have been placed on the approved list. Additionally, some certification bodies require understudy and training in specific subject areas. Still other groups or jurisdictions rely on the marketplace, through references and word of mouth, to define qualifications and suitability. The latter is the approach taken in this tool kit, which includes a registration form for gathering key information about ADR practitioners.

The intent of the registration form is to provide BLM managers and staff with information about the past experiences of an ADR practitioner, and, **most importantly**, the names and phone numbers of people (stakeholders) who have had a chance to see the ADR practitioner in practice. There is no intent to limit selection of an ADR practitioner to those who have submitted a registration form to BLM. These forms are used to assist in qualifications determination, not to determine or dictate who is qualified to work with BLM. ADR practitioners who are interested in working with the BLM as neutrals, in situation assessment, or as trainers have submitted registration forms to BLM; completed forms can be reviewed on the natural resource ADR home page at: www.blm.gov/nradr. Blank forms will be maintained at this site as well, and you are asked to encourage those who you believe would be successful ADR practitioners for BLM ADR events to register with BLM.

Other sources of information about ADR practitioners can be found in the arbitration and mediation services listings in the yellow pages of the phone directory. Martindale-Hubbell, (1-800) 526-4902, produce an annual volume that lists ADR practitioners. This volume can be found in law libraries and some public libraries. The Society of Professionals in Dispute Resolution (SPIDR), 1527 New Hampshire Avenue, NW, Third Floor, Washington, DC 20036, (202) 667-9700, has an extensive membership directory. SPIDR also has regional chapters that may be of assistance. You can get your area’s chapter address from the international office in Washington, DC. Many states also have state associations, such as the Montana Consensus Council, Office of the Governor, (406) 444-2075; the North Dakota Consensus Council, Inc, 1003 Interstate Avenue, Bismark, North Dakota, (701) 224-0588; the Transboundary Initiative (a U.S.-Canada associ-

ation), which can be reached through the North Dakota Consensus Council, Inc.; the Idaho Mediation Association, (208) 389-9211; the Colorado Council of Mediators and Mediation Organizations, (1-800) 864-4317; and the Oregon Dispute Resolution Commission, PO Box 247, Salem, Oregon, (503) 378-2877. The American Arbitration Association (AAA) also maintains panels of mediators, arbitrators, and other dispute resolution practitioners. AAA has a number of regional offices and they are listed in the yellow pages of the phone directories for most major cities.

In the past few years, many colleges and universities have established dispute resolution programs and some offer dispute resolution services. You can check with your area academic institutions for availability. Three such programs that offer dispute resolution services are the Martin Institute at the University of Idaho, Curtis Brettin, ADR Coordinator, (208) 885-6527; the Applied Communications Department at the University of Denver, Dr. Mike Spangle, (303) 871-3217; and the Institute for Study of Alternative Dispute Resolution at Humboldt State University, Dr. Betsy Watson, (707) 826-4750.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
National Special Projects & Initiatives Team
PO Box 25047, Denver, CO 80225-0047

October 1996

SOURCES SOUGHT:

The Bureau of Land Management (BLM) is building a data base of alternative dispute resolution (ADR) practitioners who may be interested in assisting the BLM in training and in conducting ADR events in the field of environment and public policy dispute prevention and resolution. If you are interested in registering with the BLM, please see the registration form, similar to the one below, at BLM's web site. The sole means of registering with BLM is through this web site at: ***www.blm.gov/nradr***. **This is not a solicitation for work.**

Name of Organization: _____

Address: _____

City: _____ State: _____ Zip Code: _____ Telephone No: (____) _____

Fax No: (____) _____ E-Mail Address: _____

Contact Person in Your Organization: _____

Number of Professional Practitioners in Your Organization: _____

Area of interest:

Training in: Negotiation _____ Facilitation _____ Mediation _____ Factfinding _____
Dispute Resolution System Design _____ Situation Assessment _____

Practice in: Negotiation _____ Facilitation _____ Mediation _____ Factfinding _____
Dispute Resolution System Design _____ Situation Assessment _____

Geographical Area of Interest: Northeast U.S. _____ Southeast U.S. _____ Midwest U.S. _____
Southwest U.S. _____ Northwest U.S. _____ Nationwide

Certifications (who issued and year issued) and ADR qualifications:

Do you belong to an ADR association that has standards of ethics for your profession? If so, what is the organization?

For additional information, contact Dr. John Schumaker at (303) 236-0170 or (719) 481-4728 or Steve Shafran at (303) 236-6694.

Name of Organization_____

Your Experience: List the three most significant environmental and public policy ADR activities in which you or your organization has participated.

1) a. Type of ADR Event_____ Year Event Occurred_____ No. of Participants_____

b. Identify key stakeholders (agency, company, organization, etc.) and key contact person and phone number for each of the stakeholders:

c. Synopsis of the event and outcome:

d. Comments:

Name of Organization_____

2) a. Type of ADR Event_____ Year Event Occurred_____ No. of Participants_____

b. Identify key stakeholders (agency, company, organization, etc.) and key contact person and phone number for each of the stakeholders:

c. Synopsis of the event and outcome:

d. Comments:

Name of Organization_____

3) a. Type of ADR Event_____ Year Event Occurred_____ No. of Participants_____

b. Identify key stakeholders (agency, company, organization, etc.) and key contact person and phone number for each of the stakeholders:

c. Synopsis of the event and outcome:

d. Comments:

Section 14. Standards of Ethics and Conduct for ADR Neutrals

Many ADR neutrals belong to professional associations that require neutrals to agree to follow their standards for conduct and practice. Standards have been promulgated by organizations such as the Society of Professionals in Dispute Resolution, the American Arbitration Association, Bar Associations, and many state-based associations, such as the Idaho Mediation Association.

These standards can help those seeking to use an ADR neutral to understand the role of the neutral. For example, standards for mediators spell out expectations of neutrality, confidentiality, and other principles of the mediation process.

Attached are two examples of standards that have been adopted by professional ADR organizations.



MODEL STANDARDS OF
CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION
ASSOCIATION

AMERICAN BAR ASSOCIATION

SOCIETY OF PROFESSIONALS IN
DISPUTE RESOLUTION

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

The Model Standards of Conduct for Mediators were prepared from 1992 through 1994 by a joint committee composed of two delegates from the American Arbitration Association, John D. Feerick, Chair, and David Botwinik, two from the American Bar Association, James Alfini and Nancy Rogers, and two from the Society of Professionals in Dispute Resolution, Susan Dearborn and Lemoine Pierce.

The Model Standards have been approved by the American Arbitration Association, the Litigation Section and the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution.

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The views set out in this publication have not been considered by the American Bar Association House of Delegates and do not constitute the policy of the American Bar Association.

ISBN: 1-57073-191-8

Printed 1995

Introductory Note

The initiative for these standards came from three professional groups: the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it -- a beginning, not an end. The model standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

Preface

The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party -- a mediator -- facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

I. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

COMMENTS:

- The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.
- A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS:

- A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.

I

- A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

III. Conflicts of Interest: A Mediator Shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the Mediation.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS:

- A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.
- Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

II

IV. Competence: A Mediator Shall Mediate Only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

COMMENTS:

- Mediators should have information available for the parties regarding their relevant training, education and experience.
- The requirements for appearing on a list of mediators must be made public and available to interested persons.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

V. Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

COMMENTS:

- The parties may make their own rules with respect to confidentiality, or the accepted practice

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of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.

- If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
- In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
- Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.
- Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

VI. Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

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COMMENTS:

- A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.
- The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.
- The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.
- A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.
- A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

V

- Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

VII. Advertising and Solicitation: A Mediator Shall Be Truthful in Advertising and Solicitation for Mediation.

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

COMMENTS:

- It is imperative that communication with the public educate and instill confidence in the process.
- In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

VIII. Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

COMMENTS:

- A mediator who withdraws from a mediation should return any unearned fee to the parties.

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- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
- A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

IX. Obligations to the Mediation Process: Mediators Have a Duty to Improve the Practice of Mediation.

COMMENT:

- Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

Copies of the Model Standards of Conduct for Mediators are available from the offices of the participating organizations. The addresses are listed on the back cover.

We wish to express our appreciation for a grant from the Harry De Jur Foundation.

PARTICIPATING ORGANIZATIONS

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Telephone: (202) 662-1681
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Section 15. Core Curriculum for ADR Training

The following core curriculum is recommended for the BLM ADR training programs outlined in BLM's strategic plan for implementing ADR processes into public land management activities. The subjects listed for each training program are those that the Natural Resource ADR Initiative Team believes to be the minimum required to adequately educate BLM employees about ADR processes and how they can be used in BLM's management of the public lands.

The intent of the Natural Resource ADR Initiative Team was to provide a list of core subjects that a BLM manager could give to a private sector trainer, BLM's National Training Center, or their own training staff to develop ADR training tailored to the current levels of knowledge and anticipated use of ADR for a specific office or situation.

Orientation Program

Purpose: To provide all employees with a basic understanding of ADR processes and their application in public land management.

Target Audience: Employees in all BLM offices. This component also could be integrated into National Training Center courses.

Time Required: 1 to 1½ hours

When: To be completed within 1 year of the approval of the Natural Resource ADR strategic plan.

Instructor: Local ADR consultant or other knowledgeable person designated by the manager. The Bureau natural resource ADR program leader is available to make this presentation if so desired. The team recommends a video program be developed to assist in the necessary ongoing maintenance of the orientation information.

Core Curriculum:

A basic discussion of why ADR can work, particularly in complex public land management disputes.

BLM's policy and vision for ADR, and its authority to use ADR processes in public land management.

Basic definitions of key ADR processes such as negotiation, facilitation, mediation, arbitration, factfinding, summary jury trials, minitrials, and the related concept of an ombudsman.

A discussion of the dispute prevention/dispute resolution continuum in which particular attention is paid to comments such as, "we are already doing negotiation/facilitation" and "what is new about the ADR initiative?"

The relationship to other ADR programs such as the EEO mediation program and mediation or arbitration programs associated with procurement and contracting activities.

User Overview Program

Purpose: To define ADR processes and concepts, including when to use ADR, how the use of ADR can enhance agency management decisionmaking, how to contact in-house resources and external (private sector/university) neutrals, how to procure and use ADR providers from the private sector and other agencies, and the role of managers in implementing ADR programs.

Target Audience: State directors, assistant directors, center directors, district managers, area managers, key staff, and invited external group representatives. This component also could be integrated into National Training Center courses.

Time Required: 1-2 days

When: Complete within 18 months after the natural resource ADR initiative strategic plan is approved.

Instructor: Private sector trainers are recommended, particularly if external representatives are invited to attend the training, using the core curriculum developed by the Natural Resource ADR Initiative Team.

Core Curriculum:

BLM's authority to use ADR in public land management: the 1996 Administrative Dispute Resolution Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, the Department of the Interior ADR Plan, and general management authority.

Why ADR works, particularly in complex public land management disputes; examples of

successful ADR events and unsuccessful ADR processes in BLM and other natural resource agencies, including state, local and private groups, showing why they worked or didn't work; and when a particular ADR process may be useful and appropriate.

How ADR processes are applicable; who controls use of the processes at the preadministrative appeal and litigation phases in a dispute; and how control, formality, and timing shift as disputes escalate up the dispute-resolution chain.

Definition of key ADR processes such as negotiation, facilitation, mediation, arbitration, factfinding, summary jury trials, minitrials, and the related concept of an ombudsman, and how each may be applicable to public land management.

A discussion of the dispute prevention/dispute resolution continuum, in which particular attention is paid to comments such as, "we are already doing negotiation/facilitation" and "what is new about the ADR initiative?"

The relationship to other ADR programs such as the EEO mediation program and mediation or arbitration programs associated with procurement and contracting activities.

Sources for ADR neutrals, private and public, and how to obtain their services; the value of the concept of neutrality and how to achieve it; the benefit and reason why neutral parties should be used in assessments and in conducting ADR events.

How to use ADR professionals to assist agency managers in assessing conflicts or potential conflicts to determine if and when an ADR process may be appropriate.

Relationship to collaborative decisionmaking concepts, community partnerships, and how consensus building uses ADR processes such as facilitation.

ADR Technical Program

Purpose: To provide in-depth, ongoing (maintenance) training, including detailed instruction about ADR processes that are most applicable to BLM, how to convene and conduct ADR events, and how to obtain neutrals.

Target audience: Newly appointed Bureau ADR consultants, other key staff, and external group representatives, and BLM units and their external constituencies that are proposing to use ADR processes for a specific situation.

Time required: 4-5 days

When: An annual offering supported by the National Training Center (NTC), preferably via satellite methodologies, and in local offices for BLM units that need in-depth training before initiating a specific ADR event.

Instructor: Private sector trainers are recommended, using core curriculum developed by the ADR team as modified based on local conditions. Internal trainers or a combination of private and internal trainers may be appropriate for NTC long-term maintenance courses.

Initial ADR Consultant Technical Program

Purpose: To provide detailed instruction on the ADR processes that are most applicable to BLM. BLM policy and vision for ADR, how to convene and conduct ADR events, how to obtain neutrals, the role of managers and

staff in using ADR processes, the benefits to BLM managers from using ADR processes, and how to market ADR processes to BLM management and external organizations.

Target audience: Designated Bureau ADR consultants, other key staff, and external group representatives.

Time required: 4-5 days

When: Complete within 120 days after natural resource ADR initiative strategic plan has been approved.

Instructor: Bureau Natural Resource ADR Program Leader assisted by BLM employees and private sector/university sources.

Core Curriculum:

BLM's authority to use ADR in public land management: the 1996 Administrative Dispute Resolution Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, and general management authority.

An in-depth discussion/role play of why ADR works, particularly in complex public land management disputes.

Definition of key ADR processes such as negotiation, facilitation, mediation, arbitration, factfinding, summary jury trials, minitrials, and the related concept of an ombudsman, and how each may be applicable to public land management.

A discussion of the dispute prevention/dispute resolution continuum, in which particular attention is paid to responses such as, "we are already doing negotiation/facilitation" and "what is new about the ADR initiative?"

How ADR processes are applicable; who controls use of the processes at the preadministrative appeal and litigation phases in a dispute; and

how control, formality, and timing shift as disputes escalate up the dispute-resolution chain.

How to address employee/manager comments such as, “we are already doing ADR,” citing negotiation and use of facilitators in day-to-day business and in the land use planning public involvement processes.

A detailed discussion of the relationship of the Federal Advisory Committee Act to ADR processes

The relationship to other ADR programs such as the EEO mediation program and mediation or arbitration programs associated with procurement and contracting activities.

Examples of successful and unsuccessful ADR processes in BLM and other natural resource agencies, including state, local, and private groups, and why they worked or didn’t work.

Sources for ADR neutrals, private and public; how to obtain their services; and the value of the concept of neutrality and how to achieve it.

How to use ADR professionals to assist BLM managers in assessing conflicts or potential conflicts to determine if and when an ADR process may appropriate.

Relationship to collaborative decisionmaking concepts, community partnerships, and how consensus building uses ADR processes such as facilitation.

Discuss/demonstrate the stages of a facilitated and mediated ADR event, from convening to opening a session, then on to the conclusion of an ADR session.

Section 16. ADR Position Description and Amendment

The following sample position description and position description amendment for collateral duty assignments can be used for employees who are designated as their office's ADR consultant.

Position Description

INTRODUCTION

The incumbent serves as an Alternative Dispute Resolution (ADR) Consultant. The ADR Consultant is responsible to the _____ Management Team for providing information and education about ADR and convening ADR processes for natural resource, public land management issues.

MAJOR DUTIES

Provides consultation services to managers and staff in the use of ADR processes.

Promotes use of ADR in natural resource, public land management in the States/Directorates/Centers.

Assists the _____ in the accomplishment of the Bureau's strategy for using collaborative decisionmaking processes in the management of natural resources.

Analyzes and develops policies and procedures for setting up ADR processes in program activities and for management decisions.

Assesses new and emerging issues and integrates ADR processes into the establishment of management goals and priorities.

Develops, analyzes, and recommends use of ADR processes during the development of policies relating to resource issues, priorities, and operations. Works closely with ecosystem teams and field organizations, solving implementation problems as they arise.

Communicates and coordinates information both internally and externally.

FACTORS

Factor 1 - Knowledge Required by the Position

Sound knowledge of ADR processes, how to convene an ADR process, and Bureau policies on the use of ADR and collaborative decision-making processes are required to advise the _____ Director and other management and staff personnel on strategies for implementing, integrating, and using collaborative, dispute prevention, and dispute resolution techniques and processes in the _____ .

A working knowledge of established methods and techniques of natural resource management and land use planning policies, procedures, and regulatory requirements along with a working knowledge of Federal agency policies,

procedures, and applicable statutes to facilitate accomplishment of the Bureau's strategy for using collaborative decisionmaking processes in natural resource management.

The skill to negotiate effectively with management officials and resource specialists to accept and implement program recommendations when proposals involve agency resources, changes in established procedures, or conflict with current policies.

Ability to conduct a situation assessment and hence provide recommendations on which ADR process may be appropriate and how to convene an ADR process.

Ability to communicate effectively orally and in writing.

Factor 2 - Supervisory Controls

As a member of the _____, the employee works under the direction of the _____. ADR program implementation is closely monitored by the supervisor. The supervisor specifies the immediate objectives, scope of the assignment, and deadlines to be met. The employee is expected to work closely with the supervisor and the other members of the statewide _____ Team to implement program guidance issued from Bureau Headquarters and discuss issues and approaches to resolving controversial matters. Completed work is reviewed for technical soundness and accomplishment of specified objectives. Although methods used are not usually reviewed in detail, controversial findings or recommendations are reviewed for effects on other organizational programs.

Factor 3 - Guidelines

Guidelines for ADR program implementation include public laws, academic literature, and

information provided by Bureau Headquarters. The employee uses judgment and discretion in determining which guidelines apply to specific situations. In cases when guidelines lack specificity, the incumbent determines the course of action based on review of several sources of guidelines and recommends development or additional guidelines or changes to existing guidelines.

Factor 4 - Complexity

Perform tasks that help in making new and significant changes to basic ways in which the managers and employees at all levels in the _____ involve the public in natural resource management decisionmaking activities.

Factor 5 - Scope and Effect

The purpose of the work is to accomplish conventional tasks in support of program development and achievement in the emerging field of ADR. The work will primarily affect land use planning and other natural resource management activities. The work is expected to result in significant changes in how the _____ manages public participation in land use planning activities and manages all other types of conflict and disputes within the Bureau.

Factor 6 - Personal Contacts

Contacts include senior employees in the _____ organization, the Bureau Dispute Resolution Specialist, ADR specialists in other bureaus, the private sector, and ADR practitioners.

Factor 7 - Purpose of Contacts

The purpose of the contacts is to provide advice and recommendations to the _____ Team; inform people about collaborative dispute prevention and resolution processes;

develop, propose, and explain strategies for using collaborative dispute prevention and resolution processes; and share information about the use of these processes.

Factor 8 - Physical Demands

There is a normal amount of physical activity typical of office positions, including occasional visits to work sites.

Factor 9 - Work Environment

Work is normally performed in an office setting.

Amendment

Alternative Dispute Resolution (ADR) Consultant

AMENDMENT to Position Description No. _____, (Title)

Additional Duties

Provides assistance to the _____ in the use of alternative dispute resolution (ADR) processes.

Promotes using ADR and collaborative decisionmaking in natural resource management activities throughout the _____.

Assists the _____ in accomplishing the Bureau's strategy for using ADR processes, including collaborative decisionmaking, in the management of natural resources.

Analyzes and develops policies and procedures for setting up ADR processes, including collaborative decisionmaking, in program activities and management decisions.

Assesses new and emerging issues and integrates ADR processes into the establishment of management goals and priorities.

Develops, analyzes, and recommends use of ADR processes during the development of policies relating to resource issues, priorities, and operations. Works closely with ecosystem teams and field organizations, solving implementation problems as they arise.

Communicates and coordinates information both internally and externally.

Additional Knowledge Required by the Position

Sound knowledge of ADR processes, how to convene an ADR process, and Bureau policies

on the use of ADR and collaborative decisionmaking processes are required to advise the _____ Director and other management and staff personnel on strategies for implementing, integrating, and using collaborative, dispute prevention, and dispute resolution techniques and processes in the _____.

A professional knowledge of established methods and techniques of natural resource management and land use planning policies, procedures, and regulatory requirements along with a working knowledge of Federal agency policies, procedures, and applicable statutes to facilitate accomplishment of the Bureau's strategy for using ADR in natural resources management.

The skill to negotiate effectively with management officials and resource specialists to accept and implement program recommendations when proposals involve agency resources, changes in established procedures, or conflict with current practices.

Ability to conduct a situation assessment and hence provide recommendations on which ADR process may be appropriate and how to convene an ADR process.

Ability to communicate effectively orally and in writing.

Added Guidelines

Guidelines for ADR program implementation include public laws, academic literature, and information provided by Bureau Headquarters. The employee uses judgment and discretion in determining which guidelines apply to specific situations. In cases when guidelines lack specificity, the incumbent determines the course of

action based on review of several sources of guidelines and recommends development of additional guidelines or changes to existing guidelines.

Additional Complexity

Performs tasks that help in making new and significant changes to basic ways in which the managers and employees at all levels in the state involve the public in natural resource management decisionmaking activities.

Additional Scope and Effect

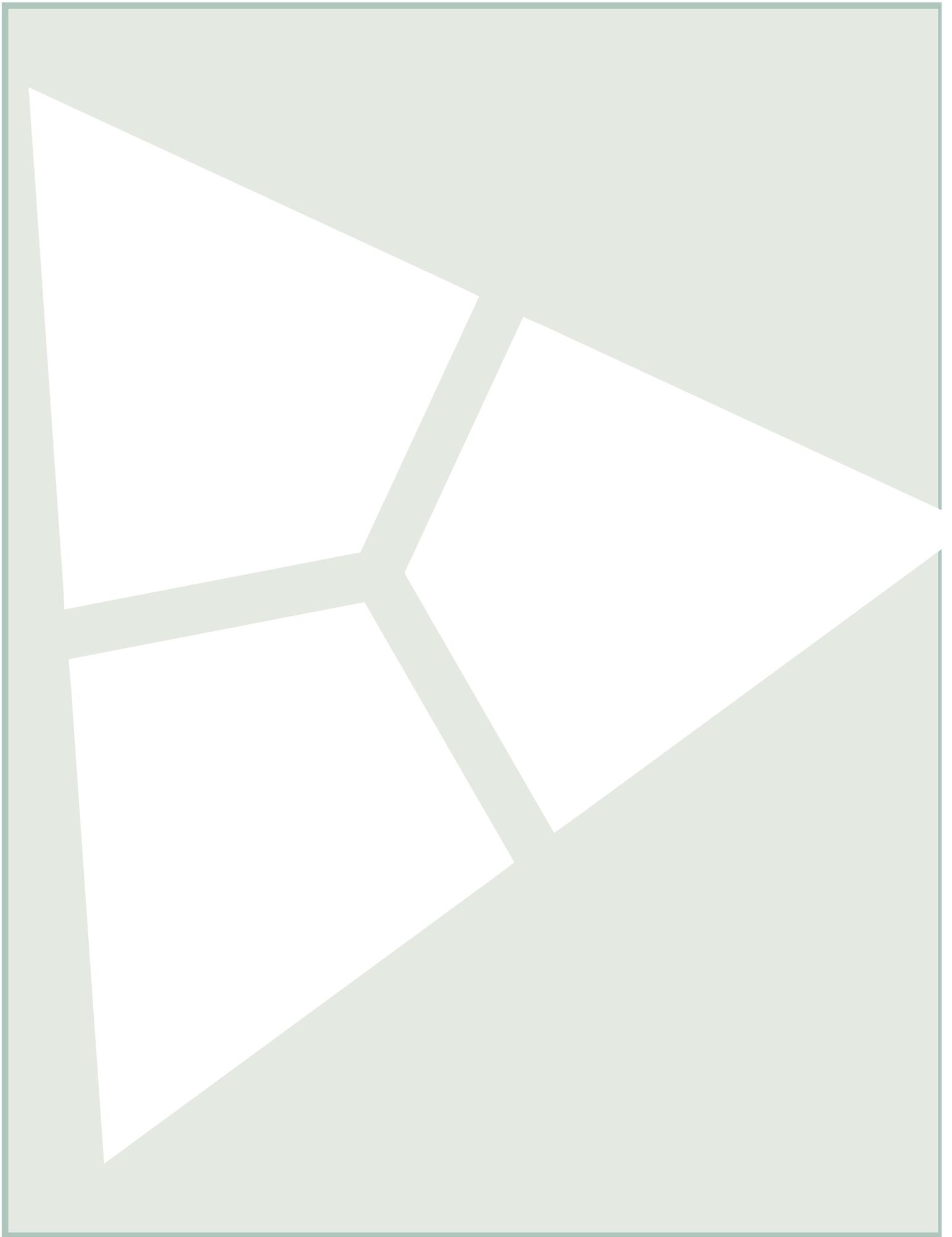
The purpose of the work is to accomplish conventional tasks in support of program development and achievement for the ecosystem in the

emerging field of ADR. The work will primarily affect land use planning and other natural resource management activities. The work is expected to result in significant changes in how the state manages public participation in land use planning activities and manages all other types of conflict and disputes within the Bureau.

Additional Personal Contacts

Contacts include senior employees in the state organization, the Bureau Dispute Resolution Specialist, ADR specialists in other bureaus, the private sector, and ADR practitioners.

All other aspects of the position remain identical to the existing position description.



Section 17. Case Studies

These case studies are presented for the purpose of providing managers with examples of how ADR has been used in the BLM and in similar agencies, such as the Forest Service. As BLM employees become involved in ADR events, whether as conveners, participants, or observers, they are encouraged to submit case studies in this same format to BLM's Special National Projects and Initiatives Team (WO-107), PO Box 25047, Denver, CO 80225-0047. Case studies of both successful and unsuccessful ADR events are needed to provide BLM managers and staff with examples of do's and don'ts and points of contact.

Place: Kingman Field Office, Arizona

Contact and phone number: Scott Elefritz,
(520) 757-3161

Period covering the situation: 1993-1996

Parties involved: BLM, National Park Service, Arizona Bighorn Sheep Society, International Society for the Protection of Mustangs and Burros, Mohave Sportsman Club, Arizona Game and Fish, and Sierra Club.

Type(s) of ADR: Negotiation and facilitated discussions

Nature of the issues: The BLM developed a management plan for the 840,000-acre Black Mountain ecosystem in response to long-standing resource use conflicts and management controversies, especially regarding desert bighorn sheep, wild burros, and livestock.

Outcome: The BLM, National Park Service, and Arizona Game and Fish developed a management plan that addressed the resource issues in the ecosystem.

Abstract: The most prevalent issue in the management of the ecosystem pertains to

competition between wild burros, desert bighorn sheep, mule deer, and livestock. The issue came to a head in 1990 when 54 burros were killed by persons unknown. The Bureau and other interests began looking for a way to solve the complex issues found in the Black Mountains. In 1993, the Black Mountain Ecosystem Management Team was formed to help meet the challenge. The team met monthly for 2-1/2 years to develop the management strategy. The result of this partnership was the development of and implementation of an ecosystem plan which was completed in April 1996. The plan addresses not only the animal issue above, but includes management direction for wilderness, recreation, biodiversity, habitat continuity and sustainability, and cultural resources. The success of the effort was due to the ability and willingness of the parties to place the health of the ecosystem over individual interests. In doing so, they found their interests were served as well.

Place: Whitehorse Butte Allotment, Jordan Resource Area, Vale District

Contact and phone number: Thomas G. Forre,
(541) 473 6284

Period covering the situation: 1989 to present
(January 1997)

Parties involved: BLM, Trout Creek Working Group, Oregon Department of Fish and Wildlife, U.S. Fish and Wildlife, livestock permittees and landowners.

Type(s) of ADR: Facilitated discussions and negotiated development of an allotment management plan (AMP) to resolve resource issues

Nature of the issue(s) or dispute: Resolve resource issues involving riparian management, fishery habitat, and watershed management.

Outcome: An AMP was developed and implemented for the Whitehorse Butte allotment in 1991.

Abstract: The Trout Creek Working Group was formed in 1988 to assist the BLM in making significant management changes on the Whitehorse Butte allotment. The formation of the working group was to create management solutions by bringing together an array of different interests to build trust, allow for a means of open communication, and to develop a common goal. Throughout the process, the BLM was working on solutions to declining riparian conditions, poor fishery habitat, and degraded watershed conditions.

As BLM resource solutions were designed, those solutions were presented to the working group to determine if resource objectives would be met and how the changes would affect resource users and interested publics. The working group was a forum used to bring forth discussion about conflicting uses and ideals, to understand what was possible, and to develop clear goals.

Using ADR helped the project succeed because those individuals participating were given an opportunity to openly present their views and concerns, enabling other working

group members to understand those concerns. The process is lengthy and time-consuming, but thorough open discussion allowed better activity plans to be developed.

Place: Cape Cod, Massachusetts

Contact and phone number: Linda Canzanelli, (508) 349-3785, ext. 202

Period covering the situation: 1985-96

Parties involved: National Park Service; Congress; Massachusetts Division of Fisheries and Wildlife; and environmental, recreation, and other interested groups. A total of 23 parties were involved.

Type(s) of ADR: Negotiated rulemaking

Nature of the issues: Development of off-road vehicle (ORV) regulations in an attempt to balance the recreational and habitation uses of the Cape Cod shores.

Outcome: All parties are satisfied with the agreement towards proposing rules that would meet the needs of ORV recreationists and other uses of the area.

Abstract: The Cape Cod area has been used for the last 20 years for ORV recreation and fishing, and is a habitat for the endangered piping plover. The original regulations, passed in 1985, gave ORV users limited access to the dunes and beaches to protect the area's natural resources. Soon after the ORV regs were passed, the piping plover was listed as endangered. Environmental groups have been legally challenging the National Park Service's regulations since 1988. By 1993, the National Park Service and the State of Massachusetts agreed to retain a dispute resolution consultant. Approval had

to be obtained from the Secretary to start the negotiations and avoid violating the Federal Advisory Committee Act. The first session was held in 1995 to agree on the ground rules for the resolution process, a critical issue since this was the first time many of the parties had ever collaborated face to face. The second session was to work out the details and limitations of the rules. The third session, held November 1995, was purposely not attended by the National Park Service and is the point where the final agreements were made regarding the maximum annual number of ORV permits, nighttime fishing, and the National Park Service's responsibility for changing the vehicle corridors according to the plover's nesting patterns. Most parties left the last session content and supportive of the negotiated rulemaking process. The National Park Service is planning to issue the proposed regulations in November 1996.

Place: Salida, Colorado

Contact and phone number: Sue Ballenski, Forest Service, (303) 275-5373

Period covering the situation: 1988-1996

Parties involved: USDA Forest Service, Public Service of Colorado, Trout Unlimited, Colorado State Division of Wildlife, and U.S. Fish and Wildlife Service.

Type(s) of ADR: Mediation

Nature of the issues: Disagreement as to bypass flows in the Las Animas River, which was depleting power from a hydroelectric power plant and harming fish habitat in the river.

Outcome: Agreement reached, awaiting final signature of Forest Service officials.

Abstract: The disagreement involved how to balance competing interests of a private sector utility company, the public, the Forest Service (other governmental agencies), and an environmental group relating to fish habitat in the Las Animas River. The various parties had been arguing for the past 8 years about how much bypass flow of water would be allowed in the river. There had been several meetings throughout the years, but nothing was ever resolved and tension was high among the parties. The Forest Service contacted a BLM employee that had experience in natural resource ADR techniques, and was referred by them to a private mediation group doing business out of Boulder, Colorado. This firm had extensive experience in mediating natural resource disputes, and as it turned out, had an employee well-versed specifically in hydroelectric power issues. A meeting was convened in late spring of this year to bring all parties to the table to see if the issue of which bypass flow model plan was to be adapted to the area could be resolved. The meeting was scheduled for 2 days at the Forest Services offices in Denver, Colorado. At the end of the session, all parties had agreed to adopt a modified Forest Service plan, which would allow for gradual flow increases over a period of time. At this time, the agreement is pending final signature from the Forest Service.

Place: Bureauwide

Contact and phone number: Ted Hudson, (202) 452-5042 and Carl Barna, (202) 452-0325

Period covering the situation: 1988-1992

Parties involved: BLM, State of Wyoming, USGS, amateur collecting clubs, two commercial fossil collectors, the Paleontological Society, and academic collectors.

Type(s) of ADR: Negotiated rulemaking

Nature of the issues: Developing regulations for the collection of fossils. Also known as the "Paleo Rule."

Outcome: The proposed rule did not have the support of the Director and was never published for public comment.

Abstract: The principal issue of contention was how to balance the interests of commercial and amateur fossil collectors and the interests of the academic community. A third-party contractor was hired to facilitate a meeting between BLM and key publics affected by BLM's requirements for collecting fossils from public lands. The sessions were held in Wyoming. The contractor arranged the first meeting and determined which parties needed to be present. The second meeting was facilitated by a BLM employee, which may not have been perceived as favorable to creating a neutral and open discussion. A "grudging" consensus was made on the various rules. Though the process could have been implemented better, the two meetings allowed BLM to draft proposed regulations that reflected the collaboration between key publics and our specialists. However, under political pressure from one of the State governments involved in the negotiation, the Director declined to allow publication of the proposed rule.

Place: Bureauwide

Contact and phone number: Ted Hudson, (202) 452-5042 and Vanessa Engle, (202) 452-7776

Period covering the situation: 1992-1996

Parties involved: BLM, Warner Brothers and other film industry representatives, the Sierra

Club, the Wilderness Society, the Southern Utah Wilderness Alliance (and other environmental groups), the National Park Service, the U.S. Forest Service, and the Film Commission of California and Utah.

Type(s) of ADR: Informal meeting to try to resolve one issue involving lease, permit, and easement regulations.

Nature of the issues: Develop regulations for issuing film permits.

Outcome: Agreements made during the facilitated sessions were not supported by others in the film industry or by some of the participants. Regulations eventually passed a few years later.

Abstract: The issue involved whether a film (or any other) permit could be put into effect pending the outcome of an administrative appeal that arose after a proposed rule revising BLM's regulations on leases and permits was published in 1990. A Washington, DC-based third-party contractor (RESOLVE, Inc.) was hired to facilitate a September 1993 session between BLM and a few key constituents to resolve the issues. The session was held in California. The session seemed to go well and the group agreed to regulations to determine under what circumstances a permit issuance could be placed into immediate effect. The proposed rules issued in February 1995, however, had intense opposition from the film industry, including some of the participants in the California meeting. The objections had not been anticipated. BLM went on to use the information gained from the experience to revise the rules and issue final rules in June 1996. To solve the immediate political problem, BLM issued a stopgap partial final rule to make all minimum impact permits, as that term is interpreted in the present regulations, effective pending appeal. BLM ultimately will

repropose the entire set of regulations dealing with leases, permits, and easements.

Place: Salmon District Office, Salmon, Idaho

Contact and phone number: John Schumaker, Natural Resource ADR Program Leader (formerly of the Idaho State Office), (719) 481-4728.

Period covered: Early 1990's

Parties involved: BLM and U.S. Forest Service employees in a joint BLM/USFS fire dispatch office and a private practice mediator.

Type(s) of ADR: Mediation

Nature of the issues: The BLM and USFS had formed a joint fire dispatch office in the BLM fire center in Salmon, Idaho, in the previous 2 years. Major problems erupted between employees on a number of issues, which threatened the joint venture.

Outcome: The Idaho State Director, Del Vail, now retired, decided to send a private sector mediator from Boise, Idaho, to resolve the conflict. The mediator spent 1 day in Salmon, and at the end of the day, all employees agreed to a plan of action and interpersonal conduct that resolved the conflict.

Abstract: The neutral, an experienced mediator from Boise, was hired based on a recommendation to the Idaho State Director by the contact person cited above. The mediator was hired as a temporary GS-12 using the Office of Personnel Management's 30-day emergency hiring authority and was paid salary, travel, and per diem for 3 days. The total cost for the mediator was about \$ 700.00, a small sum to restore order to a very contentious situation between two Federal agencies. A postmediation survey

indicated that the employees were very grateful for the end of the conflict. Their appraisal of the mediation process was typical. Many stated that the first three-fourths of the day was wasted on talking, but real progress was made in the last hour. This is typical of a dispute resolution process. People have to vent and discuss their issues and concerns, and resolution often happens very quickly once the venting and discussion process has been completed.

Place: Wyoming State Office

Contact and phone number: Ray Wilson, (307) 775-6009

Period covering the situation: 1995

Parties involved: Supervisor/employee

Type of ADR: Mediation

Nature of the issues: EEO complaint involving communication and supervision issues.

Outcome: The two parties reached a written agreement.

Abstract: Through a partnership with another Federal agency, a local mediator was used, so the only cost of using this process was the work time lost. The benefits were that it prevented us from bringing in an EEO counselor, which would have been more expensive and also would have involved many more employees than the two disputants, creating additional workplace conflicts. Had this complaint not been resolved and went through the entire EEO administrative complaints process, it could have cost the agency up to \$80,000 in administrative costs alone (workmonths, travel costs, court reporters, hearings, etc.).

This process was used because both parties were willing to talk about the issues, make concessions to each other to resolve the issues, and make a written agreement. The major lesson learned was that both parties must be willing to do the followup needed to complete the agreed-upon actions. In this case, the employee perceived that one of the actions agreed to in writing was not accomplished and eventually

filed another complaint based in part, on that action.

Despite the fact that another complaint was filed, all but one of the original issues were resolved during the mediation for the first complaint and both parties would be willing to use ADR processes again.

Section 18. Questions to Ask a Potential Third-Party Neutral or Trainer

This section lists some questions you may want to ask potential ADR practitioners and trainers about their qualifications, attitudes, means of conducting an ADR process, and other general administrative matters. Each ADR process has its own set of procedures and flexibility, hence your questions will need to be modified to fit the particular process.

Questions:

What is your background in alternative dispute resolution, collaborative decisionmaking, dispute prevention, and dispute resolution?

The general topic at issue is _____.
What knowledge or experience do you have pertaining to the topic that is in dispute?

How would you conduct or recommend that a mediation event be conducted? 1) Principles to dispute meet face to face at all times. 2) Principles meet face to face in initial phases, then use caucuses as needed. 3) Principles meet in separate rooms with the mediator shuttling between the rooms. 4) Attorneys represent principles in style. 1) or 2) or 3) above. (Refer to Section 12 of this tool kit for a discussion of how a mediation may be conducted.)

What style of mediation do you use?
[Evaluative _____ or Transformational _____]
[Rights-based _____ Interest-based _____
or Therapeutic _____] (Refer to Section 1 of this tool kit for description of these styles of mediation.)

For mediation, how do you see your role?

What role do you see for attorneys in this case? Should attorneys be present during the negotiations?

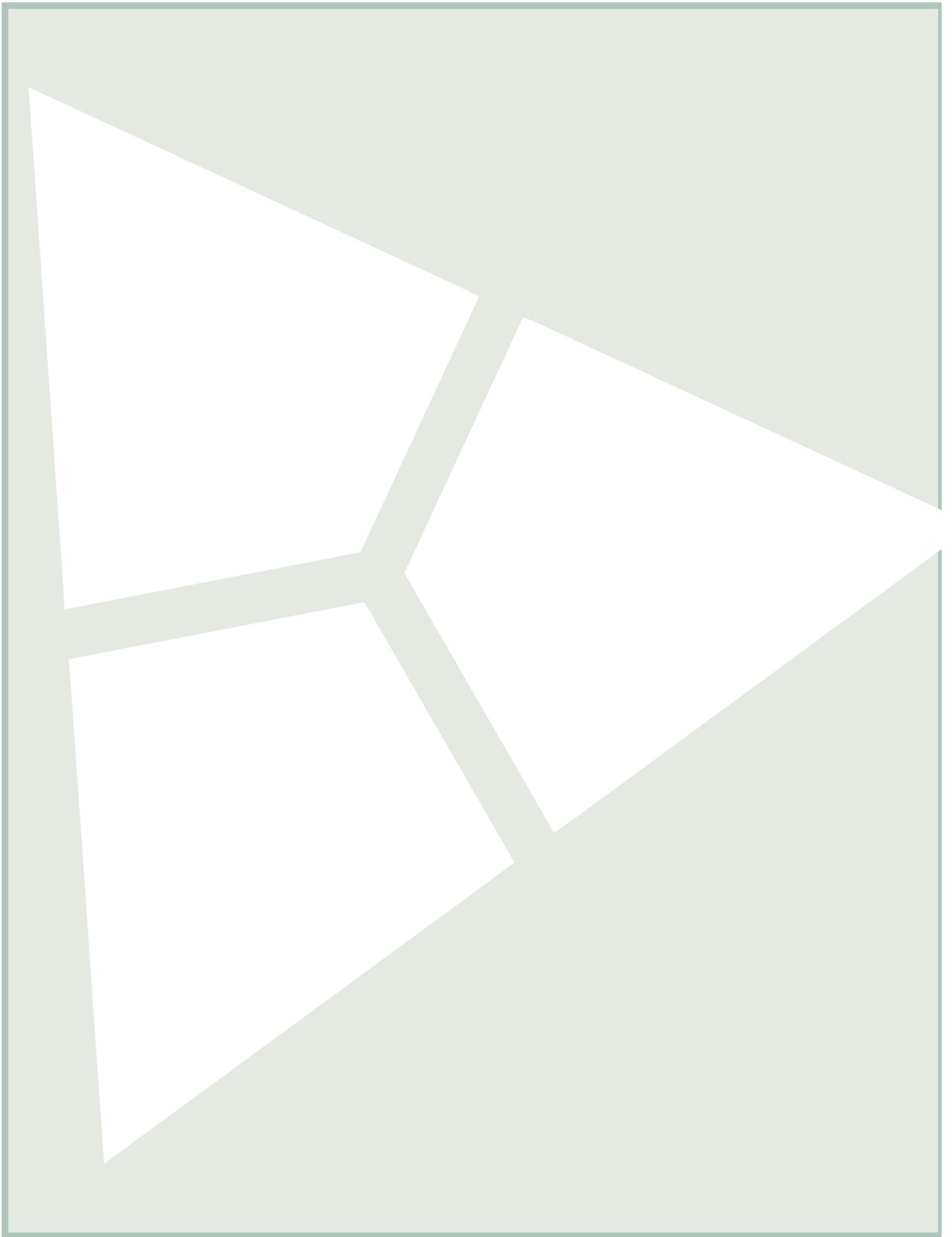
How would you facilitate the size of the group anticipated for this case (_____ number of participants at _____ number of locations)?

How do you charge for your time? By the hour _____ the day _____ the case _____

Are you aware of the particular dispute and do you see any potential conflict of interest for yourself?

Do you belong to a professional organization that has standards for ethics and conduct? What is the organization?

Can you provide references based on past work similar to the work we are anticipating?



Section 19. Sample ADR Agreements

Attached are sample agreements for mediation, minitrials, factfinding, arbitration, and financial cost-sharing. These agreements were adapted from the booklet “Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts,” published by the Civil Division, Department of Justice, Washington, DC, August 1992. These sample agreements are intended as guides, and BLM managers should contact their solicitor for assistance in developing specific agreements.

MEDIATION PROTOCOL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND

This Mediation Protocol Agreement (the "Protocol Agreement"), dated this ____ day of ____ , 19__, is executed by NAME, TITLE, on behalf of the United States of America (the "United States"), and by NAME on behalf of the other parties.

RECITALS

1. The United States and the parties are currently engaged in a dispute [or are attempting to prevent a dispute] in an administrative program administered by the Bureau of Land Management.
2. The United States and the parties have agreed to seek a resolution of issue through the use of mediation.
3. This Protocol Agreement is intended to set forth the conditions under which the parties will conduct mediation, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Protocol Agreement, the parties mutually agree as follows:

1. Participants in the Mediation Process.

- A. Interests Represented: Any party to the case be represented in the mediation process. Parties may group together to represent allied interests.
- B. Additional Parties: After the mediation process has begun, additional parties may join the process only with the concurrence of all parties already represented.
- C. Representatives: A representative of each party or alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes are appropriate to represent his/her interest, but only the designated representative will have the privilege of sitting at the negotiating table and of speaking during the negotiations, except that any representative may call upon a technical or legal adviser to elaborate on a relevant point.

2. Mediator. The neutral mediator is ____ .

ALTERNATIVELY, IF THE MEDIATOR IS NOT DESIGNATED BY THE AGENCY:

The mediator is to be chosen by the parties in the following manner: Each party, through its representative, will circulate a list of three names to all other parties. The parties will then make every effort to choose a mediator from the combined lists of all the parties. If the parties prove unable

to agree on a mediator, then the mediator will be chosen from the combined lists by _____ .
[The person designated to choose the mediator may be an official agreeable to all the parties].

3. Negotiating Sessions. Negotiating sessions will be held at a time and place convenient to the parties. The following rules will govern the negotiating sessions:

A. Meeting agendas will be developed by the consensus of the parties. Agendas will be provided before every negotiating session.

B. Any party may call a recess in the negotiating session at any time. The party calling the recess will inform the others of the expected length of the recess.

C. Negotiating sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept.

4. Confidentiality and the Use of Information.

A. The mediation process is confidential. The parties and the mediator agree that they will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree in writing or as authorized by law. The mediation process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence (Rule 408 and any other applicable rules) and State Rules of Evidence. The mediator will be disqualified as a witness, consultant, or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation. Failure to meet the confidentiality or press requirements of this Protocol Agreement is a basis for exclusion from the negotiating sessions.

B. The mediator agrees that if he/she discloses information regarding the mediation process, including settlement terms, to third parties without the participants' written agreement, except as ordered by a court with appropriate jurisdiction, he/she agrees to the following as liquidated damages to the parties:

- 1) Removal from the case;
- 2) Removal from any Department of Justice list of approved neutrals;
- 3) Payment of an amount equal to [at a minimum, the amount of the mediator's fee].

THE FOLLOWING PARAGRAPHS MAY BE INSERTED IF DESIRED BY THE PARTIES:

- 4) [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will state that certain information is being withheld and will provide the substance of the information withheld in some form (such as by aggregating data, by deleting nonrelevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it, and the reason for not providing it directly. Nothing in this paragraph imposes liability against the United States to disclose information when such information is not releasable pursuant to statute, regulation, or the reasonable discretion of an appropriate official.]

- 5) [A party may withhold documents if it reasonably believes them to be privileged. Production of some documents does not constitute a waiver of a privilege applicable to other documents even if the document falls within the same category as the document produced.]
- 6) [Parties will provide information called for by this paragraph as much in advance of the negotiating sessions as possible. (DEADLINES NEGOTIATED BY THE PARTIES OR SET BY THE NEUTRAL SHOULD BE INCLUDED IN THE AGREEMENT).]
- 7) [In advance, each party will provide for the mediator a confidential statement, which includes the highlights of the claims and defenses, the status of the case, any pending motions, the nature of the damages, and the critical issues in the case, as well as the maximum and minimum amounts each party believes the case is worth.]

5. Press.

[NOTE: THIS PARAGRAPH IS OPTIONAL. ALSO, CONSIDER THE OBLIGATION OF THE UNITED STATES TO ALLOW PUBLIC ACCESS TO CERTAIN INFORMATION.]

A. No party or caucus, or their representative, will discuss any matter relating to the mediation process with the press except by the express written permission of all other parties to the mediation process.

ALTERNATIVELY, SUCH PARAGRAPHS AS THE FOLLOWING MAY BE USED.

B. A joint press statement shall be agreed to by the participants at the conclusion of each negotiating session. A joint concluding statement shall be agreed to by the participants and issued by the mediator at the conclusion of the mediation process. Participants and the mediator shall respond to press inquiries within the spirit of the press statement agreed to at the conclusion of each negotiating session.

C. Participants and the mediator will strictly observe this Protocol Agreement in all contacts with the press and in other public forums. The mediator shall be available to discuss with the press any questions on the process and progress of the negotiations. No specific offers, positions, or statements made during the negotiations by any other party shall be divulged to the press by the mediator or any other party.

6. Approval of Proposals.

A. It is recognized that unqualified acceptance of individual provisions is not possible out of the context of a full and final agreement. However, tentative agreement of individual provisions or portions thereof will be signed by initialing the agreed upon items by the representatives of all interests at the negotiating session. This shall not preclude the parties from considering or revising the agreed upon items by mutual consent.

B. Upon final agreement, all representatives of a party or a caucus shall sign and date the appropriate document. It is explicitly recognized that the representatives of the Department of Justice and/or the United States Attorney may not have the final authority to agree to any terms in this case. Final approval must be obtained from the appropriate officials.

7. Safeguards for the Parties.

- A. All participants in the mediation process agree to act in good faith in all aspects of the process. Specific offers, positions, or statements made during the negotiations may not be raised by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and inflammatory statements are unacceptable.
- B. The participants may discontinue the mediation process at any time if they deem the process not productive. The withdrawal of one or more participants does [or does not] end the mediation process as to all other participants. Withdrawing parties remain bound by the provisions in this Protocol Agreement, particularly those regarding public comment and confidentiality.

8. This Protocol Agreement shall be effective upon the signatures of the representatives.

DATED: _____

BY: _____

Principal Representative for
the United States

DATED: _____

BY: _____

Principal Representative for
XYZ Corp.

DATED: _____

BY: _____

Mediator

**MINITRIAL PROTOCOL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND**

This Minitrial Protocol Agreement (the "Protocol Agreement"), dated this ____ day of _____, 19__ is executed by NAME, TITLE, on behalf of the United States of America (the "United States"), and by NAME, on behalf of NAME ("XYZ Corp.").

RECITALS

1. The United States and XYZ Corp. are currently engaged in litigation [or are about to engage in litigation] in the United States District Court for _____.
2. The United States and XYZ Corp. have agreed to seek a resolution of NAME OF CASE, Docket No. _____, through the use of a minitrial.
3. This Protocol Agreement is intended to set forth the conditions under which the parties will conduct the minitrial, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Protocol Agreement, the parties mutually agree as follows:

1. The United States and XYZ Corp. will voluntarily engage in a nonbinding minitrial on the issue of _____.

THE ISSUES MAY BE DELINEATED SPECIFICALLY OR GENERALLY DEPENDING ON THE NATURE OF THE CASE. The minitrial will be held on _____, 19__, at Time of Day, LOCATION.

2. The purpose of this minitrial is to inform the principal participants of the position of each party on the issues in the case and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.
3. The principal participants for the purpose of this minitrial will be _____ for the United States and _____ for XYZ Corp. The principal participants have the authority to settle the dispute or to make a recommendation concerning settlement. Each party will present its position to the principal participants through that party's designated representative, _____ for the United States, and _____, for XYZ Corp.
4. The parties have agreed that _____ shall serve as a neutral advisor to the principals. The neutral advisor shall be compensated as set forth in the financial agreement. The advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that

he or she will not participate in the litigation should the minitrial fail to resolve the dispute. The neutral advisor shall participate in the minitrial proceedings and shall render an opinion, upon request, on the following issues: _____ .

THIS CLAUSE SHOULD BE USED ONLY IF THE PARTIES HAVE AGREED THAT THE PARTICIPATION OF A NEUTRAL ADVISOR WOULD BE USEFUL

5. All discovery will be completed in 20 working days following the execution of this Protocol Agreement. Neither party shall propound more than 15 interrogatories or requests for admissions, including subparts; nor shall either party take more than 5 depositions and no deposition shall last more than 3 hours. Discovery taken during the period prior to the minitrial shall be admissible for all purposes in this litigation to the same extent as any other discovery, including any subsequent hearing before any court of competent authority in the event this minitrial does not result in a resolution of this matter. It is agreed that the pursuit of discovery during the period prior to the minitrial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the minitrial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing.
6. The presentations at the minitrial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in Paragraph ____ .
7. At the minitrial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audiovisual aids, demonstrative evidence, depositions, and oral arguments. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the minitrial proceedings, may be introduced at the minitrial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the minitrial. The parties may, if desired, no later than ____ weeks prior to commencement of the minitrial, submit to the representatives for the opposing side a position paper of no more than 25 - 8-1/2" X 11" double spaced pages. No later than ____ weeks(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for use at the minitrial and a list of all witnesses.
8. The minitrial proceedings shall take 1 day. The morning's proceedings shall begin at ____ a.m. and shall continue until ____ a.m. The afternoon's proceedings shall begin at ____ p.m. and continue until ____ p.m. A sample schedule follows:

9:00 a.m. - 10:00 a.m.	XYZ Corp's position and case presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examination.

11:00 a.m. - 11:30 a.m.	XYZ Corp.'s rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer period.
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and case presentation.
2:00 p.m. - 3:00 p.m.	XYZ Corp.'s cross-examination.
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer period.
4:00 p.m. - 4:30 p.m.	XYZ Corp.'s closing argument.
4:30 p.m. - 5:00 p.m.	United States' closing argument.

9. Within ____ day(s) following the termination of the minitrial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ____ days following completion of the minitrial, the minitrial process shall be deemed terminated and the litigation will continue.
10. No transcript or recording shall be made of the minitrial proceedings. Except for discovery undertaken in connection with this minitrial, all written material prepared specifically for utilization at the minitrial, all oral presentations made, and all discussions between or among the parties and/or the neutral advisor at the minitrial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or administrative action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as a result of the minitrial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the minitrial.
11. Each party has the right to terminate the minitrial process at any time for any reason whatsoever.
12. Upon execution of this Protocol Agreement, if mutually deemed advisable by the parties, the United States and the XYZ Corp. shall file a joint motion to suspend proceedings in the appropriate court. The motion shall advise the court that the suspension is for the purpose of conducting a minitrial. The court will be advised as to the time schedule established for completing the minitrial proceedings.

DATED: _____
 BY: _____
 Principal Representative for
 the United States

DATED: _____
 BY: _____
 Principal Representative for
XYZ Corp.

DATED: _____
 BY: _____
 Neutral Advisor

**FACTFINDING PROTOCOL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND**

This Factfinding Protocol Agreement (the "Protocol Agreement"), dated this ____ day of ____ , 19__ , executed by NAME, TITLE, on behalf of the United States of America (the "United States"), and by NAME, on behalf of NAME ("XYZ Corp.").

RECITALS

1. The United States and XYZ Corp. are currently engaged in litigation [or are about to engage in litigation] in the United States District Court for ____ .
2. The United States and XYZ Corp. have agreed to seek a resolution of NAME OF CASE, Docket No. ____ , through the use of neutral factfinding.
3. This Protocol Agreement is intended to set forth the conditions under which the parties will conduct neutral factfinding, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Protocol Agreement, the parties mutually agree as follows:

1. Participants in the Factfinding Process.
 - A. Interests Represented: Any party to the case may be represented in the factfinding process.
 - B. Additional Parties: After the factfinding process has begun, additional parties may join the process only with the concurrence of all parties already represented.
2. Neutral Factfinder. The "neutral factfinder" means any person selected in accordance with, and governed by, the provisions of this Protocol Agreement.
3. Selection of neutral factfinder. The neutral factfinder will be chosen by the parties in the following manner:
 - A. The parties shall exchange with each other lists of three to five potential neutral factfinders. Within ten (10) days after the receipt of the lists of potential neutral factfinders by the parties, the parties shall numerically rank the listed individual in order of preference and simultaneously exchange such rankings. The individuals with the three (3) lowest combined total scores shall be selected as finalists. Within ten (10) days after such selection, the parties shall arrange to meet with, and interview, the finalists. Within ten (10) days after such meetings, the parties shall rank the finalists in order of preference and exchange rankings. The individual with the lowest combined total score shall be selected as the neutral factfinder.

B. If the chosen neutral factfinder should refuse to serve, resign, die, withdraw, or be disqualified, unable, or otherwise become incapacitated, the office shall be declared vacant. Vacancies shall be filled in accordance with the applicable provisions of this section, and the dispute shall be reinitiated, unless the parties agree otherwise.

4. Issues to be Resolved Through Factfinding. The parties have agreed that the issues to be resolved by the neutral factfinder are as follows:

HERE THE ISSUES SHOULD BE STATED AS CONCISELY AS POSSIBLE. IF THE PARTIES CANNOT AGREE ON ONE STATEMENT, THEN EACH PARTY SHOULD SET FORTH ITS FORMULATION OF THE ISSUES TO BE DECIDED BY THE FACTFINDER.

5. Procedure for Factfinding.

A. Within ten (10) days after the selection of the neutral factfinder, basic source material shall be jointly submitted to the neutral factfinder by the parties. Such basic source material shall consist of:

- 1) an agreed upon statement of the precise nature of the dispute;
- 2) the position of each party and the rationale for its position;
- 3) all information and documents which support each party's position; and
- 4) [ANY OTHER MATERIAL]

B. Thereafter, for a period of _____ days, the neutral factfinder shall conduct an investigation of the issues in dispute. As part of such investigation, the neutral factfinder may interview witnesses, request additional documents, request additional information by written questions, and generally use all means at his or her disposal to gather the facts relevant to the disputes as he or she determines. The neutral factfinder shall be the sole determiner of the relevancy of information. Conformity to formal rules of evidence shall not be required.

6. Determination of Neutral Factfinder.

A. The neutral factfinder shall render a determination within _____ days of beginning the factfinding process, unless:

- 1) Both parties agree in writing to an extension; or
- 2) The neutral factfinder determines that an extension of the time limit is necessary.

B. The determination of the neutral factfinder shall be signed and in writing. It shall contain a full statement of the basis and reasons for the neutral factfinder's determination.

C. After the neutral factfinder forwards his or her determination to the parties, he or she shall return all dispute-specific information provided by the parties (including any copies) and destroy notes concerning this matter.

D. The determination of the factfinder shall not be binding upon the parties. No determination of the neutral factfinder shall be admissible as evidence of any issue of fact or law in any other proceeding brought under any other provision of law.

7. Confidentiality and the Use of Information.

- A. The factfinding process is confidential. The parties and the neutral factfinder agree that they will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree in writing or as authorized by law. The factfinding process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence (Rule 408 and any other applicable rules) and State Rules of Evidence. The neutral factfinder shall be disqualified as a witness, consultant, or expert in any pending or future action relating to the subject matter of the factfinding, including those between persons not parties to the factfinding. Failure to meet the confidentiality or press requirements of this Protocol Agreement is a basis for exclusion from the factfinding process. [A party may withhold documents if it reasonably believes them to be privileged. Production of some documents does not constitute a waiver of a privilege applicable to other documents even if the document falls within the same category as the document produced.]
- B. The neutral factfinder agrees that if he/she discloses information regarding the factfinding process, including settlement terms, to third parties without the participants' written agreement, except as ordered by a court with appropriate jurisdiction, he/she agrees to the following as liquidated damages to the parties:
- 1) Removal from the case;
 - 2) Removal from any Department of Justice list of approved neutrals.
 - 3) payment of an amount equal to [at a minimum, the amount of the factfinder's fee].

THE FOLLOWING PARAGRAPHS MAY BE INSERTED IF DESIRED BY THE PARTIES.

8. [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will state that certain information is being withheld and will provide the substance of the withheld information in some form (such as by aggregating data, by deleting nonrelevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it, and the reason for not providing it directly. Nothing in this paragraph imposes liability against the United States to disclose information when such information is not releasable pursuant to statute, regulation, or the reasonable discretion of an appropriate official.]
9. [Parties will provide information called for by this paragraph as much in advance of the factfinding process as possible.]
10. Press.
[NOTE: THIS PARAGRAPH IS OPTIONAL. ALSO, CONSIDER THE OBLIGATION OF THE UNITED STATES TO ALLOW PUBLIC ACCESS TO CERTAIN INFORMATION.]
- A. No party will discuss any matter relating to the factfinding process except by the express written permission of all other parties to the factfinding process.

11. Safeguards for the Parties.

- A. All participants in the factfinding process agree to act in good faith in all aspects of the process. Specified offers, positions, or statements made during the process may not be raised by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and prejudiced statements are unacceptable.
- B. The participants may discontinue the factfinding process at any time if they deem the process not productive. The withdrawal of one or more participants does [or does not] end the factfinding process as to all other participants. Withdrawing parties remain bound by the provisions in this Protocol Agreement, particularly those regarding public comment and confidentiality.
- C. This Protocol Agreement shall be effective upon the signatures of the representatives.

DATED: _____
BY: _____
Principal Representative for
the United States

DATED: _____
BY: _____
Principal Representative for
XYZ Corp.

DATED: _____
BY: _____
Neutral Factfinder

**ARBITRATION PROTOCOL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND**

This Arbitration Protocol Agreement (the "Protocol Agreement") dated this ____ day of ____ , 19__ , is executed by NAME, TITLE, on behalf of the United States of America (the "United States"), and by NAME, on behalf of NAME ("XYZ Corp.").

RECITALS

1. The United States and XYZ Corp. are currently engaged in litigation [or are about to engage in litigation] in the United States District Court for ____ .
2. The United States and XYZ Corp. have agreed to seek a resolution of NAME OF CASE, Docket No. ____ , through the use of arbitration.
3. This Protocol Agreement is intended to set forth the conditions under which the parties will conduct arbitration, thereby avoiding future disputes and disagreements.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Protocol Agreement, the parties mutually agree as follows:

1. Participants in the Arbitration Process.
 - A. Interests represented: Any party to the case may be represented in the arbitration process.
 - B. Additional Parties: After the arbitration process has begun, additional parties may join the process only with the concurrence of all parties already represented.
2. AAA Commercial Arbitration Rules to be Applicable. [OTHER PUBLISHED RULES MAY BE USED BY THE PARTIES. THE AAA RULES HAVE BEEN SUGGESTED BECAUSE THEY ARE THE BEST KNOWN OF THE ARBITRATION RULES].
 - A. The American Arbitration Association ("AAA") Commercial Arbitration Rules (most recent edition) are to govern this arbitration.
 - B. Any of the AAA Commercial Arbitration Rules which the parties do not wish to govern this arbitration are set forth as follows:
[HERE INDICATE BY SPECIFIC RULE NUMBER ANY RULES WHICH WILL NOT APPLY]
 - C. Any additional rules or conditions (not set forth in the AAA Commercial Arbitration Rules) which the parties wish to govern this arbitration are set forth as follows:
[HERE INDICATE ANY RULES OR CONDITIONS NOT FOUND IN THE AAA RULES WHICH THE PARTIES WISH TO GOVERN THIS ARBITRATION]

3. Nonbinding Nature of the Arbitration.

- A. It is agreed by both parties that the arbitrator's award is nonbinding and that no party may take any action, judicial or administrative, to seek to enforce this award.
- B. Following issuance of the arbitration award, either party may declare within 30 days that it elects to be bound by the award. If the other party also so elects to be bound (within 30 days from the election by the first party), then the award will be treated as a binding arbitration award. [THE ARBITRATION AWARD PROCESS USED IN THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996, AT 5 U.S.C. SS 590, PUB. L. 101-552 (NOV. 15, 1990) MAY BE USED BY AGREEMENT OF THE PARTIES AS AN ALTERNATIVE TO THE ABOVE AWARD PROCESS].

DATED: _____

BY: _____

Principal Representative for
the United States

DATED: _____

BY: _____

Principal Representative
for XYZ Corp.

**FINANCIAL AGREEMENT BETWEEN THE UNITED STATES OF AMERICA
AND**

This financial agreement (the "Agreement"), dated this ____ day of _____, 19____, is executed by NAME, on behalf of the United States of America (the "United States"), and by _____, on behalf of _____ ("the other parties").

RECITALS

1. The United States and the other parties are currently engaged in a dispute [or are seeking to avoid a dispute] involving an administrative program administered by the Bureau of Land Management.
2. The United States and the parties have agreed to seek a resolution of case or issue through the use of an alternative dispute resolution ("ADR") technique.
3. This Agreement is intended to avoid disputes and to record all agreements concerning financial matters involved in the use of this ADR technique.

AGREEMENT

NOW, THEREFORE, subject to the terms and conditions of this Agreement, the parties mutually agree as follows:

IF NO COSTS ARE EXPECTED BY USING THE ADR TECHNIQUE, AS, FOR EXAMPLE, WHERE THE GOVERNMENT PROVIDES A MEDIATOR FROM ANOTHER AGENCY:

1. The United States and the parties agree that the use of the selected ADR technique will be without cost to either party. Each party agrees that no claim will be made against the other party for any costs associated with the selected ADR technique, including, but not limited to, the cost of any "neutral," his/her expenses, or associated costs, any litigation costs such as attorney fees, expert witness or fact witness fees, transcript costs, or any other costs associated with the ADR technique.

IF THE UNITED STATES INTENDS TO PAY FOR CERTAIN COSTS ASSOCIATED WITH THE USE OF THE ADR TECHNIQUE.

(THIS PARAGRAPH MUST BE EDITED TO REFLECT THE ACTUAL COSTS WHICH THE UNITED STATES AGREES TO PAY.)

1. The United States and the parties agree that certain costs associated with the selected ADR technique will be paid by the parties as follows:
 - A. Each party will pay one-half the fee charged by the "neutral." Such fee is estimated to be \$ _____ per hour/day.
 - B. Each party will pay one-half the expenses incurred by the "neutral" Such expenses are estimated to be \$ _____ .

C. Each party will pay its own attorney fees, expenses, witness fees, and all other costs associated with the ADR technique.

2. Under no circumstances shall the liability of the United States for costs pursuant to this Agreement exceed \$ _____ without the express written agreement of the United States. Absent such an agreement, any expense incurred in excess of this amount, whether such expense is incurred by the "neutral," his/her agents or employees, or the parties, or its agents or employees, will be the responsibility of the "neutral" or XYZ Corp. The United States will not be responsible for any costs or expenses pursuant to this Agreement which exceed the amount set forth above.
3. In agreeing to pay for costs and expenses associated with the selected ADR technique, as set forth above, the United States does so voluntarily and without coercion or constraint. Nothing in this Agreement should be construed as a waiver of sovereign immunity or an admission by the United States that the parties, any court, or any other entity can impose upon the United States any duty or requirement to pay any additional costs or expenses associated with this ADR technique, or the costs and expenses of any other ADR technique. the parties and _____, neutral, specifically acknowledge and accept the statements set forth in this paragraph.
4. The United States and the parties agree that, should any disputes arise under this agreement, they will endeavor to resolve such disputes amicably and in good faith.

DATED: _____
BY: _____
Principal Representative for
the United States

DATED: _____
BY: _____
Principal Representative for
the other parties

DATED: _____
BY: _____
Neutral

