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# Seeking Solutions: Exploring the Applicability of ADR for Resolving Water Issues in the West

Gail Bingham

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**Seeking Solutions:**  
Exploring the Applicability  
of ADR for Resolving  
Water Issues in the West

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***Gail Bingham***  
*RESOLVE, Inc.*

**Report to the Western Water  
Policy Review Advisory Commission**

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Exploring the Applicability of ADR for  
Resolving Water Issues in the West

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*October 1997*

## The Western Water Policy Review Advisory Commission

Under the Western Water Policy Review Act of 1992 (P.L. 102-575, Title XXX), Congress directed the President to undertake a comprehensive review of Federal activities in the 19 Western States that directly or indirectly affect the allocation and use of water resources, whether surface or subsurface, and to submit a report of findings to the congressional committees having jurisdiction over Federal Water Programs.

As directed by the statute, the President appointed the Western Water Policy Review Advisory Commission. The Commission was composed of 22 members, 10 appointed by the President, including the Secretary of the Interior and the Secretary of the Army, and 12 members of Congress serving *ex-officio* by virtue of being the chair or ranking minority member of the 6 congressional committees and subcommittees with jurisdiction over the appropriations and programs of water resources agencies. A complete roster is provided below.

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### This is an Independent Report to the Commission

The report published herein was prepared for the Commission as part of its information gathering activity. The views, conclusions, and recommendations are those of the author(s) and are not intended to represent the views of the Commission, the Administration, or Members of Congress serving on the Commission. Publication by the Commission does not imply endorsement of the author's findings or recommendations.

This report is published to share with the public the information and ideas gathered and considered by the Commission in its deliberations. The Commission's views, conclusions, and recommendations will be set forth in the Commission's own report.

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## 1.0 Introduction: Scope of the Report

Disputes over water have and will continue to shape the history of the West. And, just as water has sculpted the land on a grand scale, so too have the conflicts over water often taken on epic proportions. It has been the very grandeur of some of these conflicts that has drawn our attention to new questions and values and given rise to important social debates. We must not forget this as we seek to improve how we deal with the differences that inevitably will shape the future. Conflict itself has value—sometimes—in helping us redefine where we find ourselves as a community or as a nation and in forcing us to discover new paths to take us where we want to go. Conflicts also can tear at the fabric of communities and national institutions, however. They can consume unconscionable amounts of public and private resources, and don't always produce much of value. Thus, increasing numbers of individuals, organizations and communities have been seeking new ways to resolve differences and build consensus on the issues that divide them.

This paper explores what has been learned in recent years about how to deal with controversial decisions through alternative dispute resolution processes (ADR), without stifling the creative power of conflict. Its purpose is to take a critical look at the application of ADR to water resources conflicts in the West and to ask: Why are people seeking new ways to deal with their differences? What is ADR, and what has been accomplished? What concerns are being raised? And, what recommendations should be considered for when not to use ADR and—where it is applicable—what practices should be encouraged (and discouraged)? Mediation of water resources disputes is not a new practice, but it and other forms of ADR would benefit from both reflection and encouragement.

This report considers the universe of western water matters broadly, with a somewhat narrower focus on the scope of procedures encompassed by the term ADR.

When one thinks of water disputes in the west, it is the clash over water rights that first comes to mind. However, many other and diverse decisions involving water resources have a significant impact on Western communities and, as a result, generate conflict. These include: dam construction and operations, flood control projects, endangered species protection, wetlands management, water quality planning and permitting (both point source and non-point source), fisheries management, recreation access, and many more. Furthermore, increasing attention is being paid throughout the United States to the value of a “watershed” approach to integrating and rationalizing water resources decision making. Certainly, part of the momentum behind the watershed approach is recognition of the linkages between these many

**ADR Approaches**

*Neutrals have played varying roles in water resources disputes, including: convening negotiations, mediating agreements, facilitating meetings, and serving as special masters:*

- *Senator Harry M. Reid invited a mediator from RESOLVE to assist in convening and mediating a second round of settlement negotiations for the Truckee and Carson River basins, to settle litigation and provide the basis for amendments to existing legislation.*
- *CDR Associates facilitated a series of meetings for Montana Power Company regarding acceptable models for researching thermal impacts of a series of dams and reservoirs on the Madison River as part of a relicensing process before the Federal Energy Regulatory Commission.*
- *Concur facilitated meetings as part of a NEPA process on options for providing emergency storage for the San Diego County Water Authority, at which parties agreed on a weighted set of criteria for evaluating the proposed options.*
- *John Thorson was appointed as special master in both the the Gila River and Little Colorado River adjudications in Arizona, and a referee is hearing thousands of claims on the Yakima River in Washington State.*

*Other examples showing the wide variety of issues in which ADR has been used is included in Section 4.*

different kinds of decisions—and how they all affect the resource. Almost by their very nature, watershed councils provide important opportunities for consensus-building, which may be enhanced in some situations by the assistance of a neutral mediator or facilitator.

A focus only on water rights issues not only may diminish the ability to see positive opportunities for consensus building but it also can perpetuate certain misconceptions by assuming an overly narrow (and sometimes false) choice between litigation and ADR. ADR is not an alternative only to litigation, since competing interests need mechanisms for resolving disputes that arise in legislative and administrative forums as well. Nor is it clear that litigation and ADR are mutually exclusive choices, as litigation can often be the impetus to get parties to the negotiating table. Looking at the full array of ADR examples that can be found in the water sector provides a richer perspective from which to assess the proper role of ADR and to evaluate its strengths and weaknesses.

Not only do the topics of dispute vary, but so too do the nature of the decisions to be made (court orders, regulations, plans, permits, licenses, contracts, etc.). Disputes about these decisions also vary in the degree of polarization among the parties, either due to how early (or late) one seeks to resolve them or because of the stakes involved. Each of these factors influences an analysis of the appropriate use and design of an ADR process and, thus, adds to the justification for a broad perspective.

In contrast to the extensive panorama of disputes where ADR might be applied, the scope of ADR approaches and/or roles played by neutrals reviewed in this report is relatively more narrow for two reasons. First, this helps establish a focus for more in-depth analysis. But also, only a few basic forms of ADR have been used extensively to resolve water resource disputes. Mediated negotiations and consensus-building have been the most common form of ADR in the vast majority of water resources disputes where ADR has been employed to date. Thus, this will be the principal body of experience from which this paper draws. In recent years, arbitration (or special masters), early neutral evaluation and mini-trials have been used occasionally in environmental and natural resources disputes. Therefore, these processes will be described, at least conceptually.

For the purposes of this paper, the term ADR will be restricted to those dispute resolution (or consensus-building) procedures that involve a formal role for a neutral, i.e. someone with no stake in the outcome or resolution of the issues in dispute and whose role is to assist the settlement process. This does not mean other dispute resolution approaches are less important. Traditional settlement negotiations without the assistance of a neutral—where parties can themselves take on “mediating” functions—are often very effective.<sup>1</sup> However, if ADR is defined more broadly as any attempt by people to deal with their differences, the term risks losing some of its utility in focusing our attention on improvements in the way we commonly do business.

Defining ADR to include processes involving the assistance of a neutral does not mean that the emphasis, either in conducting or assessing these processes, only should be on the neutral. Rather, the focus is on the procedures that the neutral assists in managing—including how well the neutral manages that procedure. There are two reasons to limit the scope to such “assisted” processes: (1) the presence of a neutral often is associated with a sufficient degree of intention to settle by the parties that one can find a discrete process to describe, and (2) involving a professional neutral is an integral part of what is new.

Finally, no assumption is made that ADR is *better* than traditional approaches in all settings. It is not. First, not all ADR processes are well conducted. In other cases, parties may have purposes other than what ADR

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<sup>1</sup> Although this paper does not include settlement negotiations within the term “ADR,” the reader is encouraged to draw lessons from ADR case experience about how parties can improve their abilities to negotiate solutions for themselves.

is designed to accomplish. Litigation is a more proper forum where the parties' central objective is to seek judicial interpretation of a legal principle. (This is in contrast to situations where parties use legal tools to obtain a favorable resolution of conflicting interests, in which case ADR tools may play a useful role as well). Public involvement workshops also may be most appropriate when there is no need or desire to negotiate a decision. In addition, people draw on many quite common and, equally important, practices instead of court proceedings, including: (1) settlement negotiations for disputes in litigation, (2) meetings between neighboring communities or water users about issues of mutual concern (declining water tables, downstream water quality impacts, etc.), (3) public involvement workshops, (4) notice and comment procedures, and many others. In the legitimate search for alternatives to improve our capacity to resolve complex issues, we should not make the mistake of assuming that existing tools should be disregarded. If something must be an "alternative" to be worthwhile, we will miss the value in what we are doing right already.

As ADR is used more often in controversial water matters, it will be important to understand how to improve the likelihood that these processes will help the citizens of the West and the institutions of government that serve them be more successful in their search for solutions to the problems that they will face in the decades ahead.

## **2.0 Terms and Definitions: What is Alternative Dispute Resolution?**

### **2.1 General Concepts**

The term "ADR" refers to a collection of procedural options for settling disputes (or building consensus on solutions to controversial problems), generally involving the assistance of a neutral. Most often, these are voluntary processes in which the participants seek a mutually acceptable resolution of their differences.

It often is useful to group these procedures into two categories based on the role of the neutral: (1) sometimes, neutrals facilitate the discussions of the parties without expressing opinions on the substance of the issues, and (2) at other times, neutrals are retained explicitly to make findings of fact or to render opinions. This is the major distinction, for example, between mediation and arbitration. Mediators facilitate negotiations; arbitrators

hear presentations of the facts and make recommendations (binding or non-binding) as to settlement.

In practice, however, virtually all ADR processes are used as tools in the larger context of voluntary settlements. Thus, negotiation remains the central mode of communication between parties, around which the varied procedures are structured. This is fairly self-evident for mediation, but it also is true for processes such as non-binding arbitration or early neutral evaluation where the neutral writes an opinion. Parties in litigation, in particular, find that their settlement negotiation efforts may break down over disagreements over factual issues or over different predictions about how the judge will decide a matter of law.

For example, parties to water allocation disputes frequently disagree on matters of law or fact regarding whether a water right claimed by one party has a legal or historical basis, particularly if the right was acquired before the state required permits to be obtained. State engineers and departments of water resources do provide information in hydrographic surveys or reports to the court that are supposed to be a common basis for decision, but parties still contest ambiguous issues. A case can be made for the value of a special master, referee, or neutral attorney being retained for his or her expertise (as an alternative or adjunct to mediation assistance, which may also be useful for joint fact finding when new information needs to be gathered) to help the parties sort through factual and legal disagreements that are creating barriers to settlement.

In a non-water example such as in Superfund allocation disputes, potentially responsible parties under the act often form a steering committee for negotiation purposes and hire an “allocation consultant” to construct a data base, develop an allocation methodology often with criteria (selection and weighting of criteria usually results from a mediated negotiation among the parties), and write an allocation report with non-binding recommendations about who should pay what share of the clean up costs. Frequently, this allocation report becomes the basis for further negotiations among the parties.

Finally, in establishing a clearer understanding of what ADR is and is not, the use of the word “alternative” is increasingly problematic. What is ADR actually an alternative *to*? Certainly, litigation continues to hold pride of place—at least symbolically—at the center of our thinking about dispute resolution and the need for alternatives. People turn to litigation frequently as the dispute resolution process of choice. Unless they benefit from the

status quo, parties often are frustrated about how long litigation takes and by the limitations of litigation for creative problem solving. In this sense, ADR methods are indeed alternatives, or at least adjuncts, to the litigation process, hence the origin of the term.

Litigation is not the only forum for water resources decisions, however. For water disputes, as for other kinds of environmental matters, administrative decisions and legislative forums are traditional. Rule making procedures, with opportunities for notice and comment under the Administrative Procedures Act, are used to set water quality standards, operating conditions and procedures for Bureau of Reclamation projects, etc. Agencies develop water quality plans for non-point source pollution control and issue NPDES permits for point source discharges, with opportunities for the public to raise issues and provide information for the agency to use in making decisions that take into account different interests and perspectives. Environmental assessments are written under the National Environmental Policy Act to create a structured process for addressing differences over such diverse projects as developments in wetlands, construction of water treatment plants, and flood control. The Federal Energy Commission makes licensing decisions for hydroelectric projects, with opportunities for public comment. Biological opinions are written, non-jeopardy decisions made, and habitat conservation plans prepared for fish and other aquatic species under the Endangered Species Act. And, parties turn to Congress and state legislatures for political remedies where they believe their needs will be better met through legislation.

Over the past 25 years, ADR processes clearly have been used not only as an alternative to litigation but also as tools for consensus-building in a wide variety of administrative settings, where parties are seeking decisions that better satisfy competing interests and concerns. These varied settings are important to disaggregate to understand what ADR actually is. In designing and conducting effective ADR strategies, processes are tailored in response to how the decision will be made if a consensus or settlement is not reached (what the ADR *really* is an alternative to) and whether the ADR process is being initiated early or late in the emergence of a dispute (i.e. what degree of polarization exists). For example, often, but not always, the applications of ADR in an administrative context occur earlier in the process than would be the case for a dispute in litigation and, thus, provide opportunities for a series of incremental, consensus-building steps integrated into the administrative decision-making process which differs from a comprehensive and intensive settlement process once an issue has polarized to the point of litigation. Both have advantages and disadvantages. Hopefully in the

future, the term ADR will disappear, with a more fully integrated array of dispute resolution “alternatives” remaining.

## 2.2. Overview of Specific ADR Processes<sup>2</sup>

### Mediation<sup>3</sup>

Mediation generically is negotiation with the assistance of a neutral person. Negotiation, broadly defined, is common in all aspects of our lives and for all kinds of disagreements, large and small. However, negotiations are often difficult to organize and conduct successfully, especially when they involve water resources issues, which are both politically and technically complex. The large number of parties, disagreements about the facts, and other complicating factors often create circumstances in which parties question the appropriateness of negotiation (sometimes rightly), don't know how to get started, or reach impasse. As a result, mediators increasingly have been called upon to help parties convene negotiations, to prevent impasse during the negotiations, or to assist parties to continue when their discussions have broken down.

In mediated negotiations, the mediator does not make a decision about who is right or wrong or what the best outcome should be. A key advantage to mediation is that the parties have significant control over the end result. Decision-making power stays in the parties' hands, and is not passed on to a judge or arbitrator. Instead, a mediator helps bring the parties together (“convening”) by establishing a framework for the negotiation within which all parties agree to participate (including mediating agreements on the scope of issues to be negotiated or suggesting process options based on the circumstances of the dispute, e.g. joint fact-finding) and helps those involved hold constructive discussions by calling meetings, facilitating communication in meetings and between meetings, and serving as intermediaries when tensions run high. (The parties usually share confidential information with the mediator about interests and priorities.) Mediators also assist by

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<sup>2</sup> See also G. Bingham, “Alternative Dispute Resolution: Variations on the Negotiation Theme” 14th Annual Water Law Conference, American Bar Association, Section of Natural Resources, Energy and Environmental Law.

<sup>3</sup> Some make a distinction between mediators and facilitators. However, it is a difficult distinction at best and the terms will be used somewhat interchangeably in this paper. Sometimes it is helpful to think of an individual meeting being “facilitated.” In other situations, the “mediation” role is larger because parties wish someone to help them agree on the underlying groundrules for the process, as well as facilitating the meetings that occur.

***What Mediators Do That Is Helpful***

- *Bring parties together*
- *Help design consensus-building processes*
- *Establish communication and set an atmosphere for negotiation*
- *Help with people problems*
- *Help convene large numbers of parties*
- *Help negotiate agendas and clarify issues to be addressed*
- *Help parties obtain data they need to make decisions*
- *Facilitate joint sessions and call caucuses.*
- *Clarify interests, priorities and alternatives to an agreement*
- *Help parties explore (sometimes in private) ideas for creative solutions*
- *Identify overlapping interests or areas of potential agreement*
- *Help parties agree on criteria to evaluate solutions*
- *Record agreements as they develop*
- *Help parties understand limits on negotiating flexibility*
- *Help anticipate implementation problems and address future conflicts*

drafting, facilitating discussion of, and refining agreement language that is then reviewed for implementability by all parties. Professional mediators hold as a matter of ethics the view that mediators should have no direct interest in the outcome of the dispute and should take no position on what the terms of settlement should be, i.e. that they should be neutral.

Frequently, however, a party with a stake in achieving a solution or with power or resources to assist the parties, who is not a central protagonist, may take on mediation functions—and may be called a mediator. Often, although not always, this is a person with clout<sup>4</sup> who either is not a central protagonist in the fight or who has the ability to bring resources to the table to expand the number of creative solutions available. Such individuals often can play a critical role in the settlement of a long-standing dispute but may not always feel the need to be “neutral” in doing so. Although the source of some chagrin for professional mediators who equate mediation with neutrality (the author included), the fact remains that this practice occurs frequently and

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<sup>4</sup> See Bacow and Wheeler, *Environmental Dispute Resolution*, Plenum Press, 1984, Chapter 10 “Ethics” p. 270-272.

should be understood. Perhaps the most important point is that parties should understand the difference and have some say in which “type” of mediator they are getting.

Mediation of water and other natural resources disputes has begun to take on discrete forms, depending on the administrative or judicial context and the stage of the dispute. Some of these variations have become sufficiently formalized to be given different names. These include, in addition to mediation of settlement negotiations:

- **Negotiated rule making**,<sup>5</sup> in which an administrative agency convenes representatives of the regulated industry, public interest groups, and other stakeholders to seek agreement on either the elements of or specific language for a proposed regulation, prior to initiating notice and comment under the Administrative Procedures Act;
- **Policy dialogues**, to build consensus on regulatory or legislative policy, in a manner similar to but less formal than a negotiated rulemaking (some policy dialogues are conducted under the Federal Advisory Committee Act, when sponsored by a federal agency, while others are sponsored by private groups for more informal purposes);
- **Joint fact-finding**, to help deal with the technical complexity of the issues and scientific uncertainty, where this creates obstacles to agreement (parties discuss what factual questions they believe to be relevant to the decision, exchange information, identify where they agree and where they disagree, and negotiate an approach to seeking additional information, either to fill gaps or to resolve areas of disagreement);
- **Facilitation**, to increase the potential for dialogue and productivity in public meetings or informal workshops, with the facilitator helping keep the discussion on the agenda, encouraging participation by all participants, maintaining a constructive tone, and summarizing areas of agreement or disagreement, as needed (increasingly integrated into a wide range of administrative procedures or private initiatives); and

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<sup>5</sup> See, for example, the Negotiated Rulemaking act of 1990, P.L. 101-648, 5 U.S.C. Section 581, et seq.

- **Partnering**, (generally applied to construction contracts) in which a project sponsor and contractor meet prior to the start-up of a project to discuss the specific tasks to be completed, how they will be carried out, what the criteria will be for evaluating that the project has been completed in a satisfactory manner, whom to contact if problems arise, and what communication steps will help resolve issues before a problem turns into a dispute.

Although each of these variations of mediation have identifiable characteristics, they are not yet so formalized as even to approach uniformity—nor, perhaps, should they. One of the strengths often cited about ADR has always been the flexibility to tailor each process to the unique circumstances of the individual case. (Examples for each of the variations noted above are provided in Section 4.0.) Mediators, like other professionals, also have different personal styles and approaches. For example, although most environmental mediators tend to emphasize the direct dialogue between the parties, mediators whose principal background has been in labor relations or other arenas may tend to emphasize separate meetings with each party (caucusing) and a form of “shuttle diplomacy” by the mediator.

### **Early Neutral Evaluation**

Settlement negotiations for cases in litigation commonly break down over different interpretations of law and/or predictions about how a judge will rule. A basic negotiation concept is that parties don’t (and shouldn’t) settle for less than they could achieve in the absence of an agreement (discounted for transaction costs). Thus, when one party bases its prediction of a favorable outcome in court on one set of legal principles or precedents and another party bases a contrary prediction of an outcome in their favor based on a different set of precedents or a different interpretation, they are unlikely to agree that any potential settlement is to their advantage.

Early neutral evaluation procedures have been designed as a tool for overcoming this barrier. Before the parties get too far into a litigation process (usually shortly after a lawsuit has been filed but not always), the parties for all sides agree on another attorney (as evaluator) with extensive experience in the area of law in dispute, or retired judge, to whom they present abbreviated legal arguments either on the particular question of law or on the case generally. The neutral evaluator prepares an opinion predicting how a judge would rule on the matter. When the evaluator’s interpretation of the law raises doubts about the strength of one side’s position, it can trigger new settlement offers.

### **Mini-Trial**

Mini-trials can be described as a more elaborate version of early neutral evaluation. The barrier of concern is the same—different predictions of the outcome in court. In a mini-trial, three characteristics are important to highlight. First, the principals in each party generally attend personally; their involvement is assumed to help expedite a settlement. Second, attorneys for each side are given an agreed upon amount of time to present their best arguments before a private neutral and the principals. The assumption here is that each principal generally only hears his or her attorney's arguments prior to a trial, perhaps giving an incomplete and/or inappropriately optimistic prediction of the outcome in court. Third, the mini-trial is conducted by a neutral agreed upon by all sides. After the presentations are completed, the principals meet privately in an attempt to settle the matter, with the neutral sometimes shifting roles from judge to mediator.

### **Arbitration**

In contrast to mediation, arbitrators conduct hearings and issue an opinion, either binding or non-binding by advance agreement of the parties. Arbitration often is considered when the legal issues are not in dispute, but what is being contested is their application to the different factual circumstances of the case. In water matters, this role is most commonly one played by special masters or referees appointed by the presiding judge.

## **3.0 The Need for ADR: What Underlies the Search for New Approaches to Resolving Water Disputes?**

Why have so many individuals, groups, and governmental institutions become interested in ADR? The answer tends to fall into two categories. People are either deeply frustrated by the length of time and costs associated with getting to a decision (*efficiency concerns*), or they judge that the decisions that are made do not meet the needs of those involved as well as they could (*quality concerns*). Most are concerned about both.

This frustration is, in part, directed at litigation, but not entirely. Much of the attention to reconciling water issues comes from the growing pressures of the issues themselves. As the end of the 20<sup>th</sup> Century draws closer, it is becoming increasingly clear that old formulations for how water should be allocated and used are being challenged by new demands on the resource.

*The assistance of a mediator can help parties overcome barriers to settlement under a variety of circumstances, e.g. when:*

- *Parties are having trouble starting a negotiation because of a history of past conflict creates distrust that prevents negotiation or when some parties are reluctant to come to the table*
- *There are too many parties (or issues) to stay focused*
- *Parties want to improve the quality of results predicted using usual process*
- *Negotiations are at impasse*
- *Parties want confidential assistance to clarify strategies and positions (or to deal with different predictions of an outcome in court)*
- *Parties want to preserve (or improve) relationships*

The two largest of these are the demands of Native Americans that the principles articulated in the Winters Doctrine at the beginning of the century be translated into wet water and the demands by environmental interests that the water needs of threatened and endangered species (and vulnerable ecosystems generally) be factored into water management decisions. As many watersheds and river basins in the West are fully (if not over) allocated, these “new” demands create enormous pressure for all sides to work together in some way. Creative solutions, supported by the diverse interests who reside together in the same places and rely on the same water, will be needed if western communities are to have a viable vision for their futures.

Evidence certainly exists that litigation can take a long time and use up enormous resources, though it does not always do so.<sup>6</sup> Anecdotal

stories abound of frustration with lack of sufficient progress toward resolution of many cases. However, others ask why ADR is needed, when 90% of all lawsuits eventually settle and many, if not most, of the ones that go to trial do so because of the need for a legal ruling. An answer even ADR critics acknowledge is that the settlement process can be enormously

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<sup>6</sup> The Judicial Conference of the United States conducted a special computer search in 1983 for this author (published in *Resolving Environmental Disputes: A Decade of Experience*) on the duration of environmental disputes filed in U.S. District Court. Although this is all environmental matters and many water disputes also are tried in state courts, it is interesting to note that the median duration of these cases was 10 months (with the top 10% taking between three and four years). For cases that went to trial, the median was 23 months (with the top 10% taking between five and six years).

frustrating<sup>7</sup> and that most cases could be settled more quickly and with more satisfying results.

Often, one of the reasons that it can be so difficult and take so long to resolve these disputes is that different parties believe they will have the advantage in different forums and, thus, engage in competition over where the decisions will be made. Some may introduce legislation or initiate legislative hearings, shifting the dispute for a time to a political arena. If legislation passes, cases are still delayed as opposing parties seek a judicial determination about whether the original provisions of the law or the amendments apply. In a different example, a long-standing fight played out in many settings involves the McCarren Act, and whether state or federal courts have the jurisdiction for federal reserved water rights claimants. So, the disputes drag on as parties try to gain the advantage by fighting over where the fight should be settled.

Even when matters do get decided it may be just a procedural stop along an even longer road to getting the problem solved on the ground. Sometimes the decisions are merely procedural ones (e.g. NEPA compliance was not adequate, or a claimant missed a filing date). Sometimes, the losing party simply waits for another day. And, frequently, where finality appears to have been achieved, implementation leads to the emergence of new challenges.

For example, as in the reserved rights claims of the Shoshone and Arapahoe Tribes on the Wind River reservation, even with a decision by a special master at the state level and a decision by the U.S. Supreme Court, parties still need to work issues out together regarding how decisions will be implemented.

Although popular and academic literature has emphasized the high costs and time-consuming

*Truckee River Settlement*

*The cui-ui is an endangered fish central to the culture of the Pyramid Lake Paiutes. Because the cui-ui is long-lived, it does not need to spawn every year. However, non-Indian diversions since the turn of the century, both upstream in the Truckee and from the Truckee into the Carson River watershed, have made almost any spawning impossible. As the Tribe's legal claims began to be recognized by the courts, quiet negotiations between Sierra Pacific and the Tribe resulted in an agreement that Sierra Pacific would pay the costs of storing water claimed by the Tribe in upstream reservoirs. This water would be released in wet years for spawning flows and would be used by Sierra Pacific for urban populations during drought years. It seems unlikely that such a creative solution would have emerged only from the formal adjudication of water rights.*

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<sup>7</sup> See Edwards, H. *Commentary: Alternative Dispute Resolution: Panacea or Anathema?* Harvard Law Review 668 (1968).

nature of litigation, the mediators more often cite the control the parties have over resolving their own disputes as the most important rationale for ADR. This view (shared by this author) is that direct involvement of the parties in negotiating a solution that they can all live with leads to *better outcomes*, i.e. creative solutions that satisfy more of the parties' real concerns.<sup>8</sup>

People often cite their desire for solutions that reflect local perspectives and for processes that involve greater personal respect, civility and simple opportunities for communication between people in a region or community as a reason for seeking less adversarial ways to resolve environmental and natural resources disputes. The bonds that strengthen communities are frayed by conflict, and the larger forces of mobility and social change in the United States also create the feeling of impersonal and distant government that many people are seeking to fill by greater participation in the decisions that affect their lives.

Two other characteristics of water resource disputes also motivate the use ADR. These include: (1) the large number of parties to these matters and (2) the complex scientific and technical nature of the issues. In the Gila River adjudication, for example, there are approximately 24,000 parties; and in the Snake River adjudication there may be 150,000! Certainly, the large number of parties makes litigation more cumbersome and time consuming. However, it also poses challenges for ADR. As one judge remarked, if a judge were to decide that an ADR process would benefit the proceedings, to whom would s/he send the order? Generally, in mediated negotiations, parties organize themselves into groups and select a common representative to reduce the size of the negotiating table. This helps focus the discussions, but it also raises concerns for some about loss of fairness or transparency in the process because the "big guys" are most often the ones "at the table." As the practice of ADR matures, however, it is increasingly apparent that creative ways can be designed to achieve the desired ends of fairness and public accountability through a combination of open meetings, observer status, ratification steps, and public outreach.

Water resources disputes often involve disagreements over complex scientific and technical issues. Parties disagree over historic use of water rights, the nature and magnitude of water quality problems, the potential

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<sup>8</sup> Menkel-Meadow, C. *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, UCLA L Rev, 31 (1984).

environmental impacts (and economic benefits) of flood control or other construction projects in rivers or wetlands, the causes of problems such as erosion downstream of dams or losses in fish populations, what it will take to protect threatened and endangered species and how well alternative strategies will work, how much proposed mitigation measures for environmental impacts will cost, etc. Judges are often the first to say that a courtroom may not be the best setting for resolving scientific or technical questions. Administrative processes generally are more effective than are judicial forums, however, the parties themselves often have key information, expertise, and resources for investigating a problem. Very often, the impetus for an ADR process in such situations is the desire to bring parties together to exchange information, clarify areas of agreement and disagreement over the facts, and determine next steps in answering remaining questions that will be seen as credible to all sides.

***Drinking Water Standards***

*The U.S. Environmental Protection Agency brought together 17 parties during 1992-1993 to participate in mediated negotiations to seek agreement on ways to reduce exposure to chemical by-products of disinfection without increasing the risks of waterborne disease. A key element of the mediation was the formation of a technical working group representing the parties' diverse perspectives, which provided committee members a common factual base from which to negotiate—and which brought to the table far more information than the agency would have had the resources to compile in the same period of time.*

Forecasts of future impacts are particularly controversial, in part because scientific understanding of how ecosystems function is still emerging and because, in almost any situation, there is always more information that could be gathered.<sup>9</sup> In the face of uncertainty, differences in risk preferences always generate disagreement. Some people feel strongly that risks should be avoided while others feel equally strongly that proposed actions should go forward unless negative impacts are certain. Many ADR processes are motivated by the sense that such fundamental value judgments can best (or can only) be resolved in a lasting way when people talk with one another directly, seek to understand the reasons for the positions being taken, and attempt sincerely to solve one another's problems.

Just as the disputes themselves are complicated by scientific and technical matters, the opportunities often found in creative solutions to resolve disputes over water resources require parties to explore scientific and technical questions in a manner less adversarial than is generally possible in

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<sup>9</sup> One party to the EPA drinking water standards negotiation once pointed out that “the amount of information available is always in direct proportion to the velocity of money!”

a court of law. Ultimately, it is the need and the potential for more creative solutions that meet the interests of more parties affected by the dispute, which provides the quiet but more pervasive driving force behind the search for alternative dispute resolution approaches. The *efficiency* concerns associated with the costs and delays in the litigation process are real, but it is the needs of parties for an improved *quality* of outcomes that ultimately will justify the investment in ADR—or will inspire its most telling critique.

## **4.0 Recent Accomplishments: How Have ADR Procedures Been Applied to Water Resource Disputes?**

### **4.1 ADR Has Produced Positive Results in Specific Cases**

The formal mediation of environmental disputes began in the United States in 1974, with attempts to resolve a long-standing controversy over flood control measures on the Snoqualmie River in Washington State. Since that time, certainly dozens if not hundreds of disputes involving western water issues have been resolved through some form of ADR procedure, and increasing attention is being paid to the strengths and the weaknesses of these approaches.

ADR processes have a nearly 25 year history in the water resources arena. What has been accomplished? And, how well are these alternatives meeting the needs that motivated people to seek them? These are hard questions to answer. A quarter century seems a long time, but momentum for societal innovations such as ADR takes time to build to the point that systematic evaluation is initiated.

During the period 1974-1985, nearly 200 environmental disputes were mediated in the United States (of which about ten percent involved water issues), and virtually no environmental matters were arbitrated.<sup>10</sup> Since that time, the practice has grown rapidly,<sup>11</sup> but no comprehensive data base has been maintained to quantify that growth.

Anecdotal data about mediation of water disputes is available. These stories suggest that the hopes for outcomes that better satisfy the needs and

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<sup>10</sup> G. Bingham, *Resolving Environmental Disputes: A Decade of Experience*. (Washington DC: The Conservation Foundation) 1986.

<sup>11</sup> The author made a few informal calls to mediators in preparing this report, uncovering numerous examples of water resources mediation cases in those calls alone. It is more than likely that these are only a small subset of the cases that exist.

concerns of the parties may be being fulfilled reasonably well, but not without difficulties.<sup>12</sup> As compared to the vast number of water related disputes that exist, relatively few such controversies have been settled through an ADR process—but the number of ADR cases so far is becoming significant and they reflect the diversity of water resources disputes. Examples can be found in legislative, administrative and judicial arenas. They involve water allocation decisions, both for surface and groundwater; water quality matters, including effluent standards, discharge permits, drinking water treatment, and instream habitat for fish and other aquatic life; and construction of projects, related to port development, water storage facilities, hydropower projects, flood control, and more. And, they have been undertaken to address the most polarized disputes and much earlier where parties have sought mutually acceptable solutions to avoid a fight before it could start.

The following examples only provide a small snapshot of the diversity of cases that can be documented. They are organized loosely by topic, although more often than not the categories are overlapping. These examples all reflect considerable success. The selection of these cases is not meant to suggest that all applications of ADR to water resources disputes have been successful, however (e.g. the mediation conducted by this author for the second round of Truckee Carson settlement negotiations did not reach the region-wide agreement intended). Because of the sensitivity required to report fairly on disputes in which the parties did not reach agreement, more detail is needed than was envisioned for this report. Thus, these cases have been used as background to the discussion of challenges in resolving water resources disputes.

## **Water Rights**

Water rights allocation disputes continues to be a major focus for all parties in the West. Resolution of Indian water rights in particular is important in many basins, and many other kinds of water issues can have impacts on water rights. Honoring the sovereign rights of tribal governments affects some aspects of the negotiating relationship, including who participates in the process and respect for cultural values and history. Many other aspects of the conduct of mediated negotiations remain the same, and tribal

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<sup>12</sup> See, for example, J. Neuman, “Run River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—for a Time,” *University of Colorado Law Review* volume 67, issue 2, 1996.

governments generally are quite sophisticated in their use of the process. Examples of ADR in this arena include:

- *San Luis Rey Indian settlement legislation.* In 1984, Congressman Ron Packard established the San Luis Rey Indian Water Settlement Task Force and directed his administrative assistant, Clyde A. Romney, to mediate the resolution of a decades-old litigation between five Bands of Mission Indians, the United States, the City of Escondido and the Vista Irrigation District. An agreement was reached on a set of settlement principles that, in turn, were embodied in authorizing legislation passed by the U.S. Congress in 1988 (P.L. 100-675) and the subsequent appropriation of a \$30 million trust fund. Mr. Romney currently is in private practice and continues as the mediator for ongoing implementation issues with the Metropolitan Water District of Southern California, the Bureau of Reclamation, and state water agencies in California, Arizona and Nevada.
- *Umatilla Basin Project settlement.* The Umatilla Basin Project, authorized by federal legislation in 1988, provided for use of water from the Columbia River to supply the agricultural community to restore instream flows needed for the historically rich salmon fishery that supported three tribes—the Umatilla, the Cayuse and the Walla Walla—and to preserve the Umatilla agricultural, irrigation-based economy. However, to complete the project, the Bureau of Reclamation needed approvals from the Oregon State Water Resources Project that would permit trading irrigation rights for fish flows and exchanging water from the Umatilla River for Columbia River water. After formal objections to these approvals were raised, the parties agreed to a mediation process assisted by Elaine Hallmark (Confluence Northwest) and Chapin Clark, water law expert and law professor, to reach a settlement that enabled the project to go forward, specifically addressed “water spreading” and other issues raised by the objectors, and guaranteed that water from the Columbia would be used to restore fish flows in the Umatilla.

### Threatened and Endangered Species

ADR cases involving issues under the Endangered Species Act issues illustrate an important distinction between what may and may not be appropriate topics for mediation. Many people (correctly in this author’s view) point out that “negotiating science” would be inappropriate. Scientific

questions can be jointly investigated, but one shouldn't negotiate the facts. Furthermore, some parties feel strongly that a decision about whether or not to list a species as threatened or endangered should not be a matter of negotiation, taking either political or economic factors into account. Decisions about how to implement protections for certain species may be more appropriate for ADR, as the examples below illustrate:

- *Red Bluff.* The Bureau of Reclamation's diversion dam along the Sacramento River near Red Bluff, California has fish ladders, but fish populations were dropping to levels of concern for environmental agencies with endangered species responsibilities, such as the National Marine Fisheries Service. In 1992-93, the Bureau invited mediators John Lingelbach and Susan Wildau from CDR Associates to help them design a process for building consensus among various stakeholder groups to reach consensus on a plan for fish passage which would be sufficient to satisfy Endangered Species Act requirements while continuing to provide water under contracts to agricultural interests. CDR facilitated two meetings of the parties, which resulted in agreements on an approach for development the plan and on interim measures, including operation of the gates that regulate flows from the dam.
- *Mid-Columbia Habitat Conservation Plan.* To avoid potential action under the Endangered Species Act to protect the Pacific salmon, three public utility districts on the middle reach of the Columbia River in Central Washington initiated a process, assisted by Triangle Associates, to develop a 50-year habitat conservation plan for each of them to provide specific steps to protect the fish. The plan would permit continued operation of the dams if the species dealt with in the plan were to be listed under the Endangered Species Act, and possibly meet the requirements of the Federal Energy Regulatory Commission. In addition to the public utility districts, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the Washington Department of Fish and Wildlife Service and three Indian nations and confederated tribes are participating in the process. Observers include power purchasers and environmental groups. The initial negotiations have focused on (1) measures to increase fish survival rates at dams and reservoirs and (2) hatchery production and tributary habitat measures to compensate for unavoidable losses.

The Federal Energy Regulatory Commission has licensing authority for non-federal hydroelectric projects dams operated by investor-owned and municipally owned utilities. FERC licenses projects under the Federal Power Act (FPA) for terms of up to 50 years (licence renewals more commonly are for terms of 30 to 40 years). FERC administers the formal relicensing process involving Tribes, citizens, interest groups and state and federal agencies, many of whom also have responsibilities under other statutes such as the Endangered Species Act or the Clean Water Act. These matters are good examples of the multi-party and multi-issue nature of water resources issues. In recent years, mediation has been used to help parties resolve disputes at various stages in the relicensing process, including pre-application, post-application, and during license implementation. The follow examples illustrate the first and last categories:

- *Clark Fork Relicensing Team.* Washington Water Power (WWP) owns and operates the Cabinet Gorge and Noxon Rapids hydroelectric projects, built in the 1950's on the Clark Fork River in northern Idaho and northwestern Montana. During the "initial stage consultation process" required by FERC, WWP explored the interest of all potential parties in developing the terms of its license application through a collaborative process. With assistance from RESOLVE, WWP convened the process in July 1996, involving approximately 25 entities: five tribes, two federal agencies, state agencies from Idaho and Montana, local government, local citizen organizations and WWP. FERC staff are participating as resource people. The intended product of this collaborative process is a settlement agreement, which would serve as the basis for the terms of the license application for the dams. WWP has committed to submitting its license application consistent with such a settlement agreement, in the event a consensus is reached prior to the deadline for submission of the license application. Four working groups have been formed, which meet almost monthly to design and approve technical studies and to develop recommended protection, mitigation and enhancement measures. The full Relicensing Team currently meets quarterly. The license application for these facilities is due in February 1999. This process is unique in that most, if not all, other collaborative efforts have been convened following the submission of the licensee's application.
- *Don Pedro Hydroelectric project.* The license for the Don Pedro Hydroelectric project mandated an interim review to determine the appropriate instream flows for protection of a downstream chinook fishery. As part of this review, the Federal Energy Regulatory

Commission contacted mediators from the Federal Mediation and Conciliation Service to help them address a long standing dispute over the affect of increasing the fishery flows on the municipal water supply for the City of San Francisco. The mediation process, which was done as work proceeded concurrently on an environmental impact statement under NEPA, resulted in an agreement and the license was amended to incorporate the terms of the settlement.

### Water Quality

Under the Clean Water Act and related statutes, increasing attention is being paid to non-point source issues, total maximum daily load requirements (TMDLs), and integrated watershed planning approaches. These issues require resolution of important scientific and technical issues about which parties disagree as well as resolution of disputes over policy questions. Applications of ADR are being initiated in these arenas, as in the following examples:

- *Puyallup River Watershed.* After municipalities and industries in the Puyallup River basin learned there was additional pollutant loading capacity in the Puyallup and Whites Rivers, the Washington State Department of Ecology received requests to increase municipal and industrial discharge permits. Rather than make a unilateral decision, the Washington State Department of Ecology, together with U.S. EPA and the Puyallup Indian Tribe jointly convened the Puyallup River Water Quality Mediation Committee. The purpose of the Committee is “to negotiate agreements to protect and enhance the water quality in the Puyallup River watershed and to meet state and tribal water quality standards while accommodating the needs of watershed users and growth management requirements.” Specifically, the Committee is working to: (1) understand the basis for and update a recent study of total maximum daily load (TMDL) in the Puyallup River basin; (2) address issues around whether the Rivers’ have additional loading capacity, and if so whether that capacity should be allocated; (3) develop principles to guide waste load allocations in the future; (4) define methods to translate TMDL limits into NPDES permit limits; and (5) frame a process that is consistent with federal, state and tribal regulations to negotiate NPDES permits and other controls that allow all parties to reach mutually acceptable results in protecting water quality, managing growth and reacting to change.

- *Patuxent River.* Although not in the West, one of the earliest examples of the value of joint fact finding was over nutrient loading issues. In June 1981, the Maryland Office of Environmental Programs issues a draft “nutrient control strategy” for the Patuxent River. The state’s strategy emphasized removal of phosphorus at large sewage treatment plants in the four upstream counties around Washington DC. The Tri-County Council of Southern Maryland, representing largely rural downstream counties closer to the Chesapeake Bay, challenge the plan as unsatisfactory because it did nothing to reduce nitrogen loads. Mediator John McGlennon designed and facilitated a two-stage process, beginning with a preliminary meeting of scientists trusted by the various sides and who had been engaging in a “war of the experts” that made consensus building on what to do more difficult. At this first meeting, the scientists put together a joint report sorting out what was known, not known and in dispute about the causes of water quality problems in the Patuxent. This report became the basis of a second meeting of approximately 40 stakeholder representatives, who were then able to focus on their policy disagreements and reach a compromise on a plan of action.

### Drinking Water

Issues associated with the provision of potable water to large and small communities across the country may not always be thought of as water resources issues, but they generate controversy over siting issues and public health standards that are of great importance to the communities involved. Positive experience with consensus-building efforts for these kinds of disputes is illustrated by the following examples:

- *San Diego.* The member agencies of the San Diego County Water Authority serve most of the county. In the early 1990’s, the Authority sought to create approximately 90,000 acre feet of emergency storage capacity in response to concerns about supplies during drought years and the possible effects of an earthquake on existing pipelines that cross active faults. A team of environmental scientists and engineers had generated 32 options or “systems” for providing that emergency storage capacity, which included combinations of new or expanded dam facilities, pump stations and pipelines. These options were narrowed to 13 by applying preliminary screening criteria. With the assistance of mediator Scott McCreary from CONCUR, the Authority convened a 27-member Emergency Storage Working Committee made

up of the diverse interests involved, including those near the sites of potential new storage facilities. This group met 7 or 8 times, seeking agreement on factors that should be weighed to select the alternatives to be included in the environmental assessment. One outcome was a process for evaluating options, which included paired comparisons of the criteria and resulted in an agreed upon weighting scheme for evaluating the options. This consensus on weighted criteria, in turn, was applied to the empirical data gathered by the consultants, narrowing the options to the four which were used as the alternatives for the environmental impact assessment document prepared in compliance with NEPA and the California Environmental Quality Act. This case is a good illustration of the use of ADR within “NEPA” type processes.

- *M/DBP*. Drinking water is typically treated with disinfectants to inactivate pathogens which cause a variety of illnesses. The by-products of disinfection (DBPs) are formed when naturally occurring organics come into contact with the breakdown products of disinfectants. Some DBPs are implicated as possible carcinogens. However, decreasing the levels of disinfectants to reduce cancer risks could increase the risk of waterborne illness—a risk/risk tradeoff. During the summer of 1992, EPA asked mediators from RESOLVE and ENDISPUTE to assess the feasibility of convening a negotiated rulemaking on these issues. Seventeen parties representing drinking water, public health, consumer and environmental interests met ten times over a period of ten months and were able to reach agreement on three new EPA regulations—a DBP Rule, an Enhanced Surface Water Treatment Rule, and an Information Collection Rule. This case illustrates the value of joint fact finding through a technical working group, comprised of representatives of the key parties, to address disagreements about effective strategies for dealing with the risk/risk tradeoff and to present consensus-based cost and other technical information to the committee.

### Other Construction Projects

Although the era of the big construction projects has been said to be over for some years, maintenance of existing facilities can lead to at least two kinds of disputes: (1) the effects of construction activities on aquatic habitat and (2) disputes between agencies and contractors. Mediated negotiations and

consensus-building efforts have been shown to be useful in the former, and partnering and mini-trials in the latter.<sup>13</sup>

- *American River.* The Sacramento River Flood Control Agency initiated a consensus-building process for an integrated flood control and habitat restoration program for the Lower American River along the 26 river miles from Folsom dam to the confluence of the American River and the Yolo By Pass. Given the highly sensitive nature of issues along the American River (this effort followed intense controversy over the proposed dam at Auburn Canyon), the agency felt that the project would benefit from dialogue on what information would be needed for the project, whose data would be acceptable, who should be involved in the process, among other issues. The agency convened a Lower American River Task Force in February 1993. Initially comprised of 34 organizational members, the task force now has grown to 41 members. Facilitated by John Gammon and Scott McCreary of CONCUR, the task force has completed six phases, each of which concluded with a specific agreement, including: habitat restoration and flood protection principles, identification of the reaches that needed repair, cross-sectional designs for priority reaches, a specific project description for the River Park site that included both armouring and habitat restoration. Construction of the first phase of that project was accelerated one full year from the normal agency review process as a result of the agreement hammered out at the task force and completed in November of 1996. Four days later the first winter flows came down the American River, and on January 1-3, 1997 the “storm of record”—the largest discharge ever recorded on the American River—passed safely down the river. One result was that the American River was one of only two tributaries to the San Bay Delta that did not have flood damage during this storm. Other agreements included a mitigation monitoring plan, a protocol for site by site review, and a special report on what to do with stands of cottonwood trees. Recently, the LAR task force agreed to initiate a comprehensive floodway management plan and to apply for habitat restoration funds made available through the CALFED Bay Delta Program.

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<sup>13</sup> Specific case study information was not readily available for construction disputes, but the U.S. Army Corps of Engineers has pioneered the use of both mini-trials (e.g. over a dispute with its contractor on the Tennessee Tom Bigby Waterway) and partnering.

## **4.2 Institutional Mechanisms Are Being Initiated**

Starting in the mid-1980s, state and federal government began to take initiatives to encourage the more systematic application of ADR to environmental and natural resources issues (and other controversial public issues). Some of these have been procedural in nature; others have been in the form of programs in the courts and administrative agencies at local, state and federal levels.

The U.S. Congress and several states have enacted laws encouraging and authorizing the use of ADR procedures for public policy and other types of disputes and establishing rules for the practice (e.g. confidentiality provisions). At the federal level, Congress passed procedural statutes, such as the Negotiated Rule-Making Act of 1990 (NRMA) and the Administrative Dispute Resolution Act (ADRA), that provide an impetus to institutionalize use of ADR and to establish clear direction and routine procedures.

The NRMA encourages federal agencies to develop rules through use a mediated negotiation process involving the parties who will be significantly affected by a rule. The NRMA establishes a framework and procedural safeguards to ensure the appropriate use of the process as well as the balanced composition of the negotiating group. The NRMA also affords the public opportunities to comment on the scope of issues for negotiation and on the composition of the group. In passing the NRMA, Congress found that a negotiated rulemaking process increases acceptability of the rule and minimizes the possibility that affected parties will challenge rules developed through a negotiation process.

The ADRA encourages federal agencies to use ADR to enhance the operation of the government and better serve the public. As a first step in institutionalizing the use of ADR, each federal agency was required to designate a senior official as a dispute resolution specialist and to adopt policies on the use of ADR for the full range of agency actions including: rulemaking, issuing and revoking licenses and permits, contract administration and litigation. The ADRA does not require that agencies use ADR, but rather that they evaluate its potential. The ADRA also provides criteria for the selection and use of different ADR processes. Significantly, the ADRA also recognizes the importance to the ADR process of preserving confidentiality and establishes and provides limited circumstances when otherwise confidential information must be disclosed.

An important example at the state level is Montana's recent statutory mechanism to promote mediation of water disputes. The Montana legislature amended the state's general stream adjudication statute in 1997 to authorize judges on the Montana Water Court to assign cases to a mediator. The Water Court had previously developed a roster of mediators and now has published a Water Right Mediation Handbook describing the mediation process, the roles of the mediator and the parties and how mediation fits into the adjudication process. The Handbook also provides guidance on the selection and qualifications of the mediators. The Handbook has extensive sample mediation forms, including a sample order initiating mediation, mediation fact sheet, mediator report and evaluation form, and stipulation to reflect agreements reached during the process. The development of routine procedures and materials such as those in the Handbook helps to create predictability and constancy in the use of ADR.

## **5.0 Lessons Learned: How to Build Consensus and Overcome Common Barriers to Settlement**

To think well about building consensus, or improving the effectiveness of settlement processes, it is important to have a picture of one's target. When asked, people identify multiple characteristics of a "successful" process. Generally, these factors fall into three categories—substance, process, and relationships. Attributes parties commonly say they use to measure whether a process was successful include:

- Substance
  - reaching agreement
  - S reaching an agreement that satisfies their interests or solves real problems
  - reaching an agreement better than otherwise could have been achieved
  - reaching agreements that are implemented
- Process
  - fair
  - all affected parties represented
  - no undue delay
  - allows adequate consultation with constituencies
  - not overly costly in time or money

- consistent with applicable procedures and laws (e.g. open meeting laws)
- does not set precedent for other parties not at the table
- encourages the exchange of accurate and complete information
- Relations
  - civil
  - provides mutual recognition and respect
  - improved capacity to solve problems together in the future

Implementation of agreements that solve real problems for those involved is probably the most important measure of success, but factors like improved relationships among the parties or developing an improved information base or array of options for later consideration can also be valued outcomes of consensus-building, as some (if not complete) progress toward a resolution.

Mediated negotiations must not be viewed only as the middle stage of what should be seen as a three-stage process—prenegotiation, negotiation, and implementation. Activities crucial to the success of an ADR process occur at each of these stages.

Negotiations never spring to life fully organized. In actuality, negotiations begin long before a first meeting. Someone needs to suggest the process in the first place and to contact other parties and persuade them to participate. Also, during the pre-negotiation stage, decisions are made about who will be invited to participate; how the objective of the negotiation will be defined; what the scope of issues will include; where, when and under whose auspices meetings will be conducted; who will chair or mediate negotiation sessions; whether meetings will be open or closed, and to whom; what deadlines will be set, if any; and what other ground rules will be established. Paying attention to these decisions, and others, makes a significant difference in the likelihood that a settlement or consensus-building process will produce a lasting agreement, because there is a direct connection between the design of the process and the opportunity it provides for each party to gain something of value out of participating.

The phase of face-to-face discussions, where parties meet to resolve the issues about which they differ, is in one sense what people most commonly think of as negotiation but in another sense is a “black box.” This stage begins with the first face-to-face meeting among parties and ends, hopefully, with an agreement. As an initial window into this stage, parties should think

specifically about several discrete functions—information sharing, the development of options, and closure.<sup>14</sup>

Finally, parties are not usually satisfied simply with an agreement on paper unless it results in real actions. Thus, implementation—and planning for implementation during each of the preceding stages—becomes a critical stage in the overall negotiation process. Anticipating common obstacles to successful implementation, creating incentives for all sides to comply with the terms of an agreement, and establishing mechanisms for ongoing communication and negotiation are all worthwhile investments of time and effort.

In achieving these goals, it is helpful to think about both: (1) general principles or concepts, and (2) barriers that are likely to be encountered.

## **5.1 General Principles for Successful Dispute Resolution**

Considerable research has gone into how to increase the likelihood of success in negotiations or consensus-building efforts generally. People historically have (and still do) approached negotiation with the idea that each side takes a position, trades concessions, and agrees (sometimes) at a point in the middle. One can't discount these dynamics in dealing with certain issues, however, the disadvantages of this kind of "horsetrading" are that it becomes a battle of wills and creates bad feelings, it takes longer, and agreements reached often are less satisfactory because of the lack of focus on the parties' real needs and concerns.

Most dispute resolution literature urges that specific disputes be managed in such a way as to allow all sides to express their views, preferably directly to one another. (Traditional public hearing or notice and comment procedures used by government agencies do give the public a voice, but do so in ways that actually create incentives for polarization.) Underlying conflicts should not be avoided, because without understanding and accepting their differences people can't jointly solve problems. This is not to say, however, that all modes of expressing conflicts are constructive. Dispute resolution methods focus on structuring incentives to deal with differences and on improved communication between parties in order to better identify options that satisfy these different interests and values.

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<sup>14</sup> See Raiffa, Howard, *The Art and Science of Negotiation*, Belnap Press.

Most current thinking about negotiation emphasizes a problem solving not position taking approach, which focuses on the interests or concerns that underlie the parties' positions on issues. One way to understand this concept is to understand issue(s) as the question(s) to be answered, a position as one party's answer to these questions, and their interests as the reasons they hold that position. First articulated in the book *Getting To Yes* by Roger Fisher and William Ury, these authors champion the view that the essence of successful negotiations is to avoid bargaining over positions. They outline some very helpful principles for how to do this effectively, all of which shift the dynamics to more creative problem solving:

#### **Discuss and Address Interests**

It is critical to ask why one side is asserting a particular position on the issues, to understand what they really need to achieve. Interests can be met in many ways; positions are much more rigid.

#### **Understand the Role of Interpersonal Dynamics in Negotiations and Help People Move On**

Fisher and Ury call this "separating the people from the problem," meaning that it is important to understand the role that emotions play in a dispute but not to allow those emotions to block one from addressing each problem on its merits. Personal prejudices and prior history need to be understood—they may constitute problems people want to solve—but people should not let themselves be so motivated by bad interpersonal feelings that this becomes a barrier to self interest.

#### **Generate a Wide Range of Options, Minimizing Judgments at First**

People are less likely to hit an impasse when many options are being evaluated. Somehow, it creates at least a partial perception of everyone being on the same "side of the table," evaluating the pros and cons of options more collaboratively. A common example of this is the technique of brainstorming.

#### **Agree on Criteria by Which to Judge Options for Resolution**

It may be easier at the beginning of a process to list the general requirements that a potential agreement must satisfy than to develop the details of specific options. Such criteria are also very helpful in maintaining the sense of common endeavor in evaluating options as they emerge, for two reasons. First, the legitimacy of each side's needs is at least tacitly accepted—these criteria are often surrogates for parties' underlying interests. In using these criteria together, parties find themselves dealing with how to solve others' problems, and experience their own problems being treated as relevant by the others. Second, where parties agree on objective criteria, it can help break impasses.

These are good principles on which to ground constructive dialogue, but not every negotiation is entirely interest based—eventually a pie can't be made any larger and parties are faced with deciding who will get what. This is particularly true for disputes over water resources. A certain amount of competition is inevitable in dividing up a finite resource. Nor can the effect that politics plays in the dynamics of a negotiation be ignored. But these principles do allow participants in a consensus-building effort to maximize the creativity needed to create more "joint gains"—an essential ingredient in sound resource management decisions.<sup>15</sup>

## 5.2 Specific Challenges in Resolving Water Disputes

In addition to the problems of positional bargaining that the general principles articulated in *Getting to Yes* are intended to overcome, there are many reasons why water resource disputes are difficult to resolve. Convening a settlement or consensus-building process will not make these challenges go away magically. Rather, for an ADR process to be successful, it must be designed with these challenges in mind:

- Water resources issues often are made more difficult to resolve by intra-organizational and institutional complexities.

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<sup>15</sup> Several contributors to current negotiation theory focus on the "tension between cooperation and competition," distinguishing between "creating value" and "claiming value." While urging parties to seek ways to invent solutions that achieve joint gains, they also caution parties that if one side cooperates—for example by sharing information—and others compete, the more competitive often win. see Raiffa, H. *The Art and Science of Negotiation*.

- Water flows across political and institutional boundaries, affecting large numbers of interested parties and creating problems in deciding who should participate in a consensus-building process.
- Parties' incentives to address one another's needs may be unclear.
- Water resources are finite, increasing the potential for competition among multiple users.
- Technical and scientific uncertainties can complicate negotiations.
- Parties have unequal technical and financial resources for participation (including the problem of pro se parties), generating concerns about equitable ability to represent their interests.
- Disputes over water resources generally involve public issues, not private matters alone; laws, press, and governmental institutions all play a significant role.

An important characteristic of ADR processes is that they are flexible. Individual processes can and should be tailored to each dispute after an analysis of the particular opportunities and barriers involved. Controversies develop at different stages in the "life-cycle" of a controversy, with different degrees of polarization, and with information and options elaborated at varying degrees of detail. Legal constraints on the process and alternatives to settlement available to the parties also vary case by case and at different stages of the same matter.

### **Institutional Dynamics**

Resource management conflicts are more often between organizations or groups than between individuals. Thus, the individuals at the table must get proposals ratified by others who are not participating directly. Because each entity has its own internal decision-making process, negotiators (and neutrals) need to know the degree to which each representative can speak for his or her constituency and the freedom each has to make proposals and to commit to an agreement. Negotiators also must keep their constituencies informed about progress and problems between negotiation sessions to increase the likelihood that agreements, if reached, will be ratified.

### **Problems of Scale**

Watersheds and basins can be drawn at any scale, but because water flows from small, headwater watersheds into larger and larger basins, establishing geographic boundaries to issues and identifying those who are affected is no easy task. A basic principle is that the scope of issues and parties should match as well as possible, so that one can evaluate whether the consensus-building process involves all of those who must implement or who can block an agreement. When water flows across political and institutional boundaries, however, this can be a large number of parties. Complicating this further, water resources issues in certain areas have larger national significance, either because of the value of the resource or because of the precedential nature of the issues. Involving only local groups, which has been the approach in some situations, has been criticized by national groups as exclusionary.

### **Complex or Changing Incentives**

In contrast to more traditional administrative or judicial proceedings, few, if any, established procedures are available to structure routine applications of consensus-building processes to resource management issues. (The Administrative Dispute Resolution Act, at the federal level, does provide consistent definitions, and a few selected statutes such as the Marine Mammal Protection Act direct the formation of consensus processes for specific issues.) Each party, with different strengths in different forums, will have different perceptions about the relative advantages of negotiating. Thus, parties are as likely to approach a suggested negotiation with different assumptions on how to structure the negotiating relationship as they are to have different views on the issues.

A standard element of good mediation practice in resolving controversial environmental issues is to conduct a feasibility assessment with the potential parties to a negotiation. All parties should feel they have something to gain, and no one should feel the negotiation process would harm their current standing on the resolution of the issues. Thus, it becomes a goal of the assessment to help parties assess how potential negotiation results would compare with their alternatives. Often, how the negotiation process is organized will directly affect the potential of the process to satisfy parties' interests. A key product of any feasibility assessment will be general agreement (often mediated) among the parties as to who will participate and

in what way, the scope of issues, any deadlines, frequency of meetings, information needed to make sound decisions, who the mediator will be (if any), and other ground rules.

### **Multiple Parties/Issues**

Because natural resources, although renewable, are finite and exist in specific places, claims of rights to use the “same” locations for different uses are made by multiple units and levels of government and diverse private interests. This generally means that resource management disputes involve many parties and many issues, making organizing any negotiation process more difficult. Sometimes coalitions can be formed, where several parties can be represented by one negotiator. Concerns have been raised about limits to participation being imposed in some consensus-processes, where national interests may be at stake over what others might view as local resources. This issue of scale, who has a right to participate, and the inability due to lack of resources of some groups to participate in many different processes needs exploration.

### **Complex Scientific and Technical Issues**

Sound scientific and technical information is essential for creating solutions that work. However, parties to natural resources issues are confronted with large volumes of information, requiring a wide variety of expertise, and subject to honest differences of interpretation. Furthermore, gaps and uncertainties in the available information base are inevitable as scientific understanding continues to grow.

Models can be developed to help deal with scientific uncertainties, but they themselves can be sources of dispute between the model builders or sources of confusion in negotiations where parties have unequal technical resources. Joint fact-finding processes, in which parties agree on the design of a model or study in advance, show considerable promise. Similarly, technical committees or information sharing workshops have been used constructively to supplement policy negotiations.

### **Inequality of Resources**

ADR processes are resource intensive. The premise is that these are resources invested up front, with reduced costs during implementation, but

parties still need time to participate, funds for travel expenses, and funds for information collection, evaluation, and expert advice. Government agencies and private corporations generally are represented by paid staff. Tribal governments and national resource user and environmental organizations have staff, but they are stretched further and have fewer funds than agencies or corporations. And, local non-governmental organizations nearly always must rely on volunteers who have other jobs. For the principle of inclusiveness to be realized in practice, adequate resources must be available for participation and for informed decision making. The most successful models where parties have unequal resources have been when resources are provided by the project sponsor (e.g. Washington Water Power in the Clark Fork relicensing example) or the government agency responsible for the decision to be made (e.g. the U.S. Environmental Protection Agency in the drinking water standards example).

#### **Public/Political Dimension**

Another characteristic complicating resource management conflicts is that the issues in dispute involve public matters that may need to be resolved in public forums. Negotiators need to deal with the press and open meeting laws sensitively, and arrive at outcomes that can withstand public scrutiny and comment. As ADR expands in the water resources arena, government agencies, parties, neutral mediators and others must pay careful attention to questions of accountability. The applicability of such laws as the Federal Advisory Committee Act (FACA), Freedom of Information Act (FOIA) and others raise special legal questions. Although government officials often perceive FACA as something to avoid, experience (particularly at the U.S. Environmental Protection Agency) suggests that FACA does not inhibit the conduct of ADR processes and, indeed, that compliance with it and FOIA contribute to the perceived legitimacy of the decisions that result. Carefully designed, consensus-building processes can maximize the flexibility within public institutions while holding negotiated solutions to the same legal and regulatory standards to which any decision would be subject.

Numerous concerns or questions about ADR have been raised in the literature, some linked to the challenges discussed above. Many are actually addressed by current norms of good professional practice, and ADR practitioners would agree that:

- Goals should be clear and set by the parties;
- Settlement for settlement sake is not sufficient or appropriate;

- Legal issues should be resolved in a court of law;
- Settlements should be consistent with applicable law and policy;
- Neutrals should not take positions on the issues (arbitrators and special masters excepted) and must maintain confidentiality;
- A value should be placed on informed decisions, i.e. obtaining sound scientific, technical, economic and legal information in the negotiation process;
- Inclusiveness is important—to the extent possible, all affected interests should be consulted during the prenegotiation phase and represented in a manner acceptable to them; and
- Negotiations on public matters generally should be conducted in open meetings (litigation settlement may be an exception).

Saying that certain principles are inherent in good practice does not mean, however, that parties should not be concerned about whether this, indeed, is what they will experience or whether they will encounter problems.

Currently, there is no equivalent between mediation as a profession and the practice of law (or medicine, etc.) in standards of training or qualifications to practice such as a law school curriculum or the bar exam provides. It is

**Guiding Principles of Consensus Processes**

**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.*

**Principle #3—Voluntary Participation**

*The parties who are affected or interested participate voluntarily.*

**Principle #4—Self Design**

*The parties design the 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.*

*by the Round Tables on the Environment and Economy in Canada*

fairly easy for anyone to claim to be a mediator, and ADR programs have a wide variety of training requirements (from a few hours to a few days to

significant apprenticeship and performance-based systems<sup>16</sup>). Thus, parties need to be vigilant in their questions about what is intended when mediation is offered, and the “field” of ADR needs to be demanding of itself in living up to the standards it advocates. Among the clearest articulation of current principles for consensus-building comes from the work on sustainable development undertaken by a series of Canadian “roundtables,” which operate by consensus.

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<sup>16</sup> Society of Professionals in Dispute Resolution *Report of the National Commission on Mediator Qualifications*.

## 6.0 Remaining Questions

Standards of good practice do not yet address all issues and questions about ADR. The application of ADR to environmental and natural resources disputes is relatively new, and with experience comes new questions that deserve additional consideration:

- What are the criteria for when ADR is appropriate, and who should decide?
- Who decides what is on and off the table and who should be allowed a seat?
- When, if ever, is mandatory mediation appropriate, and what are the pressures that may be put on parties to participate even in “voluntary” processes?
- Are there cultural biases in how ADR is practiced?
- What actions are needed to avoid disadvantaging pro se parties?
- What safeguards can be put in place so as not to reduce public involvement?
- What is the proper role for governmental agencies? as parties? as mediators? as observers?
- Who should pay for ADR and how?
- What should be the qualifications for mediators of natural resources disputes?
- Will institutionalization inhibit the flexibility of ADR processes?

The most common approach in mediating environmental and other natural resources disputes is to conduct a “convening” phase, which if done with respect for the voluntary nature of ADR processes, in essence becomes a mediation about the “terms of reference” of the process: the scope of issues (i.e. what is on and off the table), who should be involved, timetable, how an agreement will be implemented, if reached, and the resources needed for informed decision making. The criteria for when ADR is appropriate is then the parties to decide. However, considerable more research could and should

be done to compare the characteristics of cases that have been mediated, the challenges that arose, whether and how they were dealt with, and the outcomes achieved, to see if additional sophistication could be achieved in the screening criteria government agencies and parties use to decide whether or not a case is appropriate for ADR. It would be unrealistic to assume that a case should be without difficulties before it could be mediated—why then would one need an ADR process? However, further thought on screening criteria might help everyone involved anticipate challenges and plan in advance for how the process should be designed to increase the likelihood of success.

An axiom in the ADR field has been that mediation is a voluntary process. However, the field should not avoid asking when, if ever, mandatory mediation might be appropriate. The recent amendments to the Montana general stream adjudication statute do allow the Water Court to order parties to participate in mediation, and judges in other arenas are already doing so as well. Data may show that this is a helpful step to get recalcitrant parties (or frustrated ones) to take a serious look at genuine opportunities for settlement. A related question that deserves attention is to ask about the pressures that may be put on parties to participate even in “voluntary” processes. When a governmental agency announces that it will make a decision based on the recommendations of a consensus process, it is very difficult for parties who want to influence that decision to refuse to participate, even if the premises on which it is set up (e.g. what assumptions are made in how the question for decision is framed) are not attractive or even acceptable. In the end, the ADR process may be an overly expensive way to reach the same impasse, if the government agency isn’t open to allowing the parties to influence whether, and under what circumstances, the process is convened.

Disputes over water resources in the West bring together peoples of diverse cultures. Communication and decision making styles are one part of what defines different cultures. Therefore, it is likely that there are cultural biases in how ADR is practiced. What are they? And, how can we all draw the strengths brought by the rich traditions of the different people’s of the West into the processes of dialogue and negotiation? Some research has begun on these and other issues of cultural diversity, and efforts should be encouraged to support the articulation of traditional and new approaches by Native American, Hispanic and other groups.

Fairness is a measure of success that is important to those who participate in and evaluate ADR processes—or any other decision making process. Questions that have arise about ADR include: (1) what actions are needed to

avoid disadvantaging pro se parties? and (2) what safeguards can be put in place so as not to reduce public involvement? The latter has been answered to some degree, but more work is needed to link consensus-building strategies that work best with organized groups and public involvement processes that are designed to reach out to the broader public. The issues of legal representation or lack of legal representation are ones of power and resources, which can be dealt with in part during the convening phase if parties are allowed an influence in the design of the process, however, the legal aspects of it deserve additional attention.

Some remaining questions are genuinely matters of judgment, personal philosophy, and varying circumstances. Certainly, these include: (1) what is the proper role for governmental agencies? as parties? as mediators? as observers?; (2) who should pay for ADR and how? and (3) what should be the qualifications for mediators of natural resources disputes? It is likely that there is no single correct answer for these questions. The proper role of the government agency may depend on the circumstances. Generally, when the agency has statutory authority to implement, it is most appropriate for them to be active advocates of those guidelines and principles, which often takes them into the role of parties, since many laws and agency mandates establish competing goals and priorities. Sometimes, however, agencies have dual responsibilities or process responsibilities that allow them to play more of a convenor role without relinquishing responsibility for hard decisions. Payment for ADR most often comes from the agencies responsible for the decisions, which appears to be seen as legitimate by the parties and does not conflict with the mediator or arbitrator's perceived neutrality. In other circumstances (e.g. the Truckee Carson negotiation), parties prefer to share the costs of the process.

Finally, sophisticated observers and supporters of the flexibility to tailor ADR processes to individual situations express concerns that the institutionalization of ADR, in part to ensure quality of practice as well as to promote the greater use of these processes, will stifle what is best about this approach. Some forms of institutionalization clearly pose less risk of this, particularly the establishment of the state office of mediation which provide case intake services and maintain rosters of mediators, among other services. Detailed procedures could be a problem, particularly if they prescribe what issues can be negotiated and who can participate, since the full variety of circumstances could never be anticipated. A middle ground deserves exploration, following the model of the federal Negotiated Rulemaking Act, which provides safeguards for parties such as confidentiality, neutrality of mediators, and a convening process which has clear mechanisms for public comment. One model that deserves additional consideration is to add

amendments to environmental statutes, which authorize but do not require mediation for identified decisions, establish mechanisms for parties to nominate disputes for mediation, and encourage consultation on key elements of how a process is structured, i.e. gaining agreement on but not prescribing in advance: the scope of issues, parties, timetable, how an agreement will be implemented if one is reached, use and selection of a neutral, and resources for an informed decision.

These are only a few of the many questions that deserve additional attention in the years ahead. The fact of these questions is a positive sign. It means that the application of ADR to water resources issues is mature enough for serious evaluation.

## **7.0 Conclusions and Recommendations**

Sufficient experience now exists to be confident that ADR is a useful tool for parties interested in resolving their differences over water resources issues. Numerous examples exist where ADR has provided positive outcomes in helping parties clarify issues, understand the reasons for disagreements, develop a common factual base for making decisions, generate options that might satisfy each other's concerns, reach agreements, open lines of communication, improve relationships, and reopen communication during the implementation of decisions, when difficulties are encountered.

Enough reflection about the application of ADR to environmental and natural resources disputes also has taken place that a more detailed understanding is emerging of the specific opportunities that are appropriate for ADR, the specific roles that neutrals can play, and the limitations that must be considered.

ADR is no panacea, however. It will not resolve all cases, either because not all parties are ready to settle, their interests are too far apart to reconcile, or the people involved (the neutral or the parties) were inexperienced and made mistakes. ADR also is not an appropriate tool in all circumstances, particularly for interpretation of legal principles; and it should not be used to avoid legal requirements.

Actions can be taken to encourage the greater use of ADR in water disputes and to direct its application appropriately. Some of these actions are governmental, others are more general suggestions that anyone might consider.

## Recommendations for Governmental Action

The following general recommendations should be considered:

1. State legislatures should consider authorizing legislation similar to the Administrative Dispute Resolution Act on the federal level, to:
  - Provide clear authority to state agencies to utilize ADR,
  - Establish consistent definitions of terms,
  - Ensure that participation is voluntary (perhaps with the exception of settlement conferences noted above),
  - Establish confidentiality protections for cases not in litigation,
  - Require disclosure by neutrals to ensure that parties can evaluate conflicts of interest,
  - Provide guidance on procedures (e.g. to clarify how parties can initiate a request for mediation, provide information about the existence of a process and an opportunity to ensure that all affected interests are represented, encourage negotiations on public policy decisions to be open to the public with provisions for closed caucuses or working groups, etc.), and
  - Authorize “state offices” of dispute resolution to provide technical assistance to state agencies and to establish a roster of qualified mediators.
2. The U.S. Congress should consider amendments to the Clean Water Act, Endangered Species Act, the National Environmental Policy Act, and other environmental statutes when they come up for reauthorization, which would:
  - Identify specific decision points at which either the applicable agency or individual parties would be authorized (not required) to initiate an ADR process,<sup>17</sup>

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<sup>17</sup> Examples might include: an opportunity for an applicant to request mediation of a controversial 404 permit under the Clean Water Act, mediation of disputes that arise over a draft EIS (e.g. over the choice of the preferred alternative), or a collaborative fact-finding process to develop a recovery plan or habitat conservation plan under the Endangered Species Act.

- State that, except in an enforcement context, the process should comply with the Federal Advisory Committee Act;<sup>18</sup> and
  - Authorize the agency to allocate funds for joint fact-finding and other technical assistance to the process (including mediation) to ensure that the decisions made were well informed.
3. The National Academy of Sciences, National Science Foundation, the research arm of the Federal Judicial Center or some other appropriate administrative body should consider funding more research and evaluation on the use of ADR in water resources disputes specifically and public policy matters more generally and to provide opportunities for meetings of ADR program administrators in state and federal court systems and in state and federal agencies to exchange information and learn from one other's experiences.
  4. Funding should be provided to the The Bureau of Reclamation, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and comparable state agencies for pilot programs to expand the use of mediation in water resources disputes, and programs already in place at the U.S. Department of Justice and Environmental Protection Agency should receive continued recognition and support.

## General Suggestions

The following should be considered by anyone involved in the application of ADR to water resources disputes:

1. Identify opportunities for consensus building early in the decision-making process;
2. Define the objectives of the process collaboratively, taking into account the timing (early versus late in a decision-making process) and the degree of polarization;
3. Establish agreed upon groundrules at the beginning of a process and consider signing a participation agreement embodying these

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<sup>18</sup> This does not mean that all processes would require that a committee be chartered. The Federal Advisory Committee Act establishes the guidance for determining which processes would need charters and which would not.

groundrules for cases in litigation or where there is the likelihood of litigation to provide protections for the parties;

4. Ensure that all affected interests have an opportunity to participate in a meaningful way;
5. Invest in information collection and collaborative fact-finding and analysis to ensure all parties have equal access to information and to increase the likelihood of an informed decision;
6. Establish the expectation of mutual respect; and
7. Demand neutrals behave in a neutral fashion and with a high degree of skill, encouraging dispute resolution service providers (organizations or individuals) to support and participate in continuing education programs.

ADR, particularly mediation, has demonstrated positive results for resolving water resources disputes—when objectives are clear and mutually agreed upon, when the process is voluntary and inclusive, when there are incentives to settle, when there are adequate resources for participation and for information collection, when parties keep their constituencies informed, and when reasonable deadlines exist. Given the intensity of controversy over water, not all ADR attempts will be successful, however; and, depending on one’s definition of success, most settlements will involve sufficient compromise to generate frustrations even with the “success” stories. Those interested in the potential of ADR in water matters shouldn’t shrink from the scrutiny needed to expand and improve this practice. There is a lot to learn—and the lessons are worth the effort.