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POLICY CONSENSUS INITIATIVE



STATES MEDIATING SOLUTIONS TO ENVIROMENTAL DISPUTES

The Policy Consensus Initiative works with states to promote use of the tools of conflict resolution to resolve policy disputes and negotiate change benefiting all citizens. Inside are five case studies reporting how these tools helped states resolve five complex, at times heated, enviromental disputes.

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Photos: Cover - sand dune (also p.2) University of Delaware Sea Grant College Program; crane (also p. 8) Devin Wilbur through the Ohio Lake Erie Office; desert tortoise (also p. 4) Clark County, Nevada Desert Conservation Program; ship (also p. 7) City of New Bedford Office of Tourism; fishing (also p. 10) Montana Council of Trout Unlimited

The States Can Settle Environmental Conflicts

Environmental conflicts have become commonplace. We read about them in our newspapers every day. Names and datelines differ. But lawsuits against federal and state agencies over endangered species and habitat protection, water quality, facility siting, standard setting and rulemaking are occurring all over the country.

Environmental conflicts have profound impacts on states. They are not only costly and time-consuming; they often stymie real progress toward protecting the environment. For one thing, the rapid escalation and polarization of these conflicts often preclude attempts at quick, beneficial resolution.

During the past twenty-five years we have learned that the solutions to environmental conflicts can come only when competing interests work together. Each party in these conflicts holds a piece to the puzzle and only by sitting down at the same table can workable agreements be achieved. Governor Dan Evans of Washington illustrated this lesson during the mid-1970s when he initiated the first use of environmental mediation to resolve a dispute over placement of a dam.

The states' use of consensus-based processes has continued to grow and expand. State officials recognize the need to enlist the cooperation of landowners, industries, and environmentalists in efforts to protect the environment and conserve natural resources. When members of affected communities partner with policy makers to resolve environmental conflicts, they are more likely to support - rather than impede - the resulting policies. As Governor John Kitzhaber of Oregon says, "Regulation can keep people from doing the wrong things, but it provides no incentive for them to do the right thing."

Many states now have public policy dispute resolution programs that can be a resource to state officials and agencies. A list of these programs may be found on the inside back cover of this publication.

This report describes how states benefit by using the processes of conflict resolution and consensus building to deal with differences over a variety of environmental issues. These issues vary from cleaning up the environment and managing natural resources to establishing rules for water quality and coastal zone protection and preserving endangered species.

While consensus building and collaborative processes can be extremely useful in resolving public disputes, there is no cookie cutter approach to how to use them. There are, however, some general principles about when and when not to use these processes. In the coming pages, you will find this kind of useful information.

Here are five examples of the ways states are fashioning better environmental solutions and policies.

1. In Delaware, Governor Tom Carper convened a group that reached resolution of a 22-year-old dispute between industry and environmental organizations over regulations for protecting the coastal zone.
2. In Nevada, land developers and environmentalists reached an agreement on a conservation plan that both permits continued development in the Las Vegas Valley and enhances the chances for survival of the desert tortoise in its Mojave Desert habitat.
3. In Massachusetts, state legislators were involved in negotiations that halted incineration of PCB-sludge dredged from New Bedford Harbor, one of the most contaminated marine sites in the world.
4. In Ohio, consensus was reached on 81 of 99 issues affecting water quality standards for Lake Erie.
5. In Montana, key stakeholders successfully negotiated difficult issues of water rights and arrived at agreement on legislation to achieve instream flow protection.

Case Studies

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Why States are Turning to Collaborative Approaches

A study released in 1999 by the Consensus Building Institute (CBI) shows a high degree of participant satisfaction with the use of mediation in 100 land disputes which CBI examined.

Participants reported that mediated outcomes were better than if they had been obtained through traditional conflict settlement methods. Most said the agreements were well implemented (75 percent), and were more stable than if they had been achieved with other processes (69 percent), according to the CBI study. Four hundred participants from 100 cases were interviewed. In the 100 cases which CBI examined, 78 percent of the mediations were sponsored or initiated by federal, state and local governments. States sponsored the most consensus processes (29 percent).

The CBI study, which was prepared for the Lincoln Land Institute, and other assessments demonstrate the advantages mediation and other consensus-building approaches offer. These approaches help ensure that the best available information is taken into account by all parties as part of the decision-making process. Agreements reached are more likely to be implemented by all parties, in part because working relationships develop, resulting in better communication.

There are political advantages, too. Public officials can demonstrate that they are opening up the decision-making process and engaging diverse interests in finding solutions to problems.

Because they support mediated approaches, several state legislatures have passed laws authorizing agencies to use these procedures. For example, Oregon passed a law permitting all state agencies to use alternative means of dispute resolution instead of litigation for controversial issues. Texas has passed the Government Dispute Resolution Act. For other examples, see the ADR legislation page at the PCI website, www.agree.org.



Along the Delaware Coast

Balancing Environmental and Industrial Concerns in Delaware

The Problem

To outsiders, Delaware's Coastal Zone Act may sound conventional enough, perhaps something to protect sand dunes along the state's Atlantic Coast. In fact, the 1971 act is sweeping legislation dealing with matters of air, water, and land management along almost the entire sloping sweep of the state's coastline, from the Delaware River in the north through the Delaware Bay to the Atlantic Ocean in the south. In the words of mediator-lawyer Gregory Sobel, it "is a powerful land use law prohibiting new heavy industry from being built in Delaware's coastal region, while allowing existing heavy industry to continue operating."

One notable hitch existed, however, in applying the law. For more than 25 years after passage of the Coastal Zone Act, there were no formal regulations to implement it. Instead, the state's Department of Natural Resources and Environmental Control (DNREC) used an informal, undefined regulation system that pleased neither environmentalists nor industry representatives who disagreed frequently over the law's implementation. Several attempts along the way to adopt formal regulations were unavailing.

Principles of Consensus Building

- Arriving at a common information base about the source(s) of a problem
- Separating the people from the problem
- Focusing on interests instead of positions
- Brainstorming win-win options
- Reaching a solution that serves everyone's interests

Strong differences existed between industry and environmentalists over the department's efforts to interpret and apply the law to individual permit applications. Industry said DNREC's case-by-case approach was working; environmentalists were not as pleased with the department's implementation of the law.

The Process

In a new attempt to draft regulations, DNREC officials hired Sobel, director of the Massachusetts-based Environmental Mediation Services, and colleagues from the Consensus Building Institute to assess whether a new effort to draft regulations would be feasible. As defined by Sobel, conflict assessment is a tool for agencies and others considering whether to initiate an intensive negotiation process to "determine who has a stake in a dispute, what their interests are, and whether the situation is appropriate for consensus building." Sobel emphasizes that "the time and financial costs of negotiations are so significant that the parties should attempt consensus processes only if they have carefully analyzed the situation in advance."

In Delaware's case, the initial assessment was that the situation was not then ripe for a successful consensus-seeking process because some industry representatives believed DNREC's case-by-case approach was preferable to what might result from a negotiated process. The conflict assessment team pointed out that if Governor Tom Carper announced he would establish new regulations that would be substantially different from the existing, informal rules and, at the same time, stressed his preference to create those regulations through a consensus process, all key parties likely would be willing to participate in negotiations.

Governor Carper and DNREC Secretary Christophe Tulou made such an announcement in 1996. All invited participants agreed to join the Delaware Coastal Zone Regulatory Advisory Committee. The 20 members of the group represented an array of interests, among them the Sierra Club, the Delaware Nature Society, Dupont

Corporation, the Chemical Industry Council, unions, the farming community, and DNREC.

In the negotiations, industry's interest was in maintaining the economic viability of companies in a rapidly changing global marketplace. The environmentalists' main interest was the long-term environmental health of the coastal zone. Government representatives wanted to reconcile differences and finally be able to promulgate regulations.

The advisory committee held three two-day negotiating sessions between the fall of 1996 and December 1997. At first, the process involved representatives discussing each others' interests, then brainstorming options to meet those interests. Through a series of trade offs, an agreement was developed between industry and environmentalists that allows industry the flexibility to add and change products and processes while assuring environmentalists that continuous environmental improvements will be made to the coast. Industry is allowed to increase production capacity so long as it does so within its existing footprints in the coastal zone. This approach is accomplished through a procedure for allowing "offsets" in permits to industry.

An offset allows some projected environmental degradation that can be "offset" through other measures that are taken to improve the environment. As a means to ensure that this approach actually results in environmental improvement in the coastal zone, the group proposed that DNREC develop a set of environmental goals and indicators and establish a committee to monitor how the offset policy is carried out.

The Result

In December 1997 negotiators crafted a final draft MOU and by March 1998 all committee members had signed it, and then presented it to Governor Carper who also signed the agreement. As is required in negotiated rulemakings, a full public comment process followed. The draft regulations were published and hearings were held around the state. Many members of

"For the first time in the long history of Delaware's Coastal Zone Act, all interests supported the same set of rules."

A Conflict Resolution Glossary

Here are some basic terms in the practice of conflict resolution.

ADR: Appropriate dispute resolution.

Negotiation: Disputing parties engage in discussions to explore their interests and needs in an effort to reach agreement.

Facilitation: An impartial third party provides guidance to design and manage the communication process. Specifically, a facilitator helps a group work toward effective participation and communication to resolve a problem or address a set of related issues.

Mediation: An impartial third party assists disputing parties in reaching a mutually acceptable agreement. The mediator guides the parties in developing their own resolution of the issues and does not impose a decision on them.

Collaborative Problem Solving: Parties work together to define problems and generate options and objective criteria to reach decisions by consensus (see below). A third party may provide facilitation for the group.

Consensus Building: All people who have a stake in an issue or conflict work together toward common understanding and an agreement that satisfies all their interests. Consensus is not compromise. Compromise involves resolution of differences in which each side makes concessions or agrees to settle for something in the middle.

the advisory committee spoke in favor of the regulations; no members opposed them. For the first time in the long history of Delaware's Coastal Zone Act, government, industry, environmentalists, organized labor, and agricultural interests all supported the same set of rules. The regulations were formally adopted in April 1999 and are now in force.

In a case study, Sobel says the key to the Delaware settlement is that the new regulations “ensure continuous environmental improvement in the coastal zone while at the same time providing industry with the flexibility to remain competitive in the global marketplace.”

Lessons Learned

If the powers that be are willing at the onset to commit to implementing whatever agreements the groups develops, there is greater incentive for stakeholders to work together toward developing implementable solutions.

A conflict assessment is an essential step to take before proceeding with a consensus process.

(This case study is based on a chapter prepared by Gregory Sobel for publication in *Negotiating Environmental Agreements*, edited by Lawrence Susskind, Paul F. Levy and Jennifer Thomas-Lerner, forthcoming from Island Press.)

Resolving an Endangered Species Conflict in Nevada

The Problem

The desert tortoise, which is both the Nevada State reptile and the largest reptile in the Mojave Desert, had been around for about one million years when Las Vegas development seemed to threaten its odds for survival. By the late 1980s, Clark County, the cradle of the gambling mecca, thrived with an ever-expanding population and mushrooming suburbs edging relentlessly into the tortoise's hot, dry habitat. Loss of habitat combined with other habitat-degrading factors such as livestock

grazing, off-highway-vehicle use, drought, and disease to prompt the U. S. Fish and Wildlife Service in 1989 to list the desert tortoise as endangered.

The action abruptly suspended burgeoning commercial and residential development and forced Clark County to halt work on schools, utilities, and hospitals. A raging battle ensued. There was “tremendous community fear that the county's vibrant economy and rural culture was on the verge of collapse if a solution to the species' preservation was not found,” according to a University of Michigan masters project report. “Reactions were vicious and the ‘shoot, shovel and shut-up’ mantra became commonplace among embittered Nevada residents.” Developers and city and state governments sued the U. S. Department of Interior to overturn the listing, but they lost.

The Process

But even before the lawsuit failed in 1990, the University of Michigan report says that Clark County commissioners and local environmentalists looked to other options “that could preserve the tortoise (endangered) listing without ripping the community apart.” They turned to Habitat Conservation Planning (HCP), provided under the federal Endangered Species Act, that allows for the incidental take of a species in exchange for protection of habitat on nearby lands. The term “take” refers to killing, snaring, or trapping fish or game. To develop the HCP, a steering committee

The Desert Tortoise



was formed. It included representatives of local and state governments, federal agencies, local environmentalists, the Greater Las Vegas Board of Realtors representing developers, and such diverse interests as the Southern Nevada Off-Road Enthusiasts (SNORE). According to the report, the early meetings involved considerable shouting from all directions such that Clark County hired Paul Selzer, a veteran facilitator familiar with the HCP processes, to run subsequent meetings. Selzer immediately imposed three rules:

1. No discussion over the validity of the Endangered Species Act
2. No debate over the listing of the tortoise
3. Everyone at the table had to be willing to give up something.

Within these guidelines, the committee's job was to develop an HCP that provided alternative-habitat protection for the tortoise through use of federal lands that made up about 90 percent of the rural landscape in Clark County. Special technical and implementation and monitoring committees were set up to address particularly controversial matters. Argument-filled meetings dealt with such issues as the purchase of grazing rights' allotments from ranchers, location and establishment of reserve areas for the tortoise, road closures, and use designation of public lands.

Committee members faced a tough immediate deadline. During their first year, they had to develop a plan that met U. S. Fish and Wildlife Service standards for protecting the tortoise or the issue would go back to the courts. In fact, they reached agreement on a short-term HCP in 1991 which was replaced with a permanent Desert Conservation Plan in 1995. In all, during nine years of an augmented HCP process, committee members logged 800 hours of meetings, which often became full-day affairs with meals eaten at the table.

Why did the process result in agreement? The University of Michigan report quotes facilitator Selzer: "It was really a matter of not

having a better alternative ... and everyone would have lost otherwise. Environmentalists would have lost because the issue would not have been resolved at all ... Builders would have lost because it would have cost them a lot of money to go through another lawsuit and development would have faced a serious setback ... Rural folks knew they would lose access to public lands one way or another. So everyone was better off having at least a say in the matter."

The Result

According to the Fish and Wildlife Service, the settlement means that Clark County, Las Vegas, and companion cities "will be allowed to take, incidental to development activities, desert tortoises on 111,000 acres of non-federal land in Clark County ... over the next 30 years." In return, conservation measures "will minimize, monitor, and mitigate the effects of this take and the associated loss of tortoise habitat in the permit area by enhancing the species' chance for survival and recovery in the wild" on the vast federal lands in Clark County. Fees of \$550 an acre for land under development help to pay for conservation efforts.

The University of Michigan report identifies three major achievements of the Habitat Conversation Planning process:

1. Establishment of a one-year pre-HCP settlement in 1990-91.
2. Development of a 30-year Desert Conversation Plan between 1992-95.
3. Formation during 1995-98 of a multi-species HCP plan which applies excess conservation funds to preventing 200 additional species from becoming endangered while permitting Clark County development to continue.

HCP efforts have established more than 800,000 acres of habitat preserve, "implemented monitoring programs, and improved ecological conditions and land-use patterns of the Clark County region," the report says.

"Surplus funds from a conservation plan to preserve the desert tortoise are helping to prevent 200 other species from becoming endangered."

Lesson Learned

A few simple ground rules can help move a group from arguing about what they can't control to focusing on what they can affect and what they agree on.

Dealing with PCBs in a Storied Harbor

The Problem

The harbor of New Bedford, Massachusetts is central to the city's renown. It sheltered 330 whaleships in the mid-1800s and novelist Herman Melville noted the city's prosperity from whaling. Fishing boats moored in the harbor in time replaced whalers. For many years, the city was the leading U.S. port in terms of value of the total annual fish catch.

But difficulties were building. For 30 years, well into the 1970s, factories along the Acushnet River emptied waste laden with Polychlorinated Biphenyls (PCBs) that flowed into the harbor. PCBs, once widely used as liquid coolants and insulators in industrial equipment, are dangerous environmental pollutants. "The immediate harbor was an ecological disaster and the contaminated sediment, although concentrated in one area, was migrating little by little into the greater harbor, and then seaward," according to *Environment Newsmagazines*.

The U. S. Environmental Protection Agency declared the harbor a priority site for cleanup under the federal Superfund program. It identified a five-acre segment of the harbor and designated it a Hot Spot. The Hot Spot contained about 45 percent of the PCB-laden sludge in the entire harbor. In 1990, after periods of review and public comment, EPA issued plans to dredge the Hot Spot sediment, store it in a secure container, and incinerate the sediment on site.

But citizens in New Bedford and neighboring communities increasingly came to oppose the use of incineration. There were

fears that air-borne contamination from incineration would spread widely over the New Bedford area.

Acrimony about the proposed incineration grew to the point that in 1993 the Massachusetts Office of Dispute Resolution (MODR) was called in to help create a forum and to assist stakeholders in negotiations. The New Bedford Harbor Community Forum was established. Its members included area citizens groups such as the Downwind Coalition and Hands Across the River, the municipalities of New Bedford, Fairhaven and Acushnet, the EPA and the Massachusetts Department of Environmental Protection, state legislators, environmental activists, and local business representatives.

The Process

The first phase addressed whether to incinerate the PCBs. The second phase would seek to determine what to do with the contaminated materials. Jane H. Wells, the MODR's deputy director, assisted the parties in selecting J. Michael Keating as mediator, helped design the structure of the mediation, and served as co-mediator throughout the process. A fixed number of 25 representatives of stakeholder groups plus regulators began the difficult task of getting past their positions to find their mutual interests.

The mediation had an uncommon ingredient. The participants believed it necessary to hold all sessions in public so that the entire community would be aware of the proceedings. The sessions were videotaped and broadcast later on cable television to affected communities. "There was work, certainly, behind the scenes there were conversations," Wells reports, but "the mediation was done with the public observing."

In 1994, at the end of the first phase of the process, the EPA agreed not to incinerate the sediment. Forum members then turned to evaluating alternative technologies to be used on site to get rid of it. The effort lasted until 1998.



New Bedford, Massachusetts Harbor

How were forum members of different, often nontechnical, backgrounds able to evaluate alternative technologies?

Wells says they took several months to develop some competency to make choices. Then they interviewed representatives of companies whose products held out hope that they could successfully treat PCB sediment. Citizen health was one of the most important criterion against which product claims were judged. Forum members chose three companies for purposes of testing their technologies. EPA funded the testing during 1995-97.

“One of the important things about this experience is that these people became unbelievably well informed and sophisticated over the course of the process,” Wells says. “They stayed in the process for five years. It almost never happens. People drop out; people get tired. They got tired, but they stayed the course.”

The Results

The first result of the Forum process, as noted, was EPA’s agreement not to incinerate the polluted sediment. The second result was an agreement in 1996 to store sediment containing significant levels of PCBs from areas less contaminated than the Hot Spot in confined disposal facilities located at intervals along the Acushnet River and the harbor.

In 1998, forum members were about to agree that two of the tested technologies — one that dewatered sediment and another that would destroy the sediment on-site — should be used on sediment dredged from the Hot Spot, according to Wells. Then people in the area of the proposed on-site facility raised objections. They had hitherto resisted entreaties to join the forum. Now they turned to the city of New Bedford for help. According to Wells, their message was: “We don’t want anything to happen on site; we just want you to haul the stuff away.”

When the city of New Bedford sided with the objectors, many forum members were “heart sick,” Wells reports. But their final statement agreed that the contaminated Hot Spot sediment be removed in sealed containers to an off-site landfill rather than being treated on site. It concludes: “All the forum members are disappointed that the majority opinion is to use landfilling and urge the EPA and scientific community to use the results of the (forum’s) treatability studies and the results of this forum in their future endeavors.”

Even though the group’s final document demonstrated their disappointment, the forum process itself had many successes. The planned incineration was halted. Participants, once vehement opponents, were able to reach consensus on an innovative resolution to a difficult environmental problem. And even after the forum officially ended, participants from diverse groups continued to meet and work together on community environmental issues.

Lessons Learned

A diverse group of citizens can master scientific and technical information and use it to develop sound policy decisions.

If all stakeholders are not at the table during a negotiation, the agreement that is reached may not be implemented.

“These people became unbelievably well informed and sophisticated over the course of the process ...(and) they stayed in the process for five years.”

Reaching Consensus in Ohio on Water Quality Standards

The Problem

Ohio is rife with water. It has 29,000 miles of streams and rivers, a 451-mile border along the Ohio River, 5,000 lakes, ponds, and reservoirs and, not the least, 236 miles of shoreline along Lake Erie. This latter fact qualifies Ohio as one of the eight Great Lake states and, thus, subject to the Great Lakes Water Quality Initiative.

In 1995, six years after the start of negotiations to create uniform pollution limits in the eight states, the U. S. Environmental Protection Agency issued its far-reaching initiative that caused a great deal of conflict with the Great Lakes governors. EPA gave the state two years to implement rigorous standards for waste disposal and put in place strict limits on what can be discharged into the Great Lakes. In doing so, however, US EPA gave the states flexibility in determining how to meet the uniform water quality standards for the Great Lakes basin.

Ohio's approach to developing standards was to create a 25-member group of diverse stakeholders who would seek to reach consensus on new water quality rules and recommend them to the Ohio Environmental Protection Agency (OHIO EPA). Members of what was designated the Great Lakes Initiative External Advisory Group (EAG) included representatives of statewide and Lake Erie-area environmental groups, business and industry, local government, higher education, and the Ohio EPA.

The EAG had to resolve a total of 99 issues that could potentially divide the group. To make matters even more complicated, the issues were laden with technical complexity, according to Fred Bartenstein, one of two facilitators for the group. They involved establishing numerical levels (parts per million or billion) of chemical and biological agents that could be present in waters discharged into Lake Erie. These levels have to be met by industry and all other waste-



Dredging on Lake Erie

water dischargers. Deciding on these parameters involved considering matters such as the relative level of presumed cancer-causing agents in water; the required number of fish or water bugs that would need to be present to determine whether water could support aquatic life; and the rate of water flow in streams and tributaries necessary to dilute pollution from, for example, the outflow pipe of a water treatment or power plant.

The Process

At its first meeting, Ohio EPA Director Donald Schregardus gave the EAG a powerful incentive to succeed, according to co-facilitator Roberta F. Garber: "If the group achieved consensus on an issue, and if the recommendation was consistent with state and federal law, he would implement it. If the group could not reach consensus, he would make a decision after weighing Ohio EPA staff recommendations and the recommendations of the major interests groups on the EAG."

Garber describes the EAG's work using a four-phase framework developed by G. Aubrey Fisher in his book *Small Group Decision Making*. In the first "forming" or orientation phase, the group adopted ground rules to govern their interactions based on a consensus decision-making model proposed by the two facilitators. Members began their work on water quality rules, but at that point were unwilling to

"Industry and environmental groups in Ohio reached agreement on 81 of 99 issues involved in setting rigorous water quality rules."

When Should Consensus Approaches Be Used

Consensus-based approaches for resolving environmental conflicts are more likely to be successful when the following factors are present:

- The issues are of high priority and a decision is needed.
- Relevant laws are flexible enough to permit a negotiated agreement.
- The outcome is genuinely in doubt and the parties at interest do not have better options for getting the outcome they want.
- The public is frustrated with how government has handled the situation.
- Representatives of all key interests are willing to negotiate.

Even though they can be effective, consensus processes are not always the best choice for every situation. Mediated approaches should not be used when:

- It is important to get legal clarification or set legal precedent.
- The situation does not allow time for negotiation and consensus building.
- The issue is so polarized that face-to-face discussions are not possible, or negotiations will substantially affect parties who cannot be effectively represented.

break into small groups because their “trust level was not high enough to rely on secondhand reports from small groups,” Garber writes.

In the second “storming” or conflict phase, groups typically begin to express strong opinions and feelings. But in the EAG’s third meeting, facilitators observed that none of that was happening because members of the group did not want to speak openly in front of the “opposition.” The facilitators suggested that the group divide into caucuses for facilitated discussions. The caucus groups were able to make progress and when the whole group reconvened, Garber reports, “those issues on which the caucuses agreed with Ohio EPA staff were crossed off the list as areas of group consensus. From then on, group time was spent on the non-consensus areas.”

In the third “norming” or emergence phase, groups typically develop cohesion. At a two-day meeting in August 1996, group members recognized that they had fallen behind schedule if they were to meet a March 1997 EPA deadline for establishing standards. So the group accelerated its efforts and from that time forward the “EAG was making progress in both completing its work and building relationships among group members,” Garber reports.

The fourth “performing” or reinforcement phase is one in which members achieve consensus on decisions. Over the last six months, the EAG achieved consensus on 81 of the 99 issues. For issues on which the group members agreed to disagree, the Ohio EPA staff had the sensitive task of taking the viewpoints of both caucuses under advisement in crafting applicable rules.

The Result

Garber sums up the outcome of the two-year EAG process:

“When the rules were taken before the Joint Committee on Agency Rule Review for legislative approval, there were no surprises. All perspectives had been thoroughly aired, and the interest groups were

confident that they had been heard.... The groups ultimately determined that it was not in their interest to protest the rules, because a better outcome was not possible.” The legislature has since adopted the new rules.

Lessons Learned

Participants in negotiations often start off mistrustful and thus unable to collaborate. But with assistance from an impartial, skilled facilitator, they can learn how to work toward achieving mutually agreeable solutions.

The presence of a fixed deadline can promote reaching agreements in a timely fashion.

Protecting Instream Flows in Montana

The Problem

The allocation of water is one of the most fervently debated issues in the arid American West. The principal areas of debate include offstream use, instream flow, and the doctrine of prior appropriation.

“Offstream” refers to removing water from streams and rivers for domestic and commercial consumption, irrigated agriculture, industry, and mining. “Instream” refers to maintaining enough water in rivers and streams to protect fish and wildlife, recreation, aesthetic and scenic values, and water quality.

In Montana, as elsewhere in the West, the doctrine of prior appropriation, or “first in time, first in right,” is central to debate over water use. It is the basic tenet of water law and policy, adopted to facilitate the settlement and development of the West.

In a growing Montana, the demands for instream and offstream uses have intensified. As Matthew J. McKinney, director of the Montana Consensus Council, reports:

Although offstream uses of water remain critical to the culture and economy of



Fly Fishing in Montana

Assessing When to Proceed

Before using a consensus-based process, an assessment first should be made to determine if the situation lends itself to consensus building. Here are key steps in an assessment:

- Identify the stakeholders.
- Gather information about the concerns and interests, both common and opposing, that you and other stakeholders have.
- Analyze the alternatives available to stakeholders in the absence of trying to reach a negotiated agreement.
- Identify the constraints or obstacles to using a consensus approach.
- Assess stakeholders' ability to be represented and willingness to come to the table.

Montana, there has been an increasing demand and effort since the late 1960s to leave water in many streams and rivers, unavailable for diversion and offstream use, to satisfy fish, wildlife, water quality, and other purposes.

In 1988, the Montana Department of Natural Resources and Conservation (DNRC) prepared a discussion paper outlining options and possible strategies to protect instream flows. It created a working group representing diverse interests to review the paper. Sensing a threat to their livelihood, many agricultural members of the group were upset about proposed measures that contemplated voluntarily selling or leasing water rights for instream uses.

DNRC incorporated some ideas from the working group and presented all the options to the public at increasingly tense public meetings throughout the state during one of Montana's hottest, driest summers. "Fish died, and farmers and ranchers had a difficult time getting water for their crops," McKinney writes. Meanwhile, farmers and ranchers were "furious over the idea of voluntarily selling or leasing their water rights to protect instream flows," he says.

In 1989, Montana's legislature passed restrictive legislation allowing the Department of Fish, Wildlife and Parks to lease water on a trial basis. "Nobody was

happy and the debate continued," McKinney writes. Two legislative initiatives failed to become law.

The Process

In 1994, the Montana Consensus Council (MCC) successfully mediated a long-standing dispute between recreationists and ranchers over access to state school trust lands. The main participants happened to be the principal adversaries in the debate over instream uses of water. After participants reached agreement on state lands, MCC suggested that they might want to shift their focus to instream flows. Each side eventually agreed that, as the council puts it, "a consensus process might provide an opportunity to address the issue constructively and reach a mutual gain solution."

The participants decided that if they were to make progress, the negotiation should include only representatives from key advocacy groups. The parties included the Montana Water Resources Association, the stockgrowers association, the association of conservation districts, the Montana Farm Bureau, the Montana Wildlife Federation, and the Montana Council of Trout Unlimited.

McKinney comments: "Contrary to conventional theory on negotiating public policy disputes, key decision makers with a potential interest in the issue (representatives of the governor, legislature and state agencies) were not invited to the table." This was done to keep the process from getting too political. The stakeholders believed that if they, with their divergent views, could reach agreement, the government would accept their solution.

The participants developed ground rules for the negotiation and spent several meetings learning about each other's needs and interests. They explained how their particular organizations made policy decisions and the internal process they would have to go through to confirm any agreement. "The result of this educational process was to reframe the issue from one of winners and losers to a perspective that the right solution would benefit everyone," McKinney reports.

The participants realized that a solution to the instream flow impasse likely would require new legislation. By late October 1994, they agreed on a measure allowing water rights to be bought and sold to protect instream flows. But the proposed bill met firm opposition from some participating organizations. So, at subsequent meetings, the working group focused instead on the issue of leasing existing water rights for instream flows. As the council reports, “they gradually drafted a new proposed bill that satisfied the criteria of each caucus, creating a mechanism that would allow existing water rights to be leased for instream use.”

“The result of this educational process was to reframe the issue from one of winners and losers to a perspective that the right solution would benefit everyone.”

In drafting the measure, the participants asked for advice from key legislators and representatives from the office of the governor, the Montana Department of Fish, Wildlife and Parks, and DNRC. Eventually the parties and government officials were comfortable with the agreement. “The draft bill would provide a much needed tool to improve instream flow protection, protect existing water rights, and minimize any potential adverse effects to local communities,” the MCC says.

The Results

At the 1995 legislative session, no one opposed the bill as it moved out of committee. The measure passed the House by a 93-6 vote, then won Senate approval and the signature of Governor Marc Racicot. At his request, the MCC convened the same working group to monitor implementation of the law.

Lesson Learned

Consulting with legislators and other officials as an agreement is being developed increases the chances that the agreement will be approved and implemented by governing bodies.

(This case study is based on a brief report available from the Montana Consensus Council at www.state.mt.us/MCC and “Building Agreement on Water Policy,” a chapter written by Matthew J. McKinney, director of the Montana Consensus Council, for the forthcoming book *Finding the Common Good: Case Studies in Consensus Building and the Resolution of Natural Resource Controversies*, edited by Peter S. Adler and G. Kemmerly Lowry.)

How State Officials Can Take Advantage of These Approaches

Many states now have dispute resolution programs that can be a resource to state officials and agencies. (See the list opposite on the back cover.) There is also an extensive network of experienced practitioners and organizations that can offer assistance with consultation, planning and facilitation or mediation. A list of websites and other resources follows.

Consensus Newsletter, published by the MIT-Harvard Public Disputes Program, contains a resource page with paid listings of practitioners.
131 Mt. Auburn Street,
Cambridge, MA 02138-5752
E-mail: consensus@igc.org
Website
www.pon.harvard.edu/publ/consensus

Getting the Most out of Collaborative Processes: A Deskbook for Public Officials
Policy Consensus Initiative (PCI), 1003 East Interstate Ave. Suite 7, Bismarck, ND 58501-0500
Email: concensus4@agree.org
Website: www.agree.org

National Roster of Environmental Dispute Resolution and Consensus Building Professionals

US Institute for Environmental Conflict Resolution (USIECR)
110 South Church Avenue
Suite 3350
Tucson, AZ 85701
Email: usiecr@ecr.gov
Website: www.ecr.gov

Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook For Public Officials
Lincoln Institute of Land Policy, 113 Brattle Street,
Cambridge MA 02138-3400
Website: www.lincolninst.edu

The Consensus Building Handbook
Lawrence Susskind, editor
Sage Publications 1999

About the Policy Consensus Initiative

PCI's Mission

The mission of the Policy Consensus Initiative (PCI) is to improve governing and public decision making by encouraging and enabling state leaders to use conflict resolution and consensus building when appropriate.

PCI's mission is important. As much as states may want to use the tools of conflict resolution, the infrastructure for doing so is as yet only partly developed. For example, only about half of the states have publicly supported programs of dispute resolution. Some are flourishing. Others are small and fragile. That is why PCI works with states to increase and strengthen their capacity to use conflict management and collaborative problem solving in addressing environmental and other public policy issues.

It was to fulfill this mission that PCI was established in 1997 with generous support from the William and Flora Hewlett Foundation.

PCI's Operations

The metaphor that best describes how PCI operates is that it provides the circuitry that connects state leaders, state dispute resolution programs, and other organizations that promote consensus-based processes. PCI's circuitry enables vital connections to be made between and among these networks. Through these connections, greater synergy, increased leadership, and new resources are emerging.

Below are some highlights of PCI's recent activities.

- Contact with governors or their top staff in 31 states
- Information, training, or both provided to more than 700 state legislators about how conflict management and consensus building can be used to address policy disputes

- On-site consultations with existing and developing state public policy dispute resolution offices
- On-going collaborations to develop model statutes, training materials, assessment tools, guidance documents, and other materials
- Wide dissemination of information to state policy leaders through PCI's website, publications and workshops.

PCI has been able to make a significant contribution through its efforts to systematically promote the practice of consensus decision making for better governance. For more information and assistance, contact PCI or visit its website (www.agree.org).

State Offices of Dispute Resolution

ALABAMA

Alabama Center for Dispute Resolution
415 Dexter Avenue
P.O. Box 671
Montgomery, AL 36101
(334) 269-1515 ext. 111
(334) 261-6310 fax
adr@alabar.org

ALASKA

Resource Solutions
University of Alaska Environment
and Natural Resources Institute
707 A Street
Anchorage, AK 99501
(907) 257-2716
(907) 257-2707
mjkingbk@aol.com

ARKANSAS

Arkansas ADR Commission
Justice Building
625 Marshall St.
Little Rock, AR 72201-1020
(501) 682-9400 x.1332
(501) 682-9410 fax

CALIFORNIA

California Center for Public
Dispute Resolution
1303 J Street, Suite 250
Sacramento, CA 95814
(916) 445-2079
(916) 445-2087 fax
sacjean@saclink.csus.edu

COLORADO

Office of Dispute Resolution
Colorado Judicial Department
1301 Pennsylvania St., Suite 110
Denver, CO 80203-2416
(303) 837-3672
(303) 837-2340 fax
csavage@usa.net

DELAWARE

Conflict Resolution Program
University of Delaware
180 Graham Hall
Newark, DE 19711
(302) 831-3264
kgden@udel.edu

FLORIDA

Florida Conflict Resolution
Consortium
Florida State University
The Shaw Building, Suite 132
2031 East Paul Dirac Drive
Tallahassee, FL 32310
(850) 644-6320
(850) 644-4968 fax
flacrc@mailier.fsu.edu

FLORIDA

Florida Dispute Resolution Center
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1905
(850) 921-2910
(850) 488-0156 fax
press@mail.fl.courts.org

GEORGIA

Georgia Office of Dispute
Resolution
Supreme Court of Georgia
800 Hurt Building
50 Hurt Plaza
Atlanta, GA 30303
(404) 527-8789
(404) 527-8711 fax
bartona@mindspring.com

HAWAII

Center for ADR
Supreme Court of Hawaii
P.O. Box 2560
Honolulu, HI 96804
(808) 522-6464
(808) 522-6440 fax
ekent@hawaii.edu

IOWA

Iowa Peace Institute
917 10th Avenue
P.O. Box 480
Grinnell, IA 50112
(515) 236-4880
(515) 236-6905 fax
iapeacei@ac.grin.edu

KANSAS

Dispute Resolution
Office of Judicial Administration
Kansas Judicial Center
301 West 10th
Topeka, KS 66612
(785) 291-3748
(785) 296.1804 fax
oldham@lawdns.wuacc.edu

MAINE

Court ADR Service
RR #1, Box 310
West Bath, ME 04530
(207) 442-0227
(207) 442-0228 fax
dekeny@aol.com

MARYLAND

Maryland ADR Commission
113 Towson Town Blvd., Suite C
Towson, MD 21286
(410) 321-2398
(410) 321-2399 fax
rachel.wohl@courts.state.md.us

MASSACHUSETTS

Office of Dispute Resolution
Commonwealth of MA
Saltonstall Building, 14th floor
100 Cambridge Street
Room 1005
Boston, MA 02202
(617) 727-2224 x.315
(617) 727-6495 fax
FKay@anf-cbo.state.ma.us

MICHIGAN

State Court Administrative Office
Box 30048
Lansing, MI 48909
(517) 373-4839
(517) 373-8922 fax
vanepspd@jud.state.mi.us

MINNESOTA

Minnesota Office of Dispute
Resolution
340 Centennial Office Building
St. Paul, MN 55155
(651) 296-2633
(651) 297-7200 fax
mnodr@igc.apc.org

MONTANA

Montana Consensus Council
Office of the Governor
State Capitol Building
Helena, MT 59620
(406) 444-2075
(406)444-5529 fax
mmckinney@mt.gov

NEBRASKA

Office of Dispute Resolution
Supreme Court of Nebraska
Administrative Office of the
Courts/Probation
P.O. Box 98910
Lincoln, NE 68509-8910
(402) 471-3730
(402) 471-2197 fax

NEW HAMPSHIRE

Program on Consensus and Conflict
Resolution
University of New Hampshire
11 Brookway, Room 207
Durham, NH 03824
(603) 862-2051
(603) 862-3060 fax
jsv@christa.unh.edu

NEW JERSEY

Office of Dispute Resolution
Box 850, 25 Market St.
Trenton, NJ 08625
(609) 292-1773
(609) 292-6292 fax

NEW MEXICO

New Mexico Policy Partnership
1117 Stanford NE
Albuquerque, NM 87131-1446
(505) 277-0555
(505) 277-5483 fax
nmpp@unm.edu

NEW YORK

Office of ADR Programs
New York State Unified Court
System
Office of Court Administration
25 Beaver Street, Room 859B
New York, N.Y. 10004
(212) 428-2863
(212) 428-2696 fax
dweitz@courts.state.ny.us

NORTH CAROLINA

Institute of Government
University of North Carolina
Campus Box 3330
Knapp Building
Chapel Hill, NC 27599-3330
(919) 962-5190
(919) 962-0654 fax
stephens@iogmail.iog.unc.edu

NORTH DAKOTA

North Dakota Consensus Council
1003 Interstate Avenue, Suite 7
Bismarck, ND 58501-0500
(701) 224-0588
(701) 224-0787 fax
ndcc@agree.org

OHIO

Ohio Commission on Dispute
Resolution and Conflict
Management
77 South High Street, 24th Floor
Columbus, OH 43266-0124
(614) 752-9595
(614) 752-9682 fax
CDR_mone@ohio.gov

OHIO

Ohio Office of Dispute Resolution
Supreme Court of Ohio
30 East Broad Street
Columbus, OH 43266-0419
(614) 752-4700
(614) 466-6652 fax
pruette@sconet.ohio.gov

OKLAHOMA

Oklahoma Administrative Office of
the Courts
1915 North Stiles, Suite 305
Oklahoma City, OK 73105
(405) 521-2450
(405) 521-6815 fax
tates@OSCN.net

OREGON

Oregon Dispute Resolution
Commission
1201 Court Street NE, Suite 305
Salem, OR 97310
(503) 378-2877
(503) 373-0794 fax
susan.e.brody@state.or.us

TENNESSEE

Commission on Alternative Dispute
Resolution
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37243-0607
(615) 741-2687 x.135
(615) 741-6285 fax
ib271r1@smtpaoc.tsc.state.tn.us

TEXAS

Center for Public Policy Dispute
Resolution
University of Texas
727 East Dean Keeton Street
Austin, TX 78705
(512) 471-3507
(512) 232-1191 fax
jsummer@mail.law.utexas.edu

VIRGINIA

Virginia Department of Dispute
Resolution
Supreme Court of Virginia
Office of the Secretary
100 North Ninth Street
Richmond, VA 23219
(804) 786-6455
(804) 786-4542 fax
GRavindra@courts.state.va.us

STATE OFFICES OF DISPUTE RESOLUTION

This is a list of the State Offices of
Conflict Resolution of which we
are aware. If others exist which do
not appear here, please contact PCI
at 505.984.8211 with contact
informtaion.

811 St. Michael's Drive,
Suite 102
Santa Fe, New Mexico 87505
505-984-8211 (phone)
505-820-6836 (fax)
chris1250@aol.com

1003 East Interstate
Avenue, Suite 7
Bismarck, North Dakota
58501-0500
Voice 701-224-0588
Fax 701-224-0787
dgross@agree.org