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THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN NATURAL RESOURCE DAMAGE ASSESSMENTS*

SARAH L. INDERBITZIN, NICHOLAS TARG, JAMES L. BYRNES, AND BRUCE A. JOHNSON**

The practice of alternative dispute resolution ("ADR") and recovery for natural resource damage assessments ("NRDAs") are not new to the United States government. What is new is the increased awareness that ADR, which has been effective in resolving disputes concerning the cleanup of hazardous material ("HAZMAT"), may also be useful in resolving NRDA disputes.

Part I of this article introduces ADR techniques which may be utilized as part of a cooperative effort between parties to an NRDA. Part II outlines the Department of the Interior's ("DOI" or "Department") NRDA regulations and suggests "when" and "where" ADR techniques may be appropriate. Part III compares and contrasts the negotiations concerning the *Exxon Valdez* oil spill, which did not use ADR effectively, and those regarding the *Megaborg* oil spill which did use ADR effectively. Finally, Part IV concludes that, although agencies are not required to use ADR to resolve NRDA disputes, it is an effective tool which agencies should consider when conducting assessments.

I. ALTERNATIVE DISPUTE RESOLUTION

ADR—a term used frequently, recently, and often incorrectly. Is ADR a recent discovery that will save society from becoming a litigious swamp where one dare not take any action without an attorney present? Will the use of ADR cause lawyers to become an endangered species? The answers to these questions

* The views expressed in this paper are those of the authors only and are not necessarily those of the Department of the Interior or any other Department or Agency of the United States.

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are not known for sure, but are most likely "NO!" and "NO!"

Admittedly, the phrase "alternative dispute resolution" is relatively new, at least in terms of common usage. In fact, *Black's Law Dictionary* did not define it until its sixth edition, published in 1990:

[P]rocedures for settling disputes by means other than litigation; e.g., by arbitration, mediation, mini-trials. Such procedures, which are usually less costly and more expeditious, are increasingly being used in commercial and labor disputes, divorce actions, in resolving motor vehicle and medical malpractice tort claims, and in other disputes that would likely otherwise involve court litigation.¹

The DOI has been a leader in resolving disputes through ADR before resorting to litigation. Since its inception in 1849, the DOI has used a form of arbitration in which either the Secretary of the Interior or an Administrative Law Judge ("ALJ") acts as an arbitrator.² The DOI allows an internal appeal of subordinate officials' decisions on the use of public lands.³ An appellant must, therefore, exhaust his intra-agency appeal rights prior to challenging such a decision in the federal courts.⁴ While this process is not regarded as particularly novel today, it represented a unique way of resolving public lands disputes in the nineteenth century.

The DOI's administrative appeal system remains in effect, as mandated by a number of federal statutes including the Administrative Procedure Act,⁵ the Taylor Grazing Act of 1934,⁶ and the Federal Land Policy and Management Act of 1976.⁷ Although the DOI's appeal system is adversarial, unlike cooperative decisionmaking and mediation, it is still a form of ADR. However, ADR now focuses not only on avoiding costly formal litigation in federal courts, but on resolving disputes outside adversarial administrative forums.⁸ While these

1. BLACK'S LAW DICTIONARY 78 (6th ed. 1990).

2. The Department conducts its administrative review through its Office of Hearings and Appeals ("OHA"), Hearing Division, with ALJs. See 43 C.F.R. § 4.1(a) (1994). Appeals are conducted by Administrative Appeals Judges through OHA's constituent Boards of Appeals (i.e., Contract, Indian, and Land). See *id.* § 4.1(b).

3. OHA exercises the delegated authority of the Secretary to hear and finally decide appeals of subordinate agency officials' decisions. See *id.* § 4.403.

4. See, e.g., 30 C.F.R. § 243.3 (1994).

5. 5 U.S.C. §§ 551-559, 701-706 (1994).

6. 43 U.S.C. §§ 315-316o (1994).

7. 43 U.S.C. §§ 1701-1784 (1994).

8. For a thorough discussion of the problems associated with the judicial system which ADR seeks to address, see Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669-72 (1986). But see Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 889 (1991) (ADR "is illusory, if not an outright myth).

administrative forums still play a substantial role in deciding disputes and refining final agency decisions before review by the federal judiciary, some conflicts can and are being resolved before, or as an alternative to, an administrative appeal.

A. *The Administrative Dispute Resolution Act*

In 1990, Congress enacted the Administrative Dispute Resolution Act ("ADRA")⁹ which mandated that all federal agencies review and implement some form of ADR in their programs.¹⁰ In the ADRA, Congress's specific mandate to the agencies was that each agency appoint a high-level official as the Dispute Resolution Specialist to oversee the implementation of an ADR program.¹¹ Each agency was also required to adopt a policy that addresses the application of ADR to case management and to "formal and informal adjudications; rulemakings; enforcement actions; issuing and revoking licenses or permits; contract administration; litigation brought by or against the agency; and other agency actions."¹²

The ADRA suggested that agencies experiment with settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, or any combination of ADR techniques.¹³ Congress acknowledged, however, that "you can't please all the people, all the time," and did not mandate the use of ADR.¹⁴ Congress likewise recognized that there are times when ADR

Effective movement of a trial docket occurs when a presiding judge does two things: (1) sets an early trial date, and (2) adheres to the trial date if a settlement or dismissal does not occur in the interim." (quoting Letter from Hon. Richard L. Williams to Kim Dayton (June 25, 1990))).

9. Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C. §§ 571-583 (1994)).

10. *Id.* Congress was clearly concerned about the increase in the volume and the amount of time and resources devoted to administrative review when it passed the ADRA. See 5 U.S.C. § 571 note (1994) (Congressional Findings). Congress found that:

(1) administrative procedure . . . is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;

(2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;

(3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious

Id.

11. 5 U.S.C. § 571 note (1994) (Promotion of Alternative Means of Dispute Resolution).

12. *Id.*

13. See *id.* § 571(3).

14. See *id.* § 572(a).

is not appropriate for the resolution of disputes.¹⁵ It stated:

An agency shall consider not using a dispute resolution proceeding if—

- (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
- (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
- (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
- (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
- (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
- (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.¹⁶

To implement the ADRA, the DOI published an Interim ADR Policy

15. *See id.* § 572(b).

16. *Id.*

("Interim Policy").¹⁷ The first action taken pursuant to the Interim Policy was the appointment of the OHA Director as the Department's Dispute Resolution Specialist.¹⁸ In that capacity, the OHA Director facilitates intra-DOI coordination and communication; ensures consistent and quality training; and establishes minimum qualifications for mediators, arbitrators, and employees with ADR responsibilities.¹⁹ Despite OHA being the focal point for ADR activity, the DOI's Interim Policy encourages decentralized decisionmaking on "how" and "when" to propose the use of ADR.²⁰

The Interim Policy also created the Interior Dispute Resolution Council ("IDRC").²¹ This body is composed of the Assistant Secretaries, the Solicitor, the Director of the Office of Regulatory Affairs, or their designees, and is chaired by the Dispute Resolution Specialist.²² The IDRC is charged with monitoring DOI's use of ADR and Negotiated Rulemaking.²³

To assure that the goals of the ADRA are implemented in each of the Department's Bureaus, the Interim Policy mandates that each Bureau Head appoint a Bureau Dispute Resolution Specialist ("BDRS").²⁴ Each BDRS receives preliminary training in the use of ADR consensus-building techniques, conflict resolution, and program design.²⁵ Within sixty days of completion of this training, each BDRS develops its Bureau's ADR Plan ("ADRP") and submits it to the Bureau's respective Assistant Secretary.²⁶ Specifically, the Interim Policy requires each ADRP to "include at least one category of disputes amenable to ADR methods."²⁷ The Interim Policy also encourages Bureaus to select a category of disputes central to the DOI's mission for their ADR pilot initiatives²⁸ and to include a program to implement ADR to address such disputes.²⁹ Finally, the Interim Policy requires that each ADRP contain goals, objectives, timetables, implementation strategy, monitoring criteria, and evaluation methodology.³⁰ To ensure consistency, Bureaus must submit their ADRPs to the IDRC for review

17. Use of Alternative Dispute Resolution (ADR), 59 Fed. Reg. 30,368 (1994).

18. *Id.* at 30,369.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 30,370.

25. *Id.*

26. *Id.*

27. *Id.* The particular "category of disputes" was to be selected after the Bureau examined its "inventory" of disputes both within and outside the Bureau. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

prior to approval by the Assistant Secretary.³¹ The IDRC also monitors the ADRPs' performance, and evaluates each ADRP at the end of the two-year Interim Policy phase and reports the results to the Secretary.³²

This review of the recent statutory history, in addition to the DOI's historic commitment to solving disputes outside of the federal courts, makes it clear that ADR is here to stay as an additional tool for resolving conflicts. As demonstrated below, agencies have been creative in adopting various forms of ADR in an attempt to work out complex, seemingly unresolvable conflicts.

B. *Methods of Alternative Dispute Resolution*

ADR is "an inclusive term used to describe a wide variety of problem solving processes."³³ Some of these methods are new to the dispute resolution process, while others are variations of techniques the DOI has used for over one hundred years.³⁴ A review of the characteristics of each of these methods provides a means for evaluating their usefulness in NRDA conflict resolution.

1. *Arbitration*

Arbitration is "[a] process, quasi-judicial in nature, whereby a dispute is submitted to an impartial and neutral third party who considers the facts and merits of a case and decides the matter."³⁵ Arbitration can be either mandated by a court or contract or entered into voluntarily, and the arbitrator's decision is normally binding.³⁶ This means the parties have agreed to accept the settlement as final.³⁷ An arbitration decision may only be appealed on very limited grounds, such as fraud or evidence of concealed partiality.³⁸ Thus, arbitration is more final than administrative or court decisions, which may be appealed on a wide variety of reasons related to interpretation of law, evidence, or facts. Given the final nature of an arbitration decision, the ADRA mandates that any arbitration decision may be vacated by an agency head within a thirty-day period after the decision

31. *Id.* The IDRC recommends changes and improvements before the ADRP is submitted to the Assistant Secretary. *Id.*

32. *Id.* at 30,370-71.

33. *Id.* at 30,371 app. I. See *infra* notes 35-127 and accompanying text.

34. The Interim Policy defines some of these methods. *Id.* at 30,371-72. See also *supra* notes 2-7 and accompanying text.

35. 59 Fed. Reg. 30,371.

36. Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, in MARGUERITE S. MILLHAUSER ET AL., ADMINISTRATIVE CONFERENCE OF THE U.S., SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 309, 311 (Office of the Chairman 1987) [hereinafter ADR SOURCEBOOK].

37. *Id.*

38. U.S. Arbitration Act, 9 U.S.C. § 10 (1994). See also Harter, *supra* note 36, at 313 & n.56.

is served on the agency.³⁹

The advantages of arbitration are: (1) the parties may usually choose, or negotiate over the choice of, the arbitrator;⁴⁰ (2) the parties can agree to the ground rules of the proceeding⁴¹ and the type of evidence that will be excluded from the proceeding;⁴² and (3) the process is normally confidential and only the parties may learn the final results.⁴³ Arbitration is one of the most widely used forms of non-litigious dispute resolution in the United States⁴⁴ and is suitable for any dispute in which the parties are willing to be bound by the decision and to forego appellate procedures.⁴⁵ It is generally faster and less expensive than court litigation.⁴⁶ Arbitration is useful in complex multi-party disputes, in part, because the process of preparing for arbitration forces parties to narrow the issues under dispute.⁴⁷ However, arbitration is not appropriate when: (1) an authoritative interpretation of law or regulation is needed; (2) the maintenance of consistent established government policy is of special importance; (3) the dispute would significantly affect persons not parties to the proceeding; or (4) a public record of the proceeding is important.⁴⁸

39. 5 U.S.C. § 580(b).

40. See, e.g., *id.* § 577(a). See also Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 592-93 (1988); Harter, *supra* note 36, at 312-13.

41. See, e.g., 5 U.S.C. § 579(c)(2), (c)(1); Patterson, *supra* note 40, at 593; Harter, *supra* note 36, at 312-13.

42. See, e.g., 5 U.S.C. § 579(c)(1); Patterson, *supra* note 40, at 593; Harter, *supra* note 36, at 312-13.

43. Harter, *supra* note 36, at 340; Kirby Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66, 71 (1986).

44. Patterson, *supra* note 40, at 592. See also Harter, *supra* note 36, at 310; Timothy S. Hardy & R. Mason Cargill, *Resolving Government Contract Disputes: Why Not Arbitrate?*, 34 FED. B.J. 1, 8 (1975).

45. Behre, *supra* note 43, at 70.

46. See Hardy & Cargill, *supra* note 44, at 9; Patterson, *supra* note 40, at 599-600; Behre, *supra* note 43, at 70-71.

47. Patterson, *supra* note 40, at 600. See, e.g., Richard H. Robinson, *ADR in Enforcement Actions at the U.S. Environmental Protection Agency*, in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 297, 298-99 (1988). For example, the EPA uses arbitration to resolve disputes involving polluted sites governed by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), codified at 42 U.S.C. §§ 9601-9675 (1994). Harter, *supra* note 36, at 609-14; U.S. EPA, *Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases*, in ADR SOURCEBOOK, *supra* note 36, at 737, 762-63. Under CERCLA, arbitration may be used to settle federal claims where total response costs do not exceed \$500,000. 42 U.S.C. § 9622(h)(2). See also Harter, *supra* note 36, at 609-14.

48. See U.S. EPA, *supra* note 47, at 762-63; Harter, *supra* note 36, at 315-16; Edwards, *supra* note 8, at 674 & n.18.

2. Conciliation

Conciliation is a process that brings a neutral third party into the negotiation process to assist in establishing "trust and openness between the parties to a dispute."⁴⁹ The conciliator acts as a go-between, communicating each side's position to the other and relaying settlement options.⁵⁰ Thus, conciliation is appropriate where parties to a dispute are "unable, unwilling, or unprepared to come to the table to negotiate their differences."⁵¹ A conciliator may also advise the parties about the consequences of discovery and other litigation procedures.⁵²

3. Dispute Review Board

A Dispute Review Board ("Board") is a panel, usually composed of three independent members, designed to provide prompt recommendations to assist in the resolution of project disputes.⁵³ This type of ADR mechanism works to assure that interruptions of the project are prevented and to resolve small disputes early on before they escalate and end up in litigation.⁵⁴ The Board's decisions are non-binding⁵⁵ and may be accepted or rejected by the parties or used as a basis for further negotiation.⁵⁶ Although the Board visits the project site, the number of visits depends on the size of the project⁵⁷ and the agreement of the parties.⁵⁸ The costs of the Board are generally apportioned between the parties.⁵⁹ In a sense, this constitutes ongoing arbitration between the parties, but with the distinct advantages of being swift and having disputes resolved by parties familiar with the individual project and the concerns of all parties.

4. Early Neutral Evaluation

Early neutral evaluation ("ENE") is a procedure whereby a neutral third party meets with disputants and reviews summaries of their cases to evaluate their

49. 59 Fed. Reg. 30,371.

50. National Inst. for Dispute Resolution, *Paths To Justice: Major Public Policy Issues of Dispute Resolution*, in ADR SOURCEBOOK, *supra* note 36, at 5, 44-45.

51. *Id.*

52. *Id.* at 44.

53. U.S. Army Corps of Engineers, Department of the Army, *Implementation of Alternative Contract Disputes Resolution Procedure*, in ADR SOURCEBOOK, *supra* note 36, at 721, 725-26.

54. *See id.*

55. *Id.* at 723, 725.

56. *Id.* at 724, 728.

57. *Id.* at 721.

58. *Id.* at 729.

59. *See e.g., id.* at 730.

relative strengths and weaknesses.⁶⁰ The neutral party is “typically a locally respected attorney with expertise in the principal subject area of the dispute.”⁶¹ The neutral party may ask questions during the evaluation session and ultimately offer his assessments of each party’s position and the likely outcome of the case should it proceed to litigation.⁶² The benefit of ENE is that it assists the parties to find common ground and helps each side understand the other’s perspective. The ideal outcome of this procedure is for the neutral party to mediate settlement discussions between the parties.⁶³ The recommendations of the neutral party are non-binding⁶⁴ but offer participants the opportunity to receive an early and realistic evaluation of their case before investing substantial amounts of time and money in litigation.⁶⁵

5. *Facilitation*

Facilitation is a process which:

[I]nvolves the assistance of a third party who is impartial toward the issues under discussion and who works with all participants in a whole group session providing procedural directions on how the group can effectively move through the problem-solving steps of the meeting and arrive at a jointly agreed upon goal.⁶⁶

A facilitator does not focus on the substance of the issues under discussion.⁶⁷ Instead, she acts as a “neutral process expert” to help the parties focus on the process of resolving complex issues in order to improve their chances of reaching an agreement.⁶⁸

6. *Fact-Finding*

Fact-finding uses “neutrals acceptable to all parties to determine disputed

60. Dayton, *supra* note 8, at 912-13. ENE is used by the U.S. District Courts for the Northern District of California and the District of Columbia. *Id.* at 912 & n.133. See also Patterson, *supra* note 40, at 598.

61. Dayton, *supra* note 8, at 912-13.

62. *Id.* at 913.

63. In addition to promoting settlement, ENE assists the parties in “preparing stipulations of fact, drafting discovery plans, and identifying the issues.” *Id.*

64. *Id.*

65. *Id.* at 914; Patterson, *supra* note 40, at 598.

66. 59 Fed. Reg. 30,371.

67. National Inst. for Dispute Resolution, *supra* note 50, at 45.

68. *Id.*

facts.”⁶⁹ The neutral (or neutrals, as the case may be) usually has expertise in the subject matter of the dispute.⁷⁰ Parties typically offer an informal presentation of their case,⁷¹ but the neutral may conduct further research on the issues in dispute.⁷² The neutral provides an advisory opinion on the disputed issues⁷³ which the parties can then use as a basis for further negotiation.⁷⁴ Fact-finding may be particularly useful where disagreements about the need for, or meaning of, data are impeding resolution of a dispute because the process seeks to resolve disputed facts or highly technical issues which are better addressed by experts.⁷⁵

7. Mediation

Mediation is one of the most informal ADR procedures, involving the intervention of an impartial and neutral third party into a dispute.⁷⁶ Unlike an arbitrator, the mediator has no decisionmaking authority but assists the parties procedurally to reach a voluntary settlement of the dispute.⁷⁷ Thus, the mediator does not issue a binding decision.⁷⁸ Mediation sessions are private and confidential.⁷⁹ Parties are governed by the rules of procedure and conduct which they have agreed upon in advance.⁸⁰ If any party is unhappy with the outcome, they may opt not to draft a final settlement agreement.⁸¹ Mediation is useful where a negotiated settlement is likely,⁸² where the parties are likely to have dealings in the future,⁸³ and where the parties need a process to mitigate emotions impeding communication.⁸⁴

The success of mediation in multi-party disputes is an example of the

69. 59 Fed. Reg. 30,371. See also U.S. EPA, *supra* note 47, at 743.

70. U.S. EPA, *supra* note 47, at 743.

71. 59 Fed. Reg. 30,371. See also National Inst. for Dispute Resolution, *supra* note 50, at 45.

72. National Inst. for Dispute Resolution, *supra* note 50, at 45.

73. 59 Fed. Reg. 30,371; U.S. EPA, *supra* note 47, at 743.

74. 59 Fed. Reg. 30,371; National Inst. for Dispute Resolution, *supra* note 50, at 45. The neutral's decision can be binding or non-binding according to the wishes of the parties. U.S. EPA, *supra* note 47, at 743.

75. 59 Fed. Reg. 30,371.

76. John W. Cooley, *Arbitration vs. Mediation—Explaining the Differences*, 69 JUDICATURE 263, 266 (1986); Patterson, *supra* note 40, at 594.

77. Cooley, *supra* note 76, at 263.

78. Patterson, *supra* note 40, at 594.

79. Cooley, *supra* note 76, at 267. See also Barbara A. Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1234 (1983).

80. Phillips & Piazza, *supra* note 79, at 1234-36.

81. Cooley, *supra* note 76, at 267; U.S. EPA, *supra* note 47, at 742.

82. National Inst. for Dispute Resolution, *supra* note 50, at 14; Cooley, *supra* note 76, at 264.

83. National Inst. for Dispute Resolution, *supra* note 50, at 14; Cooley, *supra* note 76, at 264.

84. Phillips & Piazza, *supra* note 79, at 1234; National Inst. for Dispute Resolution, *supra* note 50, at 14; Cooley, *supra* note 76, at 269. This involves “separat[ing] the people from the problem.” Cooley, *supra* note 76, at 267 n.36.

adaptability of the process.⁸⁵ Mediation is often better equipped to resolve disputes than traditional litigation because the process allows for more candid discussion of parties' interests and substantially more flexibility and creativity.⁸⁶ The primary reason why it is such a flexible process is that the parties develop decisionmaking procedures tailored to the needs of the specific dispute.⁸⁷ The parties also choose the neutral.⁸⁸ Because mediators have different styles, levels of experience, and backgrounds, the disputants can select a neutral based upon the intricacies of the issue, giving the process additional flexibility as compared with traditional adversarial processes.⁸⁹

8. *Mini-Trial*

A mini-trial is "a structured settlement process in which the disputants agree on a procedure for presenting their cases in highly abbreviated versions (usually no more than a few hours or a few days) to [each party's] senior [decisionmaking officials]."⁹⁰ Thus, mini-trials allow senior officials to assess firsthand the relative strengths or weaknesses of their cases, and can serve as a basis for more successful negotiations.⁹¹ Often, a neutral will assist the senior officials or preside over the hearing.⁹² The neutral may also subsequently mediate the dispute or give his opinion on the likely outcome of litigation.⁹³ Like mediation, the mini-trial is voluntary and non-binding, and, like arbitration, the parties vigorously present their positions.⁹⁴ Given the need to invest substantial resources in attorneys, senior officials, witnesses, and a neutral party, the mini-trial is only appropriate for major disputes that could only otherwise be resolved

85. For three case studies of multi-party mediation, see Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAVIORAL SCIENTIST 255-79 (1983). See also Phillips & Piazza, *supra* note 79, at 1238-41.

86. Phillips & Piazza, *supra* note 79, at 1234-36; Patterson, *supra* note 40, at 594.

87. Phillips & Piazza, *supra* note 79, at 1234-36; Patterson, *supra* note 40, at 594.

88. Phillips & Piazza, *supra* note 79, at 1234-36; Patterson, *supra* note 40, at 594.

89. Patterson, *supra* note 40, at 595. The desirable background and experience of a mediator depends on the nature of the dispute and the parties' perception of the skills necessary to resolve the dispute. *Id.*

90. 59 Fed. Reg. 30,371. See also Patterson, *supra* note 40, at 595. Participating officials must have the authority to enter into a binding settlement agreement. *Id.*; LESTER EDELMAN ET AL., U.S. ARMY CORPS OF ENGINEERS, PAMPHLET-89-ADR-P-1, THE MINI-TRIAL 1 (1989) [hereinafter THE MINI-TRIAL].

91. 59 Fed. Reg. 30,371; THE MINI-TRIAL, *supra* note 90, at 3; Patterson, *supra* note 40, at 595.

92. 59 Fed. Reg. 30,371; THE MINI-TRIAL, *supra* note 90, at 2; Patterson, *supra* note 40, at 595-96.

93. 59 Fed. Reg. 30,371; THE MINI-TRIAL, *supra* note 90, at 2.

94. Patterson, *supra* note 40, at 595; THE MINI-TRIAL, *supra* note 90, at 2.

by long, complex, and costly litigation.⁹⁵ However, even if the size and complexity of the dispute justifies a mini-trial, it should be used only in disputes regarding the facts of the case, not about "what the law means."⁹⁶

9. *Partnering*

Partnering is a process unlike other forms of ADR because it is specifically designed to prevent disputes from developing in the first instance.⁹⁷ Partnering involves a series of meetings of the relevant parties in a "partnering workshop," usually in a retreat-type setting, where the parties get to know each other.⁹⁸ With the help of a neutral, the parties proceed through team-building exercises and discussions regarding the project, costs, potential problems, etc.⁹⁹ The result of the meetings is a "Partnering Charter" which outlines the future relationship between the parties, responses to disputes, and the project goals.¹⁰⁰ The Partnering Charter should also include ADR methods should later disputes arise.¹⁰¹ The Partnering Charter is supplemental to other contracts and agreements that may have been signed by the parties. However, the Partnering Charter does not create any legally enforceable rights.¹⁰² Partnering allows parties involved in major projects to establish a cooperative, team relationship based on open communication, shared risks and rewards, and collaborative decisionmaking.¹⁰³ Partnering, like the Dispute Review Board, is used by the construction industry as a way to avoid problems that might otherwise disrupt a large construction venture and create additional project costs for all parties.¹⁰⁴

10. *Private Judging*

Private judging is similar to arbitration because parties refer their dispute to a neutral third party who renders a binding decision.¹⁰⁵ However, in private

95. Patterson, *supra* note 40, at 596; THE MINI-TRIAL, *supra* note 90, at 7-8. The U.S. Army Corps of Engineers ("Corps") has successfully used mini-trials to resolve construction contract disputes involving millions of dollars. THE MINI-TRIAL, *supra* note 90, at 7-8.

96. THE MINI-TRIAL, *supra* note 90, at 10. See also Patterson, *supra* note 40, at 596.

97. LESTER EDELMAN ET AL., U.S. ARMY CORPS OF ENGINEERS, PAMPHLET-91-ADR-P-4, PARTNERING I (1991) [hereinafter PARTNERING].

98. *Id.* at 2-3, 18-19.

99. *Id.*

100. *Id.* at 3, 19-20. Common project goals are quality, safety, timeliness, and cost-effectiveness. *Id.*

101. *Id.* at 8.

102. *Id.* at 1.

103. *Id.*

104. *Id.* at 1-2. The Corps has used the partnering concept with both its construction contractors and its suppliers. *Id.* at 7-15.

105. Patterson, *supra* note 40, at 597.

judging, the parties decide “how” and “when” to utilize private judging after a dispute has arisen, whereas parties normally elect to use arbitration at the time of contract before the dispute arises.¹⁰⁶ Private judging may speed the completion of civil trials by permitting litigants to hire their own private judge to hear and decide all or a portion of their case.¹⁰⁷ In California, private judging is used by parties who do not wish to wait years for their cases to be heard by overburdened civil trial courts.¹⁰⁸ Generally, litigants may choose an attorney or retired judge¹⁰⁹ to preside over a “trial” and render a decision just as a court would.¹¹⁰ This decision may be appealable through the normal state court appellate system.¹¹¹

11. *Settlement Negotiation*

Settlement negotiation is a process in which the parties hold discussions in an attempt to settle on a compromise agreement of the dispute, some portion of it, or a procedural point.¹¹² Agencies use settlement negotiation as a “procedure[] and process[] for settling matters that would otherwise be resolved by more formal means.”¹¹³ Settlement negotiation can be voluntary on the part of the parties, before or after an action is filed, but is sometimes required by court rules as a prerequisite to an adjudicative procedure.¹¹⁴ Because agencies’ settlement agreements may be subject to multiple layers of review and approval, as many agency decisionmakers as possible should be included in the negotiations.¹¹⁵

12. *Settlement Conference*

A settlement conference is an attempt by the court in which a lawsuit is filed to settle the suit before a trial or hearing.¹¹⁶ Judges often schedule settlement conferences at the pre-trial conference stage under Rule 16 of the

106. *Id.*

107. *Id.* at 597, 601.

108. *Id.* at 597.

109. In complex cases, parties may wish to select a private judge with expertise in the disputed area. *Id.* at 600.

110. *Id.* California courts offer referral to a private judge who will hear the case, and his decision becomes that of the court. *Id.* at 597.

111. *Id.* However, the decision is not subject to trial de novo. *Id.*

112. See generally 59 Fed. Reg. 30,372; Charles Pou, Jr., *Federal Agency Use of “ADR”: The Experience to Date*, in ADR SOURCEBOOK, *supra* note 36, at 101, 118.

113. Pou, *supra* note 112, at 118.

114. National Inst. for Dispute Resolution, *supra* note 50, at 45.

115. Pou, *supra* note 112, at 116.

116. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 490-93 (1985).

Federal Rules of Civil Procedure. Rule 16(a)(5) specifically gives the judge discretionary authority to direct the parties to appear before the court at a pre-trial conference to "facilitate settlement of the case."¹¹⁷ The settlement conference is sometimes presided over by the judge to whom the case is assigned for hearing but may also be referred to another judge, magistrate, or other court officer.¹¹⁸ While style and procedure will vary widely with the forum and presiding official,¹¹⁹ the judge will hear each side's respective positions and, depending on the judge, may offer his opinion of the parties' positions.¹²⁰ The judge may then attempt to convince each side to settle the dispute and thus help to "broker" a settlement.¹²¹

13. *Summary Jury Trial*

A summary jury trial is a process, either court-mandated or voluntary, in which parties present abbreviated versions of their cases to a "jury," which renders a non-binding, advisory verdict.¹²² The jury may then discuss the case's strengths and weaknesses with the parties and their counsel.¹²³ The parties may enter into a settlement agreement based on the advisory verdict, use the verdict as the basis for further negotiation, or proceed to litigation.¹²⁴ The summary jury trial process generally lasts less than one day and is most appropriate in cases where the outcome of factual disputes does not hinge on witness credibility as witnesses usually are not presented.¹²⁵ This technique was developed for use in federal district courts¹²⁶ and authorized by Congress in the Civil Justice Reform Act of 1990.¹²⁷

As the preceding inventory indicates, numerous ADR techniques exist for resolving disputes of any size, shape, or form. Additionally, there are infinite variations and combinations of these techniques that can be tailored for a particular dispute or set of disputes. With these ADR methods in mind, the following section analyzes their application to Natural Resource Damage Assessments.

117. FED. R. CIV. P. 16(a)(5). See also Menkel-Meadow, *supra* note 116, at 491-92.

118. Menkel-Meadow, *supra* note 116, at 491-92.

119. For a good discussion of the role of judges in settlement conferences, see *id.* at 494-98.

120. *Id.* at 510-11.

121. *Id.* at 506, 510-11.

122. Patterson, *supra* note 40, at 596; Dayton, *supra* note 8, at 905-07.

123. Dayton, *supra* note 8, at 907 & n.89.

124. Patterson, *supra* note 40, at 596.

125. *Id.*; Dayton, *supra* note 8, at 908.

126. Patterson, *supra* note 40, at 596 & n.27; Dayton, *supra* note 8, at 905-07.

127. 28 U.S.C. § 473(a)(6)(B) (1994).

II. NATURAL RESOURCE DAMAGE ASSESSMENTS

A new era of increased environmental awareness and activism commenced when Congress promulgated the National Environmental Policy Act of 1969 ("NEPA").¹²⁸ Environmental disasters, such as the Love Canal toxic waste dump, eventually led to promulgation of specific environmental statutes.¹²⁹ One of these statutes, CERCLA,¹³⁰ was enacted "to address the threat to human health and the environment of abandoned hazardous waste sites."¹³¹ Although CERCLA has primarily been invoked to clean up abandoned waste sites, it also authorizes public trustees¹³² to recover for injury to, loss of, or destruction of natural resources.¹³³ CERCLA also specifically requires that the President promulgate regulations for the assessment of damages for the injury to, loss of,

128. 42 U.S.C. §§ 4331-4370d (1994). "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . ." *Id.* § 4331(a).

129. Sarah L. Inderbitzin, *Taking the Burden Off the Buyer: A Survey of Hazardous Waste Disclosure Statutes*, 1 ENVTL. LAW. 513, 517 (1995).

130. 42 U.S.C. §§ 9601-9675.

131. Inderbitzin, *supra* note 129, at 517. See also Pilar Okun, *The Revised Natural Resource Damage Assessment Rule: Computation for Compensation and Restoration*, 70 WASH. U. L.Q. 959 (1992) (discussing DOI's revisions to CERCLA's natural resource damage rules).

132. 42 U.S.C. § 9607(a)(4)(C). Unlike the Clean Water Act ("CWA"), which also authorizes the recovery of NRDs, CERCLA specifically authorizes Indian tribes to act as trustees, in addition to federal and state governments. *Id.* § 9607(f)(1). See also *infra* note 133.

133. 42 U.S.C. § 9607(a)(4)(C). However, it was not until 1989, with the highly publicized environmental catastrophe which resulted from the *Exxon Valdez* oil spill in Prince William Sound, that the public became aware of the need to restore damaged or destroyed natural resources. Terry Fox, *Natural Resource Damages: The New Frontier of Environmental Litigation*, 34 S. TEX. L.J. 521, 521-22 (1993). Since that time, trustees have increased efforts to recover for injuries to natural resources. *Id.* at 522-23. See also Grayson R. Cecil & Nancy Foster, *Natural Resource Injury at Oil Spills: A New Approach*, 45 BAYLOR L. REV. 423 (1993) (recommending new approach to natural resource damage assessment in light of *Exxon Valdez* oil spill). The Department of Justice has seen an increase in suits seeking natural resource damages since the *Exxon Valdez* spill. Fox, *supra*, at 538 n.113.

In response to the *Exxon Valdez* oil spill, Congress enacted the Oil Pollution Act of 1990 ("OPA") with comprehensive natural resource damage recovery provisions. 33 U.S.C. §§ 2701-2761 (1994). Like CERCLA, OPA requires promulgation of NRDA regulations. The National Oceanic and Atmospheric Administration ("NOAA") was delegated responsibility for the promulgation of those regulations and has published proposed rules. *Id.* § 2706(e)(1); Natural Resource Damage Assessments, 60 Fed. Reg. 39,804 (1995).

Prior to the *Exxon Valdez* oil spill and enactment of the OPA, amendments to the CWA gave federal and state governments the authority to recover damages for injuries to natural resources. 33 U.S.C. § 1321(f)(4) (1994). Trustees could recover for discharges of oil and hazardous substances "into or upon the navigable waters of the United States." *Id.* § 1321(b)(1). Thus, unlike CERCLA, the CWA specifically applies to releases of oil.

or destruction of natural resources.¹³⁴ Former President Ronald Reagan delegated that responsibility to the DOI.¹³⁵

In 1986, the DOI issued rules for assessing natural resource damages.¹³⁶ Trustees are not required to follow the DOI's rules, but CERCLA provides that any assessment made under those rules benefits from a rebuttable presumption that the assessment is accurate.¹³⁷ Accordingly, it is in the trustee's best interest to conduct assessments pursuant to DOI rules.

The 1986 DOI NRDA rules were challenged in *Ohio v. Department of the Interior*.¹³⁸ That decision invalidated portions of the DOI's rules as: (1) contrary to congressional intent that the primary measure of natural resource damages should be restoration costs,¹³⁹ and (2) contrary to congressional intent that trustees receive full compensation for damages to natural resources.¹⁴⁰ The court remanded the rules to the DOI and directed the Department to revise the regulations consistent with its decision.¹⁴¹ On March 25, 1994, the DOI issued its final revised rules which addressed all but one aspect of the *Ohio* decision.¹⁴²

The reasons for settlement in the NRDA context are not complex. From the potentially responsible parties' ("PRPs") perspective, they have an incentive to negotiate because the trustees have substantial discretion in selecting the

134. 42 U.S.C. § 9651(c).

135. Executive Order No. 12,580, 52 Fed. Reg. 2923 (1987).

136. 43 C.F.R. §§ 11.10-.93 (1994).

137. 42 U.S.C. § 9607(f)(2)(C).

138. 880 F.2d 432 (D.C. Cir. 1989).

139. *Id.* at 456. DOI's rule limited trustee damage recoveries to the "lesser of" restoration or replacement costs or the diminution of use value of the injured resource. 43 C.F.R. § 11.35.

140. *Ohio*, 880 F.2d at 462-63. The 1986 rule set up a hierarchy of valuation methodology which almost exclusively relied on the market value of the resource. 43 C.F.R. § 11.83(c)(1). Trustees could select an alternative value only if the market value methods were impossible. *Id.* § 11.83(d). Problems with this method are that, frequently, there is no "market" value for a resource, and, notwithstanding the existence of a market value, intangible values are not captured therein.

Another restriction in the rule which severely limited the ability of trustees to recover "non-use value" damages was also invalidated. Non-use values include: (1) "option value," the value of knowing that one has the option to use a resource, (2) "existence value," knowing the resource exists whether one intends to use it or not, and (3) "bequest value," the value of the resource to future generations. See Fox, *supra* note 133, at 545-47. See also Rhoda L. White, *Natural Resource Damages: Trusting the Trustees*, 27 SAN DIEGO L. REV. 407, 418-19 (1990) (discussing valuation of natural resources).

141. *Ohio*, 880 F.2d at 481.

142. 59 Fed. Reg. 14,261 (1994). The revised final rule did not address the assessment of lost non-use values. See *supra* note 140. The revised rules have also been challenged in *Chamber of Commerce v. United States Dep't of the Interior*, No. 94-1462 (D.D.C. filed June 21, 1994). The consolidated case involves actions by numerous industry representatives and one state. *Id.* Several states have intervened on behalf of the United States. *Id.* Two primary issues are: (1) whether the DOI gave the trustees too much discretion and flexibility to select the appropriate alternative for purposes of calculating damages, and (2) whether the level of guidance provided by the rules in selecting a method is consistent with CERCLA. *Id.*

appropriate remedy and calculating costs¹⁴³ which form the basic measure of damages.¹⁴⁴ The trustees may also collect damages to recover the use and non-use values lost to the public until the restoration is complete.¹⁴⁵ Finally, the responsible parties are liable for the reasonable costs of the trustees' assessment.¹⁴⁶ Combined, the responsible parties face potentially large liability. Moreover, while the trustees conduct their studies and until the resource is restored, the damages continue to increase.

The trustees' incentives to negotiate are different but equally unambiguous. The primary goal of the NRDA process is to restore the integrity of the resource.¹⁴⁷ Statutes with NRDA provisions, however, do not make funds available for restoration.¹⁴⁸ Thus, until the parties settle or a court enters an award for damages, injury to the resource and the broader ecosystem may continue, and the trustees' ability to address natural resource damages will be lessened as resources are devoted to lingering cases.¹⁴⁹ The trustees' incentive is clear: restore, remediate, or replace the resource as quickly as possible while avoiding protracted litigation.

The DOI's NRDA rules create incentives which encourage negotiation and settlement. This, in addition to the trustees' and PRPs' shared goals of generating a fast and efficient remedy, makes the question not whether negotiating is a good idea, but rather "when" and "how" best to negotiate.

A. *NRDA Regulations*

The DOI's NRDA regulations set out a four-phase administrative process for conducting NRDA's. Although ADR has frequently been used during these processes, the DOI does not explicitly incorporate ADR procedures into its rules.¹⁵⁰ However, the DOI has encouraged the use of ADR in its regulations¹⁵¹

143. See *supra* notes 132-40 and accompanying text.

144. Although the preferred remedy is restoration, unless the costs are completely disproportionate to the value of the resource, the Department has substantial discretion over the choice of valuation methodology. *Ohio*, 880 F.2d at 444, 459. The valuation methodology, thus, can become the predicate for the damages. See Okun, *supra* note 131, at 970-71.

145. See *supra* note 140.

146. 43 C.F.R. § 11.91(a).

147. *Ohio*, 880 F.2d at 444.

148. For example, CERCLA's Superfund provision does not apply to natural resource restoration. See 42 U.S.C. § 9611.

149. See *supra* note 148 and accompanying text. Under budget-constrained circumstances, even with everything else remaining constant, it is axiomatic that an agency's carrying capacity diminishes as greater demands are placed on its resources.

150. Only NOAA has proposed regulations that explicitly encourage settlement among the parties involved in NRDA's. 60 Fed. Reg. 39,828. See also *id.* at 39,809, 39,820; Natural Resource Damage Assessments Under the Oil Pollution Act of 1990, 59 Fed. Reg. 1162 (1994). Trustees and

through “negotiated resolutions.”¹⁵² Accordingly, as will be discussed below, the use of ADR is proper in each phase of an NRDA under DOI rules.

1. *Preassessment Phase*

The first phase under the DOI's NRDA rules is called the Preassessment Phase.¹⁵³ This phase covers activities that precede the actual assessment.¹⁵⁴ As a preliminary matter, after a natural resource trustee is notified of the discharge or release, she should assist in identifying other trustees.¹⁵⁵ Once trustees are identified, they must determine whether further assessment activities are warranted, including appraising whether injuries have occurred to natural resources.¹⁵⁶ Trustees must base their determination on various criteria and conditions outlined in the DOI's NRDA regulations.¹⁵⁷ The trustees' determination is documented in the Preassessment Screen Determination.¹⁵⁸

Because preliminary assessment activities are expensive and may be duplicative in the case of numerous trustees, trustees should coordinate their assessment efforts at this earliest phase.¹⁵⁹ To this end, NOAA has published a Draft Memorandum of Understanding (“MOU”) for trustees with its proposed NRDA rules.¹⁶⁰ The Draft MOU outlines, among other things, the trustees' duties and responsibilities, the method of decisionmaking and dispute resolution, and the handling and disposition of damages recovered.¹⁶¹ At this juncture, it has proven

responsible parties “may settle a claim for natural resource damages at any time” following a discharge. 60 Fed. Reg. 39,828.

151. Natural Resource Damage Assessments, 59 Fed. Reg. 52,749, 52,753 (1994).

152. *Id.* at 52,753.

153. *Id.* at 52,750; 43 C.F.R. §§ 11.20-.25.

154. 59 Fed. Reg. 52,750; 43 C.F.R. §§ 11.20-.25.

155. 43 C.F.R. § 11.20(c).

156. *Id.* § 11.22.

157. *Id.* § 11.23. The DOI requires trustees to conduct a preassessment screen to determine that all of the following criteria are met before beginning formal assessment efforts: (1) a discharge has occurred; (2) natural resources have been or are likely to be injured; (3) the quantity and concentration of the discharge is sufficient to cause injury to the natural resources; (4) there is sufficient data, necessary to pursue an NRDA, readily available or obtainable at a reasonable cost; and (5) response actions undertaken in accordance with the National Contingency Plan, 40 C.F.R. Part 300, do not or will not remedy the injury to natural resources. 43 C.F.R. § 11.23(e)(1)-(5).

158. 43 C.F.R. § 11.23(c). The Preassessment Screen Determination includes information on the site and on the discharge or release, damages excluded from liability under CERCLA or the CWA, a preliminary determination of exposure pathways, exposed areas, estimates of concentrations of the oil or hazardous substance, and potentially affected resources. *Id.* §§ 11.24, 11.25.

159. Cecil & Foster, *supra* note 133, at 425-26. See 43 C.F.R. § 11.32(a)(1) (cotrustee coordination for Planning Phase).

160. 57 Fed. Reg. 8984 (1992).

161. *Id.* at 8985.

effective to include the PRPs in any cooperative agreement.¹⁶²

Early inclusion of PRPs, especially if initiated by a neutral,¹⁶³ sends a clear message to the PRPs that the trustees seek PRP involvement and a non-adversarial process.¹⁶⁴ Depending on the circumstances of the case, the neutral can help the parties memorialize the level of collaboration through a consent agreement.¹⁶⁵ Because of the great potential for breakdown in communication¹⁶⁶ and the need for logistical coordination,¹⁶⁷ both the trustees and the PRPs can benefit from the assistance of the neutral. The potential beneficial results of such cooperative efforts are: (1) it saves money and prevents duplicative studies performed by trustees and PRPs;¹⁶⁸ (2) settlement, unlike litigation, focuses the parties on the goal of restoration;¹⁶⁹ and (3) it fosters trust and confidence between the parties when data and calculations of values are shared.¹⁷⁰ Therefore,

162. Cecil & Foster, *supra* note 133, at 425. In the case of the *Megaborg* spill off the Texas coast, joint studies performed by the trustees and PRPs resulted in an agreement as to how to proceed with further studies within three days of the spill. *Id.* See also *infra* notes 273-93 and accompanying text.

163. The neutral need not be a private nor professional dispute resolution specialist if a non-trustee agency individual with ADR experience is available to make initial contact with the PRPs.

164. For example, the EPA's guidelines on the use of ADR recommend early intervention. U.S. EPA, *supra* note 47, at 744.

165. See Cecil & Foster, *supra* note 133, at 432-33.

166. See generally Thomas L. Eggert & Kathleen A. Chorostecki, *Rusty Trustees and the Lost Pots of Gold: Natural Resource Damage Trustee Coordination Under the Oil Pollution Act*, 45 BAYLOR L. REV. 291, 304-12 (1993).

167. See Endispute, Inc., *Making Alternative Dispute Resolution Work: A Guide for Practicing Lawyers*, in ADR SOURCEBOOK, *supra* note 36, at 53, 65-66.

168. Trustees and PRPs frequently perform duplicative studies. Richard C. Paddock, *How Much Is a River Worth? Assessing Damage in the Dausmuir Spill*, CAL. LAW., Aug. 14, 1994, at 33 (Southern Pacific, state, and federal biologists conducted independent, multi-million dollar studies of injuries to river due to release of 19,000 gallons of weed killer). See also *infra* notes 272-92 and accompanying text.

169. Cecil & Foster, *supra* note 133, at 434.

170. *Id.* at 425-30. Inclusion of the PRPs at the earliest levels of decisionmaking enhances trust which is critical to collaborative decisionmaking. See Endispute, *supra* note 167. PRPs' differing interests lead them to characterize natural resource injury differently even though they may agree on the quantitative harm. Raymond J. Kopp & V. Kerry Smith, *Benefit Estimation Goes to Court: The Case of Natural Resource Damage Assessments*, 8 J. POL'Y ANALYSIS & MGMT. 593, 600 (1989). Without input from all of the parties, including the trustees, the preassessment is unlikely to address the parties' broad range of interests. Thus, if a party to a dispute feels left out of the decisionmaking process, it has a reason to try to disrupt the decision and any subsequent collaborative efforts that build upon the earlier determination. LAWRENCE E. SUSSKIND ET AL., ENVIRONMENTAL IMPACT ASSESSMENT PROJECT, MASSACHUSETTS INST. OF TECHNOLOGY, RESOLVING ENVIRONMENTAL DISPUTES: APPROACHES TO INTERVENTION, NEGOTIATION, AND CONFLICT RESOLUTION 77 (1978). Moreover, the PRPs frequently have special knowledge of the site or resource which may be useful in making the initial NRDA determination. Early inclusion of PRPs may therefore increase the speed of the preassessment determination and reduce its cost.

although the rules do not require PRP notification until the second phase,¹⁷¹ the trustees should notify the PRPs and include them in joint Preassessment Phase activities whenever practicable and possible.

A facilitator or mediator at the Preassessment Phase could serve at least three useful functions: (1) identifying and contacting responsible parties, including public entities;¹⁷² (2) explaining the trustees' intent to adopt a cooperative approach;¹⁷³ and (3) assisting the parties in negotiating a limited consent agreement concerning the preparation of the preassessment screen and the allocation of costs.¹⁷⁴ To the extent that an agency presently undertakes these actions, the lead trustee would perform these functions.¹⁷⁵

2. *Assessment Plan Phase*

The second phase of the assessment process is the Assessment Plan Phase.¹⁷⁶ This phase explicitly requires coordination among trustees,¹⁷⁷ selection of a "lead authorized official,"¹⁷⁸ and identification and notification of PRPs.¹⁷⁹ The lead authorized official, designated by mutual agreement of all trustees, acts as the "final arbitrator of disputes if consensus cannot be reached [on] . . . any . . . aspect of the Assessment Plan."¹⁸⁰ Trustees must then develop a written Assessment Plan describing the procedures that will be used to determine the injuries and damages.¹⁸¹ The Assessment Plan must select either a type A assessment which "provide[s] standard methodologies for conducting simplified" NRDA's¹⁸² or a type B assessment which "provide[s] alternative methodologies for conducting [NRDA's] in individual cases."¹⁸³ The lead authorized official has

171. 43 C.F.R. § 11.32(a)(2)(iii).

172. Bruce C. French, *More Effective Citizen Participation in Environmental Decisionmaking*, 24 U. TOL. L. REV. 389, 403 (1993). A third party might be able to "ferret-out" PRPs and others who should be involved in negotiations, including those with no direct legal stake, such as locally impacted residents and industries.

173. DAVID M. PRITZKER & DEBORAH S. DALTON, ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK 98-101 (Office of the Chairman 1990).

174. See *infra* notes 178-80 and accompanying text.

175. See *supra* note 155 and accompanying text.

176. 43 C.F.R. §§ 11.30-35.

177. *Id.* § 11.32.

178. *Id.* § 11.32(a)(1)(ii)(A).

179. *Id.* § 11.32(a)(2).

180. *Id.* § 11.32(a)(1)(ii)(A). If trustees cannot reach a consensus on the designation of the lead official, the DOI rules set out which trustee shall be designated based upon where the affected land or water is located. *Id.* § 11.32(a)(1)(ii)(A)-(D). This section also provides that if assessments may reasonably be divided and do not overlap, they may be pursued separately by each trustee. *Id.* § 11.32(a)(1)(iii).

181. *Id.* § 11.31.

182. *Id.* § 11.40. See *infra* notes 208-11 and accompanying text.

183. *Id.* § 11.60. See *infra* notes 208-11 and accompanying text.

final approval over the methodologies included in the Assessment Plan.¹⁸⁴

Once an Assessment Plan is established, it must be made public for comment.¹⁸⁵ It has been suggested that there is an advantage in involving interested citizens and environmental groups prior to the official public comment period.¹⁸⁶ Often, these groups suggest "creative restoration options [which] are often the most cost effective alternatives."¹⁸⁷ This also helps foster trust between the public and government that public concerns are being addressed early on¹⁸⁸ and may prevent legal challenges to the sufficiency of the Assessment Plan.¹⁸⁹ Finally, if both PRPs and the public are involved in the process, it ensures that the NRDA addresses both industry and environmental concerns.¹⁹⁰

Collaborative, assisted decisionmaking has potential applicability to the Assessment Plan Phase and has precedent in the context of the Endangered Species Act,¹⁹¹ the siting of hazardous waste storage facilities,¹⁹² and in a variety of land use planning initiatives.¹⁹³ With wide discretion in developing damage estimates and remedies¹⁹⁴ but limited resources available to conduct planning assessments, there is reason to believe that negotiations on at least methodology and funding issues could be productive.

Reaching consensus on at least the broad parameters of the Assessment Plan can prevent conflict before it starts. Third party neutrals, especially mediators, facilitators, and fact-finders, can help parties expose and understand

184. *Id.* § 11.60(b).

185. *Id.* § 11.32(c).

186. Cecil & Foster, *supra* note 133, at 433-34.

187. *Id.* at 434.

188. Dinah Bear, General Counsel for the Council on Environmental Quality, has long advocated public participation in the NEPA process to ensure that the concerns of the parties involved are heard, responded to, and addressed. DINA BEAR, EPA REGION IV WORKSHOP, MUST NEPA CONTROVERSIES MEAN WIN, LOSE OR SUE? EXPLORING ALTERNATIVE MEANS OF ENVIRONMENTAL DISPUTE RESOLUTION (1986).

189. *Id.*

190. Cecil & Foster, *supra* note 133, at 434.

191. For a good overview of consensus-building in the endangered species context, see STEVEN L. YAFFEE & JULIA M. WONDOLLECK, NEGOTIATING SURVIVAL: AN ASSESSMENT OF THE POTENTIAL USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES FOR RESOLVING CONFLICTS BETWEEN ENDANGERED SPECIES AND DEVELOPMENT (1994). This study evaluates dispute resolution efforts involved in the recovery implementation program for endangered fishes of the Upper Colorado River Basin, the Salmon Summit, the negotiated rulemaking of turtle excluder devices, and the San Bruno Mountain habitat conservation plan. *Id.*

192. CHRISTOPHER W. MOORE, INSTITUTE FOR WATER RESOURCES, U.S. ARMY CORPS OF ENGINEERS, CORPS OF ENGINEERS USES MEDIATION TO SETTLE HYDROPOWER DISPUTE (1991).

193. Nicholas Targ, Procedural Advantages of Informal Administrative Processes in the Land Use Planning Context: Asking the Wrong Question, Again (1995) (unpublished M.B.A. thesis, Massachusetts Inst. of Technology).

194. See e.g., *supra* note 142.

differences in their basic assumptions¹⁹⁵ and priorities¹⁹⁶ as these differences become apparent.¹⁹⁷ If left unchecked, such differences can arise at the very end of the process when positions are hardened and all alternatives tend to be drawn in win-lose dichotomies.¹⁹⁸

Moreover, once the parties' assumptions and priorities are exposed, neutrals can help parties communicate and prioritize the interests which make competing assumptions important.¹⁹⁹ Parties to an NRDA dispute do not hold dichotomous interests.²⁰⁰ Indeed, all parties have some interest in having the injury remedied in a fast, efficient, and permanent manner.²⁰¹ What separates the parties is primarily how they set their priorities, and in some cases, other special concerns.²⁰²

By negotiating at the Assessment Plan Phase, parties do not "give up" anything.²⁰³ If negotiations fail, trustees may lose some time in preparing the

195. Neutral third parties are effective at assisting parties to expose different assumptions about the causes and impacts of particular actions. SUSSKIND ET AL., *supra* note 170, at 87-90. Such differences in the NRDA context can take a variety of forms: interest or discount rates, toxic threshold levels, the time over which harm occurs, etc. Kopp & Smith, *supra* note 170, at 605. Without jointly probing and understanding basic assumptions, it is almost axiomatic that parties will arrive at different conclusions.

196. Third parties are particularly effective at helping negotiation participants prioritize their own interests and understand those of others. See Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357, 1374 (1991) (describing use of court-appointed special master to assist parties to "score" issues using agreed upon methods). Unlike the interested parties, a neutral can speak confidentially with parties, help parties to realistically evaluate alternatives, and make suggestions without the parties having to worry about "showing weakness." Michael G. Liffing, *Which Is the Fairest Court of All? The Case for a Private Court System*, 70 N.D. L. REV. 353, 361 nn.18-20 (1994) (adversarial negotiation does not lend itself to open and realistic appraisals of respective parties' cases). Thus, the mediator or facilitator can help parties identify and prioritize interests, structure possible alternatives, and determine whether continued negotiations are worthwhile. See SUSSKIND ET AL., *supra* note 170, at 87-90; PRITZKER & DALTON, *supra* note 173, at 37.

197. See Sturm, *supra* note 196, at 1374. Professor Sturm describes how a court-appointed special master in a Michigan fishing rights case helped the parties to the dispute evaluate and "score" their concerns using an agreed-upon method. *Id.* Because the parties used a unified system, each interest could be ordered and compared with others. *Id.*

198. Kopp & Smith, *supra* note 170, at 593.

199. See *supra* notes 195-97 and accompanying text.

200. Not only do parties have a common interest in removing both legal and financial uncertainty, but it is likely that all parties want the environmental injury to be repaired. See Mark Sagoff, *We Have Met the Enemy and He Is Us or Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283, 313 (1982).

201. See *supra* notes 143-49 and accompanying text.

202. Local residents may be especially concerned about how the actual physical remedy will be conducted.

203. Unlike binding arbitration, discussed *supra* notes 35-48 and accompanying text, the neutral would have no substantive decisionmaking authority. Because the parties have control over the negotiating process, they must feel confident that their next best alternative (i.e., litigation) is not

Plan, but they will also better understand where points of contention lie.²⁰⁴ With this information, the trustees can address these areas thoroughly, indicating to both the parties and any reviewing court that the Plan was well-considered. Although the parties are likely to disagree on some basic issues such as information-sharing and funding, it is unlikely that negotiations will be completely unproductive. Based on the neutral's ability to understand and communicate assumptions, interests, and priorities, the neutral could help parties to the NRDA dispute make maximum use of the negotiating opportunities in the Assessment Plan Phase.²⁰⁵

3. *Assessment Phase*

The next phase under the DOI rules is the Assessment Phase.²⁰⁶ This phase consists of Injury Determination, Injury Quantification, and Damage Determination.²⁰⁷ These determinations differ depending on whether the trustees selected a type A or type B procedure in the Assessment Plan.²⁰⁸ Injury Determination is the stage at which the trustees determine whether natural resources have been injured and whether there is a path of exposure between the discharge or release site and the injured resource.²⁰⁹ Although the term "injury" is defined under the DOI regulations as a measurable adverse change in quality or viability of a natural resource as a result of exposure to oil or a hazardous substance,²¹⁰ under a type B assessment, specific additional definitions of injury are provided for surface water, ground water, air, geological, and biological resources.²¹¹ Once trustees establish an injury and a pathway, they proceed to

as good as the negotiation process. See LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 26-28 (1984).

204. See *supra* notes 195-202 and accompanying text.

205. See *supra* notes 195-204 and accompanying text.

206. 43 C.F.R. §§ 11.40-.84.

207. *Id.* § 11.60(b).

208. See *supra* notes 182-83 and accompanying text. If a type A procedure is used, minimal field work is performed and a computer model is used to determine and quantify injuries and damages for small discharges in marine or coastal environments. 43 C.F.R. § 11.41(a). The computer model is called the Natural Resource Damage Assessment Model for Marine and Coastal Environments. *Id.* The DOI recently proposed revising these rules. 59 Fed. Reg. 63,300 (1994). The DOI is also developing a computer model to use in the Great Lakes. *Id.* at 40,319.

If a type B procedure is selected, site-specific studies must be performed and trustees must identify and consider a reasonable number of alternatives for restoring, rehabilitating, replacing, or acquiring equivalent resources. 43 C.F.R. §§ 11.60-.84. Trustees must document their decisions in a Report of Assessment. *Id.* §§ 11.60, 11.90.

209. 43 C.F.R. § 11.61(a).

210. *Id.* § 11.14(v).

211. *Id.* § 11.62.

Injury Quantification.²¹²

Injury Quantification requires trustees to quantify the extent of the injuries and determine which damages will be sought.²¹³ This is accomplished by measuring the resource's reduction from "baseline" conditions.²¹⁴ An example is the reduction in "services," which are the functions that natural resources provide for humans and other resources, such as flood control, food, or recreation.²¹⁵

Once injuries have been quantified, trustees must make the Damage Determination,²¹⁶ a calculation of the money damages to be sought as compensation for the quantified resource injuries.²¹⁷ The basic measure of damages is the cost to restore, rehabilitate, replace, and/or acquire the equivalent injured resources.²¹⁸ Trustees may also seek "compensable value" damages,²¹⁹ which are damages for the economic value of services lost to the public from the time of discharge until the completion of restoration.²²⁰

As with other phases of the assessment, early cooperation can be beneficial to all parties. As outlined above, the purpose of the consensual process is to produce a good remedy and to save costs and time.²²¹ Because time is saved, restoration may begin sooner, thereby reducing compensable value damages.²²²

Collaborative decisionmaking can help resolve valuation issues.²²³ Parties' separate damage assessment estimates frequently differ by substantial amounts.²²⁴ In *Eagle Mine*, a CERCLA-NRDA case, the State of Colorado and other trustees' valuation was two orders of magnitude greater than the PRPs' estimate.²²⁵ This discrepancy occurred even though both the trustees and PRPs used very similar valuation methodologies.²²⁶ The problem was not the scientific

212. *Id.* § 11.61(e)(2).

213. *Id.* § 11.70(a).

214. *Id.* § 11.70(c). A resource's "baseline" condition is the condition that would have existed without the discharge or release. *Id.* § 11.72(b).

215. *Id.* § 11.71(e).

216. *Id.* § 11.80(a).

217. *Id.*

218. *Id.* § 11.80(b).

219. *Id.*

220. *Id.*

221. See *supra* notes 143-49 and accompanying text.

222. Cecil & Foster, *supra* note 133, at 434.

223. See generally Kopp & Smith, *supra* note 170. Private parties and public entities already use ADR techniques in a variety of contexts, including: (1) contract cost overruns, see ADR SOURCEBOOK, *supra* note 36, at 491, 493; (2) wage and salary disputes, *id.* at 501; (3) tort claims, *id.* at 496; and (4) corporate worth determinations, see James C. McKinney, Federal Communications Comm'n, *Final Report of the Mediator/Facilitator in the RKO Settlement Process*, in ADR SOURCEBOOK, *supra* note 36, at 531, 534.

224. See Kopp & Smith, *supra* note 170, at 604-05.

225. *Id.* at 605.

226. *Id.*

method or data used, but the basic assumptions that the parties' respective counsels instructed the economists to use.²²⁷

If differences in scientific assumptions are not resolved in the Assessment Phase, a lay trier of fact in a court proceeding must determine which set of assumptions or methodological approach is better.²²⁸ Because the credibility of the science, not the witness, would usually be at issue before the court in an NRDA proceeding, an adversarial process conducted by non-technically trained lawyers before a non-technically trained trier of fact would rarely be the most effective way to make cutting-edge scientific determinations.²²⁹

One approach used to reconcile methodological and scientific assumptions is to question the parties' expert witnesses at the same time.²³⁰ In such "tandem witness" examinations, witnesses are asked the same questions and must respond directly to the other's argument.²³¹ This approach serves to clarify the points of scientific departure, the basis for disagreement, and can be used to develop measures that test the validity of underlying assumptions.²³² Techniques that involve tandem witness examination or scientific advisory panels can increase the accuracy of the damage assessment and reduce the transaction costs in reaching agreement.²³³ Unlike much adversarial settlement bargaining, these approaches do not attempt to effect a "zero-sum game" or "split-the-difference" compromise.²³⁴ Instead, they seek to develop, using the best science available and objective criteria, a common understanding of the facts, the extent of the injury's impact, and the injury's expected duration.²³⁵

The Fish and Wildlife Service ("Service") and the EPA have used scientific panels to help resolve contentious factual determinations in a manner analogous to that which could be used in the Assessment Phase.²³⁶ In a decision involving the Endangered Species Act, the Service requested the assistance of

227. *Id.* See also *supra* notes 195-202 and accompanying text.

228. This problem is only likely to increase with the recent holding in *Daubert v. Dow Chemicals, Inc.*, 113 S. Ct. 2786 (1993) (holding that "general acceptance" standard was not necessary prerequisite for admissibility of scientific evidence and that trial judge is bound to ensure that scientific experts' testimony is reliable and relevant).

229. See James P. Groton, *Solving the "Conflicting Expert Witnesses" Dilemma Through ADR*, PROCEEDINGS OF THE FEDERAL BAR ASSOCIATION ALTERNATIVE DISPUTE RESOLUTION CONFERENCE (1992).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES* 58-83 (1981).

235. See generally *id.* at 84-98.

236. See YAFFEE & WONDOLLECK, *supra* note 191, at 5-7. Professors Yaffee and Wondolleck aptly and critically discuss the use of dispute resolution in the endangered species context. *Id.* See also Peter Evans, *A "Recovery" Partnership for the Upper Colorado River To Meet § 7 Needs*, 8 NAT. RESOURCES & ENV'T 1, 24 (1993).

nine leading fish experts to evaluate the best scientific evidence and to report their independent conclusions as to whether to list the Alabama Sturgeon as a protected species.²³⁷ While the Service, of course, retained all authority in the decision whether to list the fish,²³⁸ the Service sought expert peer review to help develop a credible, unbiased basis for making the complex determination.²³⁹

Techniques such as tandem witness questioning and the use of scientific panels can be employed in facilitation, mediation, or mini-trials.²⁴⁰ These techniques have applicability to the NRDA process because it is a service-based process.²⁴¹ Like the other techniques discussed above,²⁴² their use does nothing to avoid or "privatize" the dispute.²⁴³ Rather, the consensus-building techniques focus dispute resolution efforts on understanding the science, the facts, and the parties' interests in an effort to avoid delay, transaction costs, and inefficient or under-funded remedies.

4. *Post-Assessment Phase*

The final phase of the assessment process is the Post-Assessment Phase.²⁴⁴ This phase outlines the process by which the trustees prepare a final report, present demands to PRPs, and, if necessary, file suit.²⁴⁵ Although DOI regulations do not explicitly address settlement of damage claims, "[t]rustees have authority to settle their damage claims at any time during the administrative process."²⁴⁶ Furthermore, CERCLA requires the EPA to notify trustees if settlement negotiations involving a release affecting resources are underway and to encourage the trustees' participation in the negotiation.²⁴⁷ A trustee, however, should not wait until the last minute to attempt to reach settlement for the reasons addressed above.²⁴⁸ A trustee is more likely to recoup sufficient damages from PRPs to complete a restoration plan which they have helped develop. The

237. See Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 2-6, *Alabama-Tombigbee Rivers Coalition v. United States Fish & Wildlife Serv. et al.*, No. CV-93-AR-2322-S (C.N.D. Ala. So. Div. 1993) [hereinafter *Memorandum*].

238. Endangered Species Act of 1973, 16 U.S.C. § 1533 (1994).

239. *Memorandum*, *supra* note 237, at 3.

240. See *supra* note 234 and accompanying text.

241. See *supra* notes 143-49 and accompanying text.

242. See *supra* notes 35-127 and accompanying text.

243. Quite the contrary of avoiding disputes, consensus-building focuses the parties' attention on the roots and facts of the dispute and separates out superficial posturing and personality conflicts. See, e.g., *supra* notes 195-205, 234-35 and accompanying text.

244. 43 C.F.R. §§ 11.90-93.

245. *Id.*

246. 59 Fed. Reg. 52,751. See also *supra* notes 150-52 and accompanying text.

247. 42 U.S.C. § 9622(j)(1).

248. See *supra* notes 159-75, 195-205, 221-31 and accompanying text.

alternative is to adopt a litigation posture and "settle" for less than might have been gained via a joint effort.²⁴⁹

Whether a case settles or not, the damages must be allocated among the PRPs.²⁵⁰ Liability under CERCLA is joint and several.²⁵¹ As a result, trustees have the option of looking to one or all PRPs for compensation of natural resource damages.²⁵² However, because CERCLA allows PRPs to seek contribution from, and allocate responsibility among, other PRPs,²⁵³ all PRPs should be involved in the allocation of damages. Thus, it is more efficient for all parties to reach settlement together than to negotiate with, or litigate against, each PRP. This would be particularly productive in cases where PRPs have been involved in the process from its earliest stages because they will have had access to information which will help determine their proportionate liability. Furthermore, because trustees may also be PRPs under CERCLA,²⁵⁴ it is in their best interest to determine early in the assessment process what their potential liability may be so that public money is spent in the most efficient manner.

The EPA and the Corps have used different types of ADR techniques to resolve cost allocation disputes.²⁵⁵ The EPA has used mediation as its primary method of resolving cost allocation disputes through ADR, in part because of the agency's desire to retain control over the decisionmaking process.²⁵⁶ Furthermore, the EPA and PRPs have found that mediation's informal but structured approach to negotiation has significant advantages beyond non-assisted negotiations.²⁵⁷ These benefits include: (1) improved sharing of information,²⁵⁸ (2) development of objective criteria for determining the allocation of costs,²⁵⁹ (3) improved speed

249. While a good remedy may be developed without cooperative decisionmaking, the process used is likely to be more resource-intensive than it needed to be. See *supra* notes 147-49 and accompanying text; *infra* notes 275-85 and accompanying text.

250. 42 U.S.C. § 9607(a).

251. See also *In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 893 (D. Mass. 1989).

252. D. Alan Rudlin & Michael R. Shebelskie, *Natural Resources Damages Claims Under CERCLA: A Trap for the Unwary*, 1 ENVTL. CLAIMS J. 3, 8-9 (1988).

253. 42 U.S.C. § 9613(f)(1). See also Rudlin & Shebelskie, *supra* note 252, at 8.

254. The CERCLA definition of liable "persons" includes the United States government and the states. 42 U.S.C. § 9620(a)(1).

255. See U.S. ARMY CORPS OF ENGINEERS, ALTERNATIVE DISPUTE RESOLUTION SERIES, CASE STUDIES # 1-12, 1989-1994. See, e.g., THE MINI-TRIAL, *supra* note 90; PARTNERING, *supra* note 97; CHRISTOPHER W. MOORE, U.S. ARMY CORPS OF ENGINEERS, ALTERNATIVE DISPUTE RESOLUTION SERIES, PAMPHLET 91-ADR-P-3, MEDIATION (1991) [hereinafter MEDIATION]. See also Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327 (1992).

256. Peterson, *supra* note 255, at 338-41.

257. *Id.* at 329. See *supra* notes 85-89 and accompanying text.

258. U.S. EPA, THE E.H. SCHILLING LANDFILL CERCLA CASE, MEDIATION CASE STUDY (1992) [hereinafter SCHILLING LANDFILL CASE].

259. *Id.* at 10.

and quality of communications through the mediator's use of "shuttle diplomacy;"²⁶⁰ and (4) greater ability to negotiate through an impasse as a result of the mediator's encouragement, interventions, and calls for "cooling-off" periods.²⁶¹

The Corps has used a mini-trial process to resolve hazardous waste cost allocation disputes in which the Department of Defense was a PRP.²⁶² The Corps has chosen the mini-trial process for three principle reasons. First, this ADR technique allows technical experts and decisionmakers to retain control over the process, rather than having lawyers with different priorities take over.²⁶³ Second, unlike judicial decisions, mini-trials allow for greater flexibility in possible settlements.²⁶⁴ If the facts at issue are limited in scope, the "judges" can meaningfully consider the relative strengths of the case. Finally, mini-trials allow parties to settle their case quickly and on a set time schedule.²⁶⁵

The line between mediation and mini-trial can easily become blurred. Both use a third party neutral to organize and keep the negotiations moving.²⁶⁶ The mediation process, however, tends to be more flexible and cooperative.²⁶⁷ Unlike the mini-trial, in which the decisionmakers consider opposing positions and then negotiate an agreement, in a mediation, parties work together, preferably before positions become hardened, to develop a joint solution.²⁶⁸ Mediation's time-saving aspect may make its use more appropriate when only a small number of parties are involved, the issues are technical, and the decisionmakers have expertise in the subject matter.²⁶⁹

III. CASE STUDIES: ADVERSARIAL V. COLLABORATIVE DECISIONMAKING

Federal agency experience suggests that negotiations early in the assessment process can reduce the amount of money spent on data collection, increase the data's acceptability, and reduce litigation.²⁷⁰ State and federal agency experience with HAZMATs under CERCLA suggests that the use of a third party

260. See *Endispute*, *supra* note 167, at 66.

261. *SCHILLING LANDFILL CASE*, *supra* note 258, at 11.

262. LAWRENCE E. SUSSKIND ET AL., U.S. ARMY CORPS OF ENGINEERS, *ALTERNATIVE DISPUTE RESOLUTION SERIES, CASE STUDY #5, GOODYEAR TIRE AND RUBBER COMPANY* (1989).

263. *Id.* at 3.

264. *THE MINI-TRIAL*, *supra* note 90, at 3.

265. *Id.* at 4.

266. Compare *id.* at 1-3, 10-17 with *MEDIATION*, *supra* note 255, at 1-6. The mini-trial can be used as a technique within a mediation to help the parties better judge the relative strengths of their respective cases. See also *supra* notes 76-96 and accompanying text.

267. See *supra* notes 76-89 and accompanying text.

268. See *supra* notes 76-96 and accompanying text.

269. U.S. EPA, *supra* note 47, at 17.

270. See *infra* notes 272-94 and accompanying text.

neutral may provide additional benefits.²⁷¹ The following case studies illustrate the value of early negotiation.

A. *The Exxon Valdez and the Megaborg Spills*

The tragedy of the *Exxon Valdez* oil spill²⁷² will be compounded if one does not draw lessons from what went wrong with the federal agencies' restoration efforts.²⁷³ Although the DOI negotiated a large settlement which will effect a substantial restoration of the injured natural resources,²⁷⁴ the Department can still learn valuable lessons about ADR from the *Exxon Valdez* case.

Within one week after the *Exxon Valdez* released eleven million gallons of oil into Prince William Sound, Exxon pledged \$15 million to the damage assessment process.²⁷⁵ Federal agencies, however, informed Exxon that it could not participate in the planning of the assessment nor have access to the data developed.²⁷⁶ When the company finished its own analysis, it had spent over \$100 million.²⁷⁷

State and federal trustees included Alaska, NOAA, the Department of Agriculture, and the DOI.²⁷⁸ Without sufficient funding and sufficient inter- or intra-governmental coordination, the public entities conducted assessments independently and with varying degrees of comprehensiveness.²⁷⁹ Because of litigation concerns, the assessments were conducted in a closed atmosphere without peer review.²⁸⁰ In total, the trustees spent about \$130 million on their assessments before the parties reached settlement.²⁸¹

The settlement was expensive, time consuming, and not based on the best data that could have been collected.²⁸² The assessment should have cost substantially less than the approximately \$230 million ultimately spent by the

271. See U.S. EPA, SUPERFUND ENFORCEMENT MEDIATION: REGIONAL PILOT PROJECT RESULTS (1991); Peterson, *supra* note 255, at 338-46.

272. See *supra* note 133 and accompanying text; Summary of Injuries to Natural Resources as a Result of the *Exxon Valdez* Oil Spill, 56 Fed. Reg. 14,687 (1991).

273. Cecil & Foster, *supra* note 133, at 424-25.

274. By accepting responsibility for the oil spill and agreeing to pay over \$1 billion, Exxon and the United States entered into the largest settlement for environmental damages in U.S. history. *Exxon To Pay \$5 Billion in Spill*, UPI, Oct. 9, 1991, available in LEXIS, Nexis Library, UPI File.

275. Cecil & Foster, *supra* note 133, at 424.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 425.

282. *Id.*

parties.²⁸³ But for the adversarial atmosphere and front-loading of data in preparation for litigation,²⁸⁴ many millions of dollars could have been used instead to achieve CERCLA's goal of repairing damaged natural resources.²⁸⁵

One year after the *Exxon Valdez* spill, the tanker *Megaborg* spilled more than 3.9 million gallons of volatile crude oil fifty miles off the Texas coast.²⁸⁶ The oil ignited in a series of explosions, causing two deaths.²⁸⁷ The lead agency, NOAA, formulated an initial "no-injury hypothesis" because the fires burned off a portion of the oil, the tanker owner responded rapidly to clean up the spill, and the spill did not occur near coastal areas.²⁸⁸

Less than ten days after the initial spill, the trustees (NOAA, the State of Texas, and the DOI) proposed that the responsible parties jointly conduct an initial study to determine the validity of the "no-injury hypothesis."²⁸⁹ The trustees then entered into negotiations with the responsible parties²⁹⁰ Within three days of the initial study, and about two weeks after the spill, the responsible parties and the trustees reached an agreement providing for the joint funding of additional studies and for the sharing of all data.²⁹¹ As a result of the preassessment cooperation, the trustees were able to quickly confirm the initial no-injury hypothesis.²⁹²

B. *Lessons To Be Learned from the Exxon Valdez and Megaborg Spills*

An adversarial assessment process, such as that used in the case of the *Exxon Valdez*, follows a predictable cycle crudely stated as follows. The trustees and the PRPs perform independent assessments and valuations. The trustees then seek damages for the injury through a "demand" letter, threatening litigation. Rather than focusing on how to restore the resource, the parties, and, if the case reaches litigation, the court, scrutinize the nexus between the alleged injury and the release to determine liability and damages. Therefore, in anticipation of litigation, the studies become oriented more toward proving or disproving liability and undermining the others' science and findings, rather than toward documenting the injury to the resource.

The fact that most cases settle sometime before a court assigns liability

283. See *supra* notes 277-81 and accompanying text.

284. Cecil & Foster, *supra* note 133, at 424-25.

285. See 42 U.S.C. § 9607(f); *supra* notes 132-33 and accompanying text.

286. *Workers Preparing To Pump Crude Off Megaborg*, UPI, July 17, 1990, available in LEXIS, Nexis Library, UPI File.

287. *Id.*

288. Cecil & Foster, *supra* note 133, at 425.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

mitigates only slightly the adverse effects of noncooperative assessments. Independently conducting an assessment in anticipation of litigation tends to harden the parties' positions, makes any settlement harder to reach, may result in a less tailored solution to the resource's needs, and uses scarce agency resources inefficiently.

The *Exxon Valdez* and *Megaborg* examples contrast in more ways than just the ability of the parties to reach a cooperative agreement. The spills differed in both size and impact on natural resources. Because the *Megaborg* spill was smaller and further offshore, the costs were lower. In addition, NOAA had used the one-year interval between the *Exxon Valdez* and *Megaborg* spills to develop a response strategy that lent itself to cooperative assessment.²⁹³ This strategy included improved trustee coordination and agreements on information sharing and contingent valuation techniques.²⁹⁴ Thus, the stakes in *Megaborg* were comparatively low and the conditions for settlement were good, making the comparison between the two cases particularly stark.

IV. CONCLUSION

The contrast between the *Exxon Valdez* and *Megaborg* spills serves to underscore the value of an early non-adversarial approach to joint scientific inquiry into injury resulting from a release. It also raises the issue regarding what actions the trustees can take to improve the conditions for non-adversarial assessments. This article suggests that the use of a cooperative decisionmaking process and the assistance of a third party neutral can help. The article does not presume to advise agencies on how to conduct NRDAs. Rather, in furtherance of OHA's role as ADR coordinator, it makes the suggestion based on OHA's and other federal agencies' experiences with ADR.

293. *See id.*

294. *Id.* at 429-32.