

**NEGOTIATED RULEMAKING:  
INVOLVING CITIZENS IN PUBLIC DECISION**

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- I. THE HISTORICAL CONTEXT .....
- II. THE THEORY IN MONTANA.....
  - A. Constitutional and Statutory Framework .....
  - B. Exceptions.....
  - C. Informal Consultations .....
  - D. The Montana Negotiated Rulemaking Act .....
- III. THE PRACTICE IN MONTANA: RESULTS OF A SURVEY
  - A. Reasons for Not Using Negotiated Rulemaking .....
  - B. Interest in Future Use and Training .....
- IV. THE PRACTICE IN MONTANA: CASE STUDIES.....
  - A. Formal Negotiated Rulemaking Processes .....
  - B. An Anomaly: Recreational Access to State School Trust Lands .....
  - C. Informal Consultations .....
- V. DOES IT WORK? LESSONS LEARNED .....
- A. Refine Evaluation Methods .....
- B. Increase Awareness and Understanding .....
- C. Match the Process to the Situation .....
- D. Clarify the Legislature's Role.....
- E. Create Incentives.....
- F. Affirm Best Practices.....
- VI. CONCLUSION .....

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Negotiated rulemaking, sometimes referred to as regulatory negotiation or "reg-neg," emerged in the 1980s as an alternative to traditional procedures for drafting proposed regulations.<sup>1</sup> The essence of the idea is simple: in certain situations, it is valuable to bring together representatives of the responsible agency and the stakeholders to jointly prepare the text of a proposed rule before the agency submits the rule to the formal rulemaking process.

In the traditional draft-notice-comment approach to administrative rulemaking, the agency may or may not consult people whose activities are regulated, or who might otherwise be interested in the issue, to gather information that may be helpful in drafting the proposed rule. And when an agency does seek the input and advice of stakeholders during the process of drafting a rule, it typically consults with one stakeholder at a time. Such contacts are usually informal and unstructured. In short, traditional rulemaking procedures do not necessarily encourage the agency and all affected parties to sit down face-to-face and exchange ideas in an effort to reach agreement prior to drafting the proposed rule.

Negotiated rulemaking, by contrast, provides an opportunity for all stakeholders and the responsible agency to work together to draft a proposed rule. In some situations, additional negotiations among the agency and the stakeholders may be useful after the formal public comment period and during implementation of the rule. By allowing the agency and all affected interests to jointly frame the issues and search for mutually agreeable solutions, negotiated rulemaking is supposed to increase citizen participation in public decision making; improve the substance of a proposed rule; shorten the length of time necessary to implement a final rule; increase the level of compliance; and reduce litigation. In theory, it can also foster cooperative working relationships among the agency and stakeholders.

However, this process can be resource-intensive in the

1. See generally PHILIP J. HARTER, *NEGOTIATING REGULATIONS: A CURE FOR THE MALAISE* (1982) (detailing the history of the idea of negotiated rulemaking). See also Lawrence Susskind & Gerald McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *YALE J. ON REG.* 1 (1985); DAVID M. PRITZKER & DEBORAH S. DALTON, *NEGOTIATED RULEMAKING SOURCEBOOK* (Administrative Conference of the United States, U.S. Government Printing Office, 1995); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 *DUKE L.J.* 1255 (1997); and Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 *DUKE L.J.* 1389 (1997).

short-term for both the agency and other participant agency may be compelled to retain a convener or facilitate the process. The stakeholders may have to spend time and resources with the agency before, during, and after the public comment period. A negotiated rulemaking process requires the participants to review additional documents, generate ideas, proposals, and perhaps data—all of which take time. While these short-term costs should not be underestimated, proponents of negotiated rulemaking argue that it is in fact worth the cost to focus on the long-term benefits that accrue through the process.

Negotiated rulemaking seems to hold much promise, at least in theory. However, it is not widely used at federal levels for a number of reasons. The purpose of this article is to examine the disparity between the theory and practice of negotiated rulemaking in Montana, and to offer suggestions toward improving citizen participation in negotiated rulemaking.

## I. THE HISTORICAL CONTEXT

The idea of negotiated rulemaking emerged in 1982 in the hope of decreasing the amount of time it takes to draft regulations, improving the substance and acceptability of proposed rules, and reducing or eliminating subsequent challenges.<sup>2</sup> In that year, the Administrative Conference of the United States published a recommended framework for negotiated rulemaking at the federal level.<sup>3</sup> The Conference quickly pointed out that the recommendations were non-mandatory, but simply provided a starting point for agencies to apply the concept of reg-neg to their own situations. The recommendations included criteria to identify rulemaking situations in which reg-neg is likely to be useful. These criteria were designed to help federal agencies determine when negotiated rulemaking may be appropriate. The Conference suggested specific procedures to follow when using negotiated rulemaking.

2. See generally HARTER, *supra* note 1. Philip J. Harter is widely recognized as one of the key architects of the theory of negotiated rulemaking. He is an experienced practitioner, having designed and managed a number of reg-neg projects.

3. See Administrative Conference of the United States, *Recommendations: Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.82-4 (1986). See generally HENRY H. PERRITT, JR., *NEGOTIATED RULEMAKING BEFORE AGENCY: EVALUATION OF RECOMMENDATIONS BY THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* (1986).

rulemaking. These recommendations were refined in 1985 based on initial agency experiences.<sup>4</sup>

In 1983, the Federal Aviation Administration became the first federal agency to try negotiated rulemaking.<sup>5</sup> The FAA convened a committee to negotiate a revision of rules governing flight and rest time for domestic airline pilots. The committee included representatives of airlines, pilot organizations, public interest groups, and other concerned people. The prior rules were in effect for 30 years, an interval of substantial change in the airline industry, and the FAA issued more than 1,000 interpretations of the rules. On a number of occasions, the agency proposed revisions to rules which were subsequently withdrawn due to opposition. The 1983 negotiated rulemaking process resulted in a final rule, which was adopted in 1985 and not challenged in court. Since then several agencies within the U.S. Department of Transportation have used reg-neg on a variety of issues.

The U.S. Environmental Protection Agency has been the most consistent and committed user of negotiated rulemaking at the federal level, accounting for about one-third of federal reg-negs.<sup>6</sup> The EPA has relied on negotiated rulemaking to achieve consensus on rules dealing with penalties for manufacturers of vehicles not meeting Clean Air Act standards, emergency exemptions from pesticide regulations, performance standards for woodburning stoves, control of volatile organic chemical equipment leaks, national emission standards for coke ovens, manifests for transporting hazardous wastes, and chemicals used in manufacturing wood furniture. In several other situations, the EPA promulgated administrative rules on the results of negotiations when participants were unable to agree completely on a proposal.

Other federal agencies that have used negotiated rulemaking include the Occupational Safety and Health Administration, the Nuclear Regulatory Commission, Farm Credit Administration, Federal Communications Commission, Federal Trade Commission, and the departments of Agriculture,

4. See Administrative Conference of the United States, Recommendation 85-5, in *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.85-5 (1998).

5. See generally PRITZKER & DALTON, *supra* note 1.

6. See HARTER, *supra* note 1, at 9. Harter further suggests that the Department of Transportation has actually engaged in more negotiated rulemaking proceedings, largely because the EPA has not used the process during the Clinton Administration. Personal communication with Phillip J. Harter (April 8, 1999).

Education, Health and Human Services, Housing and Development, and the Interior. According to a comprehensive assessment at the federal level, 67 negotiations were conducted from 1983 through 1996.<sup>7</sup> Of the total, 13, or nearly 20 percent, were abandoned by the agency before any consensus was reached. Nineteen of the rulemakings remained pending in 1996, with no final rule yet to be issued. Since 1983, when the FAA began the first negotiated rulemaking, federal agencies have promulgated only 35 rules using this procedure, or less than 10 percent of all administrative rules promulgated by the federal government during the same time period.<sup>8</sup>

The theory of negotiated rulemaking was formalized at the federal level in 1990 with the enactment of the Negotiated Rulemaking Act.<sup>9</sup> The Act, which was later reauthorized in 1996,<sup>10</sup> establishes the basic requirements for the use of reg-neg, but allows for flexibility and encourages experimentation and innovation at federal agencies. The Act emphasizes the value of communication with people affected by or interested in the proposed rule, adequate opportunity for public participation, and openness of the entire process.

Following the trend at the federal level, the legislatures of Idaho,<sup>11</sup> Florida,<sup>12</sup> Montana,<sup>13</sup> Nebraska,<sup>14</sup> Texas,<sup>15</sup> and Washington<sup>16</sup> passed statutes encouraging negotiated rulemaking.

7. See Coglianese, *supra* note 1, at 1256.

8. The question of how successful negotiated rulemaking is at the federal level is open for debate. For a critical reply to Coglianese's work, see Philip J. Harter, *The Actual Performance of Negotiated Rulemaking: A Response to Coglianese* (unpublished draft article on file with the author).

9. See Public Law No 101-648 (1990), 5 U.S.C. § 561-570 (1998).

10. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-11(a), 110 Stat. 3870, 3873 (1997).

11. See IDAHO CODE §§ 67-5206 - 67-5232 (1998).

12. See FLA. STAT. ANN. § 120.54 (2)(d)(1) (West 1998).

13. See MONT. CODE ANN. §§ 2-5-102-110 (1997).

14. See NEB. REV. STAT. ANN. §§ 84-921-932 (Michie 1998).

15. See TEX. GOV'T CODE ANN. § 10-2008 (West 1997). As of 1988, negotiated rulemaking has been used three times in Texas. The first use was sponsored by the General Land Office to formulate oil spill damage assessment rules. The second was initiated by the Comptroller to design a new timberland tax appraisal manual. The latest involved regulation of nursing home Medicaid beds by the Department of Health Services. Each one of these proceedings resulted in a consensus proposal.

16. See WASH. REV. CODE § 34.05 (1998). See also Executive Order on Regulatory Activities (EO 93-06) and Executive Order on Regulatory Activities (EO 94-07). See also WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT,

rulemaking.<sup>17</sup> The Governor of New York issued an executive order establishing a negotiated rulemaking program in 1992.<sup>18</sup> The legislatures in New York and Pennsylvania considered bills in the past to authorize the use of negotiated rulemaking.<sup>19</sup> However, apparently there has yet to be any systematic documentation or analysis of implementing negotiated rulemaking at the state level.<sup>20</sup>

## II. THE THEORY IN MONTANA

### A. Constitutional and Statutory Framework

The Montana Constitution states that "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."<sup>21</sup> Section 2-3-101 of Montana Code Annotated (MCA) provides legislative guidelines to implement this constitutional right. This section, referred to as the Public Participation in Governmental Operations Act, states that each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures ensure adequate notice and provide for public participation before a final agency action is taken that is of significant interest to the public.

The promulgation of administrative rules in Montana is further governed by the Montana Administrative Procedure Act (MAPA).<sup>22</sup> Taken together, the public participation act and MAPA require agencies to facilitate citizen participation in rulemaking through the following steps:

- (1) provide written public notice of the intended action

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PUBLIC INVOLVEMENT IN RULE MAKING (February 1995).

17. For more information about state involvement in negotiated rulemaking, see CENTER FOR PUBLIC POLICY DISPUTE RESOLUTION, PUBLIC RESOURCE SERIES NUMBER THREE, COMMENTARY ON THE GOVERNMENTAL DISPUTE RESOLUTION ACT AND THE NEGOTIATED RULEMAKING ACT (September 1998).

18. See State of New York Exec. Order No. 156 (June 8, 1992).

19. See WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT, A GUIDE TO PUBLIC INVOLVEMENT IN RULE MAKING at 3 (February 1995).

20. The Policy Consensus Initiative [PCI], a national organization dedicated to promoting consensus approaches to public policy, is currently conducting research into the use of negotiated rulemaking in states. It has not published findings as of the date of this publication. For an update on this research, PCI can be reached at (505) 984-8211.

21. See Mont. Const. Art. II, § 8.

22. See MONT. CODE ANN. § 2-4-101 (1997).

prior to the adoption, amendment, or repeal of any rule;<sup>2</sup>

- (2) conduct a public hearing after appropriate notice;

- (3) allow citizens to submit data, views, or arguments orally or in written form, prior to making a final decision.

### B. Exceptions

These requirements do not apply to an agency decision that must be made to deal with an emergency situation involving public health, welfare, or safety; an agency decision that is made to maintain or protect the interests of the public, including but not limited to the filing of a lawsuit in a court of law or becoming a party to an administrative proceeding; or a decision involving no more than a ministerial act.<sup>25</sup>

### C. Informal Consultations

Section 2-4-304, of the MCA provides additional guidelines for agencies to engage citizens in the process of promulgating administrative rules.<sup>26</sup> According to this provision, "An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rulemaking."<sup>27</sup> The statute provides that an agency "may also appoint committees of interested persons or representatives of the general public to advise it with respect to any contemplated rulemaking." The powers of the committees shall be advisory only. As explained below, state agencies have used this provision to involve citizens and stakeholders in a variety of ways in the administrative rulemaking process.

### D. The Montana Negotiated Rulemaking Act

The Montana Negotiated Rulemaking Act was passed in 1993 and is modeled after its federal equivalent.<sup>29</sup> The purpose of the Montana act is "to establish a framework for the use of negotiated rulemaking consistent with the

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23. See MONT. CODE ANN. § 2-4-302(1) (1997).

24. See MONT. CODE ANN. § 2-3-104(3) (1997).

25. See MONT. CODE ANN. § 2-3-112 (1997).

26. See MONT. CODE ANN. § 2-4-304 (1997).

27. *Id.*

28. *Id.*

29. See MONT. CODE ANN. § 2-5-101 (1997).

Administrative Procedure Act and the constitutional right of Montanans to participate in the operation of governmental agencies...<sup>30</sup> In other words, the act is designed to supplement, not replace, the existing constitutional and statutory framework for citizen participation in administrative rulemaking. It encourages agencies to use negotiated rulemaking to resolve controversial issues prior to initiating the formal rulemaking process. The act is not a substitute for the public notification and participation requirements of MAPA.<sup>31</sup> The procedures in the act are not mandatory; they are simply advisory, and agencies and citizens are encouraged to experiment with different approaches to their implementation.

To initiate a negotiated rulemaking process, an agency director must determine that the procedure is "in the public interest."<sup>32</sup> In making such a determination, the agency director is encouraged to consider a number of practical issues, such as the need for the rule, the ability to identify stakeholders and convene a balanced committee, the likelihood of reaching consensus, the availability of resources, and the willingness of the agency to use a consensus recommendation of the committee.<sup>33</sup> An agency may use the services of a convener or facilitator to determine the appropriateness of using a negotiated rulemaking committee,<sup>34</sup> and, subject to the approval of the entire committee, to coordinate the negotiated rulemaking process.<sup>35</sup>

If an agency proposes to create a negotiated rulemaking committee, it must publish a notice in the Montana Administrative Register and appropriate newspapers and other publications to explain its intentions; the subject and scope of the rule to be developed; a list of interests likely to be affected by the proposed rule; a list of people proposed to represent the various interests, including the agency; a proposed schedule; and how a person may apply for or nominate another person for membership on the committee.<sup>36</sup> An agency may include the notice of intent to create a negotiated rulemaking committee in the notice of intent to promulgate rules pursuant to Section 2-4-

30. *Id.*

31. See MONT. CODE ANN. § 2-5-102 (1997).

32. MONT. CODE ANN. § 2-5-104 (1997).

33. See MONT. CODE ANN. § 2-5-104 (1) (1997).

34. See MONT. CODE ANN. § 2-5-104 (2) (1997).

35. See MONT. CODE ANN. § 2-5-109 and 110 (1997).

36. See MONT. CODE ANN. § 2-5-105 (1997).

302, MCA, and must allow at least 30 days for people to comment with comments and applications for membership.

The agency may or may not decide to form a committee based on the results of the public notice. If the agency creates such a committee, it must provide administrative and technical support to the committee.<sup>37</sup> The committee must meet upon adopting the final rule under consideration, and participants agree to an earlier termination date. If the agency decides not to create a negotiated rulemaking committee, it notifies the people who commented on or applied for membership on the committee and explain the reasons for its decision.<sup>38</sup>

Once a negotiated rulemaking committee is formed, it may expand its membership by consensus.<sup>39</sup> The committee may recruit additional people or organizations believed to be essential to the project's success. In addition, people who are significantly affected by a proposed rule, or who believe their interests will not be adequately represented by a person on the committee, may petition or nominate another person for membership.<sup>40</sup> Upon receiving such a petition, the committee decides by consensus at its next meeting whether to expand its membership.<sup>41</sup> Agency officials "shall participate in the deliberations of the committee with the same responsibilities of other members of the committee" and may be "authorized to fully represent the agency in the discussions and negotiations of the committee."<sup>42</sup>

The negotiated rulemaking committee may develop procedures or ground rules to govern the proceedings. The committee considers the issue proposed by the agency and attempts to reach consensus concerning the proposed rule and the subject matter it determines is relevant to the proposed rule. Consensus is defined as "unanimous concurrence of all interests represented on a negotiated rulemaking committee, unless the committee agrees upon another specified de-

37. See MONT. CODE ANN. § 2-5-106 (1997).

38. See MONT. CODE ANN. § 2-5-106(2) (1997).

39. See MONT. CODE ANN. § 2-5-107(1) (1997).

40. See MONT. CODE ANN. § 2-5-107(2) (1997).

41. See MONT. CODE ANN. § 2-5-107(3) (1997).

42. MONT. CODE ANN. § 2-5-108(2) (1997).

43. See MONT. CODE ANN. § 2-5-108(3) (1997).

44. See MONT. CODE ANN. § 2-5-108(1) (1997).

45. MONT. CODE ANN. § 2-5-103(2) (1997).

If a committee achieves consensus on a proposed rule, it must submit a report that includes the proposed rule to the agency that established the committee.<sup>46</sup> If the committee does not reach a consensus, it is encouraged to submit a report to the agency that specifies areas of agreement and clarifies the issues remaining unresolved.<sup>47</sup> The committee may include in the report any other information, recommendations, or materials considered appropriate. Any individual member of the committee may include additional material as an addendum to the report.

### III. THE PRACTICE IN MONTANA: RESULTS OF A SURVEY

In July 1998, the Montana Consensus Council distributed a survey to 21 state agencies in Montana.<sup>48</sup> The intent of the survey was to evaluate Montana's experience with the use of negotiated rulemaking since the Montana Negotiated Rulemaking Act took effect in October 1993.

Nineteen agencies returned a completed survey, for a response rate of 90 percent. Based on these responses, there have been five negotiated rulemaking proceedings convened under the auspices of the Montana Negotiated Rulemaking Act (see Table 1). In three of the cases, the legislature mandated the use of the formal negotiated rulemaking process. To date, 69 administrative rules have been promulgated as a result of negotiated rulemaking.<sup>49</sup> The 69 rules regulate the licensing and management of game farms in Montana. Fifty of the rules are new and 19 repeal existing rules. During this same five-year period, a total of 10,307 administrative rules and regulations were promulgated by Montana state agencies. Of this total, nearly half, or 4,799 rules, focused on routine agency matters, including the repeal of existing rules and the transfer

of rules from one agency to another. In these cases, negotiated rulemaking is probably not appropriate. It is not clear how many of the remaining rules were challenged through administrative or legal channels, or how many were challenged with no opposition.<sup>50</sup>

#### A. Reasons For Not Using Negotiated Rulemaking

When asked to explain why they have not engaged in the formal negotiated rulemaking process, the department that responded to the survey offered three primary responses.

First, several agencies rely on informal consultations as a means of obtaining the viewpoints of interested persons with respect to contemplated rulemaking. The departments explain that using these informal processes is encouraged in section 2-4-305, MCA, is consistent with the intent of the Montana Negotiated Rulemaking Act.

For example, the Department of Agriculture replied that it never found it necessary. If we anticipate controversy, we automatically include the affected public during the rulemaking process . . . which seems to be *de facto* negotiated rulemaking. The Office of the State Auditor reinforces this observation by stating, "Negotiated rulemaking merely adds formal steps (such as publication of notice regarding committee appointments, a public facilitator, and so on) to regular rulemaking which accomplishes the same end."<sup>52</sup> The Department of Administration says "We have not had a real controversy. We do seek input from all constituencies prior to rulemaking. After. Mostly our rules reflect consensus now."<sup>53</sup> The Department of Natural Resources and Conservation says "We generally solicit informal comments from c

46. See MONT. CODE ANN. § 2-5-108(4) (1997).

47. See MONT. CODE ANN. § 2-5-108(5) (1997).

48. The Montana Consensus Council is a small state agency designed to promote fair, effective, and efficient processes for building agreement on natural resources and other public policy issues important to Montanans. It was created by executive order in January 1994. The Council convenes collaborative problem solving forums; provides consultation, education, and training; and conducts research and produces publications to improve people's awareness, understanding, and ability to resolve complex, multi-party public issues through collaboration and consensus building. For more information, call (406) 444-2075.

49. Personal communication with the Office of the Secretary of State (December 9, 1998). It should be further noted that most rulemaking processes result in multiple rules.

50. According to the Secretary of State's office, the only way to obtain information is to contact the legal department of every state agency, a process beyond the scope of this research project. A better understanding of the issues which administrative rules are appealed might give us a better sense of whether negotiated rulemaking might be a more effective approach to drafting administrative rules.

51. Survey response from the Department of Agriculture to the *Quality of the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

52. Survey response from the Office of the State Auditor to the *Quality of the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

53. Survey response from the Department of Administration to the *Quality of the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

groups prior to commencing formal rulemaking. In the recent past, we have developed rules where the traditional process was the most appropriate model to use."<sup>54</sup>

Second, several departments find negotiated rulemaking too cumbersome. For example, the Department of Labor and Industry states "The act has a number of specific requirements which are more cumbersome and costly than the department's informal process. The department believes that its informal negotiated rulemaking process tends to meet with the spirit and intent of the act."<sup>55</sup> The Public Service Commission echoes this sentiment: "We find the negotiated rulemaking act extremely cumbersome relative to what can be accomplished under the Montana Administrative Procedure Act. The Public Service Commission has engaged in numerous negotiated rulemakings through the use of MCA 2-4-304, which involves a series of informal comments on proposed rules prior to the formal round of comments."<sup>56</sup>

Third and finally, some departments have not used negotiated rulemaking because the appropriate situation has not emerged. For example, the Commissioner of Political Practices says "We considered the procedure with regard to a rule regarding lobbying and reportable expenditures. Since it was a procedure mandated by a supreme court decision, it was felt the normal procedure would be best."<sup>57</sup> The Department of Environmental Quality says "The appropriate situation has never presented itself" and adds "the negotiated rulemaking process still appears to be overly cumbersome and expensive."<sup>58</sup> The Departments of Corrections and Transportation simply found that "the occasion has never arisen."<sup>59</sup>

54. Survey response from the Department of Natural Resources and Conservation to the *Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

55. Survey response from the Department of Labor and Industry to the *Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

56. Survey response from the Public Service Commission to the *Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

57. Survey response from the Commissioner on Political Practices to the *Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

58. Survey response from the Department of Environmental Quality to the *Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

59. Survey response from the Department of Transportation to the *Questionnaire*

These three reasons for not using negotiated rulemaking in Montana are largely consistent with the conclusions of studies on its use in Texas and at the federal level. In the Texas study, the Center for Public Policy Disputes concludes that formal negotiated rulemaking has only been used three times by Texas state agencies.<sup>60</sup> The most frequently cited reason for not using the process was the absence of an appropriate rulemaking structure. State agencies also explained that they rely on the informal conferences, consultations, and advisory committees to advise the agency about contemplated rulemakings.<sup>61</sup> The most common reason for not using negotiated rulemaking is the cost to the agency, in both time and money. In short, it appears that state agencies in Texas feel much the same as state agencies in Montana: there are many ways to involve citizens in the rulemaking process, and given the costs associated with negotiated rulemaking, it should be used sparingly.

At the federal level, Coglianese suggests that negotiated rulemaking has failed to surpass that of conventional rulemaking for three reasons.<sup>62</sup> First, the process may foster conflict stemming from determining membership on committees, the consistency of final rules with negotiations, and the potential for heightened sensitivity to adverse aspects of rules. Second, given that negotiated rulemaking is designed to shape a proposed rule which is subject to the formal process of public review and comment, the sponsoring agency may need to amend the proposal to accommodate new interests or information. Such amendments may require a retreat from the consensus proposal. Third and finally, Coglianese argues that agencies and interest groups are quite capable of working with each other in the context of conventional rulemaking. Similar to the comments in Montana and Texas, Coglianese says that "Negotiated rulemaking shows weak results in large part because of the strength of agencies in using less intensive mechanisms of negotiation and public input in the context of con-

*Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

60. See CENTER FOR PUBLIC POLICY DISPUTE RESOLUTION, REPORT ON THE RESULTS OF ALTERNATIVE DISPUTE RESOLUTION USE IN TEXAS STATE AGENCIES (1999).

61. See TEX. GOV'T. CODE ANN. § 2001.031 (authorizing the use of informal conferences, consultations, and advisory committees by the Texas Administrative Procedure Act).

62. See Coglianese, *supra* note 1, at 1321-1334.

rulemaking. These methods, which include individual meetings, public hearings, and ongoing advisory committees, provide agencies with information about technical aspects of regulation as well as the interests of affected parties.”

Harter agrees that agencies may include citizens and stakeholders in administrative rulemaking through a variety of processes, including negotiated rulemaking.<sup>63</sup> He is emphatic, however, that negotiated rulemaking should be reserved for “highly complex, politicized rules—the very kind that stall agencies when using traditional or conventional procedures.”<sup>64</sup> And, he persuasively argues that evaluating the performance of negotiated rulemaking must be based on “what the agency itself sought to accomplish” by using reg-neg.<sup>65</sup> In other words, the utility of negotiated rulemaking should not be diminished because state or federal agencies rely on other methods to involve citizens and stakeholders. The value of reg-neg should be based on its core objectives—direct negotiations among stakeholders, including the agencies, that result in substantively better and more widely accepted rules.<sup>66</sup> From this perspective, Harter concludes, negotiated rulemaking “has proven to be an enormously powerful tool in addressing highly complex, politicized rules—the very kind that stall agencies when using traditional or conventional procedures.”<sup>67</sup> He goes on to say that “Properly understood, reg-neg has been remarkable in fulfilling its promise . . . reg-neg cuts the time for rulemaking by a third . . . and no rule that implements a consensus reached by the committee has ever been challenged substantively in judicial review.”<sup>68</sup>

### B. Interest in Future Use and Training

Although Montana state agencies seem cautious in approaching negotiated rulemaking, when asked if they would be interested in using the process in the future, 11 of the 19 agencies responding to the survey said yes; 3 said maybe; 4 said

63. See Philip J. Harter, *The Actual Performance of Negotiated Rulemaking: A Response to Professor Coglianese* (unpublished draft article on file with this author).

64. *Id.*

65. *Id.*

66. See *id.* at 13-15 (Harter presents the goals of negotiated rulemaking from the perspective of the people and institutions, namely the U.S. Congress, that shaped the initial idea).

67. *Id.*

68. *Id.*

probably not; and 1 did not respond to the question.

The respondents cited several reasons for this interest. The Commissioner of Political Practices said that “It is more difficult to develop rules for complex situations that satisfy everyone’s needs and interests. In addition, the expenses associated with the resulting lawsuits may be avoided.”<sup>69</sup> The Office of the State Auditor explained that it would be interested in using negotiated rulemaking if the parties affected by a proposal suggested using the process.<sup>70</sup> Many departments explained that they would be interested under the right circumstances.”

On the more critical side, some departments say they are not interested in using negotiated rulemaking unless it is done above and beyond the informal consultation process that has been demonstrated. These departments feel strongly that the informal consultation process is more flexible and more efficient and effective.

### IV. THE PRACTICE IN MONTANA: CASE STUDIES

The five cases of negotiated rulemaking in Montana show some similarities and many differences. A summary of each case is presented here, along with two other case studies that illustrate the place of negotiated rulemaking in the context of other approaches for involving citizens in administrative rulemaking and to highlight lessons learned from Montana experience.

#### A. Formal Negotiated Rulemaking Processes

**Game Farms:** The existence of game farms—family-owned ranches that raise elk, deer, bison, and other wild animals—has historically been contentious in Montana.<sup>71</sup> The debate has included emotional philosophical disagreements over ownership of wildlife, a public resource, and the rights of private landowners. They have also centered on practical issues, such as

69. Survey response from the Commissioner of Political Practices, *Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

70. See Survey response from the Office of the State Auditor to the *Questionnaire on the Use of Negotiated Rulemaking* (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

71. Personal communication with Paul Sihler, Department of Fish, Wildlife, and Parks (April 30, 1999).

potential transfer of disease from domesticated wildlife to wild populations, theft of wildlife, and the potential hybridization with undesirable species, such as the red deer.

After the 1993 legislature established a comprehensive framework for regulating game farms, with responsibilities shared between the departments of Livestock and Fish, Wildlife and Parks, the "alternative livestock industry" tried during the 1995 legislative session to shift nearly all of the regulatory responsibilities to the Department of Livestock, which is presumably more sympathetic to the industry needs and interests. The legislature did shift some of the responsibilities that were more consistent with the expertise of the Department of Livestock, and required the Department of Livestock and the Department of Fish, Wildlife, and Parks to use the negotiated rulemaking process to revise and update the administrative rules governing the regulation of game farms in Montana.<sup>72</sup> After a period of delay, the departments contracted with the Montana Consensus Council in July 1996 to assess the situation and to help the stakeholders design an appropriate process. The results of the assessment indicated that representatives of six stakeholder groups were willing to come together and, with the help of the Consensus Council, seek agreement on rules to govern the licensing and management of game farms. The stakeholders—including representatives from the game farm industry, livestock producers, hunters, sportsmen, and the two departments—selected their own representatives and first met in October 1996. This initial meeting focused on the ground rules and a work plan to guide the negotiated rulemaking process. Among other things, the ground rules specified that the committee would make decisions by consensus, and that consensus is reached when all six stakeholder groups or caucuses agree on a package of provisions that address the issues being discussed. The ground rules also specified that committee meetings were open and the public would be given an opportunity to provide input and advice. Finally, the ground rules stated that the Consensus Council would document the results of each meeting and facilitate communication among the participants during and between meetings.

The work plan outlined the issues to be addressed in the negotiations and presented three goals or criteria for evaluating proposed solutions: (1) the rules should serve the needs of the

game farm industry and should not unreasonably legitimate businesses from thriving, while also protecting wildlife resources in Montana from any harm due to game operations; (2) the rules should clarify the respective DFWP and DOL in regulating game farms; and (3) the rules should be clear, specific, unambiguous, and understandable by people owning and operating game farms, DFWP and DOL personnel, and interested citizens.

The substantive negotiations began in an atmosphere of distrust and frustration resulting from past regulatory actions. The participants met for an entire day nearly every month until May 1998. At that point, after 20 months of negotiation, the participants reached agreement on 68 proposed rules. The participants did not reach agreement on 1 rule proposed by the DFWP on maintaining records. The participants agreed to disagree on three other issues, and thus no rules were adopted on these issues: (1) create another committee to recommend alternative designs for appropriate game farm fences; (2) use DNA testing to monitor and enforce game animal thefts; and (3) test elk imported from outside Montana for meningeal worm.

Based on the negotiated agreement, the participants spent 4 months seeking ratification of the proposed rules from their constituents, drafting and redrafting the agreement in the appropriate format for administrative rules, and resolving the disagreements that emerged during this first stage of implementation. Throughout this process, the Consensus Council shuttled among the participants to clarify information and interests, and to resolve disputes over specific language.

The draft administrative rules were eventually ratified by the constituents of each stakeholder group, and DFWP and DOL convened three public hearings in late fall 1998 on the proposed rules. Very few people attended the hearings, and there was essentially no opposition to the proposed rules. The two departments made a few minor, editorial changes to the rules after the public hearings. Sixty-nine rules—the 68 agreed to by the stakeholders and the 1 on maintaining records—were adopted by the Board of Livestock in December 1998 and the Montana Commission on Fish, Wildlife and Parks in January 1999. The adopted rules were published in the Montana Administrative Code.

72. See MONT. CODE ANN. § 87-4-422 (1997).

73. Personal communication with Paul Sihler, Department of Fish, Wildlife and Parks (April 30, 1999).

Rules on January 14, 1999.

**Bed and Breakfast Establishments:** Prior to 1997, bed and breakfast establishments were not considered "public accommodations" under Montana law. The Department of Public Health and Human Services, however, required such facilities to obtain a license under section 50-51-201, MCA, which governs hotels, motels, and similar facilities. Before a license can be issued by the department, it must be validated by the local health officer or the sanitarian in the county where the establishment is located.<sup>74</sup> After certain bed and breakfast operators complained about the inconsistent and unfair application of these policies to their establishments, the issue was raised at the legislature.

S.B. 118 required the department to "consult with bed and breakfast operators" to develop rules to govern the operation of bed and breakfast establishments.<sup>75</sup> The rules may relate to "construction, furnishings, housekeeping, personnel, sanitary facilities and controls, water supply, sewerage and sewage disposal systems, refuse collection and disposal, registration and supervision, fire and life safety, food service... staggered license expiration dates, and reimbursement of local governments for inspections and enforcement."<sup>76</sup>

The department began by reviewing the requirements of the negotiated rulemaking act, and distributed a letter of intent to initiate the process in August 1997. The letter was sent to trade associations, interested parties, and groups known to have an interest in bed and breakfast establishments. The letter outlined a work plan and schedule, and requested suggestions and comments from potential stakeholders. During September, the department incorporated the comments it received, and created a mailing list that included all known bed and breakfast operators in Montana, trade associations, and other people interested in the proposed rulemaking process.

In October, the department filed a notice in the Montana Administrative Register to establish a negotiated rulemaking committee on bed and breakfast establishments. The notice specified that the department would accept applications and nominations to serve on the committee. Then, in early November, the department considered the responses and

74. See MONT. CODE ANN. § 50-51-201(3) (1997).

75. S.B. 118, 55th Leg., Reg. Sess. (Mont. 1997), codified at MONT. CODE ANN. § 50-51-108 (1997).

76. MONT. CODE ANN. § 50-51-103 (1997).

selected committee members to represent the bed and breakfast industry and local health officials and sanitarians historically work very well together.

Between January and May 1998, the committee met at least once every month. The department facilitated the meetings, prepared and distributed documents, and conducted research with the committee. The committee worked diligently, and focused on developing reasonable rules to govern different types and sizes of bed and breakfast establishments. The committee reached preliminary agreement on nearly every issue, and in the meeting in May 1998, it prepared a proposed set of rules. However, before the participants could ratify and complete a step in the process, they agreed to recess for the summer season, the busiest time of year for bed and breakfast establishments.

As of March 1999, the department had not reconvened the bed and breakfast negotiated rulemaking committee. This is largely due to time and resource constraints faced by the department, as well as other priorities—such as other legislative mandates to convene a negotiated rulemaking process on other issues, such as ranches, outfitting, and guide services, and to create a new licensing process for new businesses. When it does reconvene the committee, the department expects the participants to ratify the agreements, translate the agreements into draft rules, and then participate in the formal public hearings on the rules. Although the department believes that it could have produced similar outcomes through the conventional rulemaking process, it is impressed with the participant's support and owner of the negotiated rulemaking process and its outcomes.

**Guest Ranches, Outfitters, and Guides:** In 1997, the Montana legislature also required the Department of Public Health and Human Services to convene a negotiated rulemaking process to develop rules governing the operation of guest ranches and outfitting and guide facilities.<sup>78</sup> This issue was raised at the legislature for largely the same reasons as the issue of bed and breakfast establishments; in the absence of specific legal authority to regulate guest ranches and outfitting and guide facilities, operators of such facilities perceived that the department was applying existing policies in an incon-

77. Personal Interview with Staff, Department of Public Health and Human Services, Helena, Montana (March 3, 1999).

78. See S.B. 338, 55th Leg., Reg. Sess. (Mont. 1997), codified at MONT. CODE ANN. § 50-50-102 (1997).

and unfair manner.

The legislature directed the department to develop rules "to properly and reasonably address differences in the size, location, purpose, and time of year of operation of certain small or seasonal establishments. . . . (and that) rules governing . . . (such) establishments must be limited to requirements meant to ensure basic health standards and should not detract from the rustic, out-of-doors experience offered by many guest ranches and outfitter and guide facilities and desired by many tourists."<sup>79</sup>

The department followed the same process for this issue as it did for the negotiated rulemaking on bed and breakfast establishments. It distributed a letter of intent in August 1997, presented an initial work plan, collected names of interested people, incorporated comments on the work plan, and established the negotiated rulemaking committee in November 1997.

Starting in January 1998, the committee met at least once every month through April. Apparently, the operators of guest ranches and outfitter and guide facilities did not have the same type of working relationship with local officials as the operators of bed and breakfast facilities. The lack of trust between these two parties made it very difficult for the committee to reach consensus on any issue. The committee recessed for the summer because of the busy tourist season, and has not been reconvened.

In response to their frustration with the negotiated rulemaking process, representatives of guest ranch and outfitter and guide facilities supported legislation in the 1999 session to determine when a guest ranch or outfitting and guide facility meets the definition of a seasonal or small establishment.<sup>80</sup> The future of the negotiated rulemaking process is thus somewhat dependent on what happens in the legislature. From the department's perspective, the committee should meet again to determine whether it should continue its search for consensus or, consistent with the provisions of the negotiated rulemaking act, submit a report to the director of the department outlining areas of agreement and areas of disagreement.<sup>81</sup> S.B. 338 is clear: "The department shall adopt rules governing guest

79. MONT. CODE ANN. § 5051-102(2).

80. See S.B. 439, 56th Leg., Reg. Sess. (Mont. 1999).

81. Personal Interview with Staff, Department of Public Health and Human Services, Helena, Montana (Mar. 3, 1999).

ranches and outfitting and guide facilities."<sup>82</sup> Presumably the department must move forward and adopt such rules in the fact that the negotiated rulemaking process did not result in a consensus proposal.

**Wastewater Treatment System Design:** Following a series of intense discussions, the Montana Board of Professional Engineers and Land Surveyors requested permission from the director of the Department of Commerce to create a negotiated rulemaking committee to propose rules on whether or not the design and installation of wastewater treatment systems requires a professional engineer's expertise and seal. With the director's support, the department announced its intent to create a negotiated rulemaking committee and received numerous applications from interested people. The chairman of the committee then appointed a seven-member negotiated rulemaking committee, including four members of the board—three of whom were professional engineers and the fourth a public member representative of the Montana Society of Engineers; a public member, a sanitarian; and one "qualified individual" certified by the Montana Department of Environmental Quality.

The committee held two meetings, one in July and the other in August 1998. Concerned members of the public attended and participated in the meetings. The committee agreed to review the existing process used by the department to determine whether engineering services are required and whether such services are appropriate. The committee also agreed that the Department of Environmental Quality should best be suited to determine who is "qualified" to design wastewater treatment systems that do not require the services of a professional engineer. Based on these findings, the committee unanimously recommended that the Department of Environmental Quality develop a rule defining a "qualified individual" for the purpose of designing wastewater treatment systems and specify a certification process for such individuals. The committee also agreed to refine the meaning of "complex wastewater treatment systems" as used in the department's existing rules; and to specify the services of one person from the Board of Professional Engineers and Land Surveyors, one person from the Board of Sanitarians, and one person who is considered a "qualified individual" to assist the department in preparing the new administrative rules.

82. S.B. 338, 55th Leg., Reg. Sess. (Mont. 1997), codified at MONT. CODE ANN. § 51-103(3) (1997).

In September 1998, the Department of Environmental Quality agreed to the substantive recommendations of the negotiated rulemaking committee, and said that it would "be glad to provide a draft of our proposed rules for comment by the three individuals which your committee selects," suggesting that DEQ would draft the rule and then ask for input and advice. DEQ said that it anticipates having rules ready for the formal rulemaking process within six months.

**Fire Suppression Systems Design and Installation:** The Department of Commerce convened another negotiated rulemaking process in much the same way and at the same time as the committee on wastewater treatment systems. The Board of Professional Engineers and Land Surveyors, again with the support of the department director, appointed a negotiated rulemaking committee to investigate allegations that people who were not professional engineers, but certified by the National Institute for Certification in Engineering Technologies (NICET), were designing fire suppression sprinkler systems. The committee included three representatives of the national institute, two fire protection engineers, and three members of the board.

The committee met in July and August 1998. Members of the general public and agency staff with technical and legal expertise participated in the meetings. The committee learned that the majority of sprinkler systems in Montana are designed by people certified by NICET. To the degree that professional engineers are involved, they simply stamp a plan as "sprinkler as required," or words to that effect. Representatives from the state fire marshal's office and the building codes division said that people certified by NICET were competent to design many, if not most, sprinkler systems in the state, and that they had experienced very few problems with the work of such people. The fire suppression engineers and one board member, however, had some reservations about non-engineers designing sprinkler systems that involve pumps, which are rare.

At the end of the two meetings, the committee offered a series of consensus recommendations to the Board of Professional Engineers and Land Surveyors. The recommendations, which are pending adoption by the board, clarify the type of sprinkler systems that can be designed by NICET-certified individuals and the responsibilities of professional engineers.

*B. An Anomaly: Recreational Access to State School Trust Lands*<sup>83</sup>

In addition to the five reg-negs convened under the aegis of the negotiated rulemaking act, Montanans have engaged in at least one informal, but rigorous and systematic process of negotiating administrative rules. When Montana became a state in 1889, the U.S. government set aside two sections of every township to support public education. The Montana Constitution requires the Land Board to manage these lands to maximize the financial return to the trust. The Department of Natural Resources and Conservation leases most of these lands to farmers and ranchers. The trust allows lessees to manage the land, which has fostered fee simple ownership and exclusive use among many lessees.

In the 1950s, recreationists argued that school trust lands belong to the public and should be open to recreational use. A multiple-use policy was written into state statutes in the late 1950s, but in 1979 the Land Board authorized lessees to deny public access. In 1988, a coalition of recreationists filed suit against DNRC and the Land Board to secure access to school trust lands. DNRC tried to negotiate a settlement, but negotiations broke down in 1990. The state district court recommended that the parties address the issue through legislation. In response, HB 778 was drafted and passed in the 1991 Legislature. The bill allowed certain types of recreational use—hunting and fishing—of state school trust lands and required recreationists to buy a \$5 license to compensate the trust.

In 1993, recreationists petitioned the Land Board to allow other types of recreation in accordance with HB 778. The Land Board voted to expand allowable uses to include not only hunting and fishing, but also hiking, bird watching, and picking. The lessees responded by closing nearly two million acres of private land to recreationists. The closures occurred during the peak of fall hunting season. The lessees argued that in supporting HB 778 they had agreed to give up their right to control access by hunters and anglers in return for recreationists abandoning their request for expanded access. The recreationists argued that the lessees never had a right to control access.

In October 1993, the Land Board asked the lessees

83. This section is based on a case study prepared by the Montana Council.

recreationists to sit down and resolve the issue within 60 days. The parties agreed and created an ad hoc committee composed of four representatives each from the Montana Wildlife Federation and the Montana Stockgrowers Association, and one representative from the Montana Farm Bureau. The committee then invited the Montana Consensus Council to convene and facilitate negotiations.

In a series of meetings from November 1993 through January 1994, the committee worked out agreements on key provisions in the rules. The parties agreed that lessees could condition or deny access to state land for selected management reasons. They identified recreational uses that could cause problems for lessees, including motorized vehicles, fires, pets, horses, camping, and concentrated uses. The parties also developed a process for resolving site-specific disputes, and they agreed to a moratorium on any legislative, administrative, or judicial activity to amend the agreement. They also agreed to reconvene in December 1994 to assess these and other emerging guidelines.

Throughout this process, the Consensus Council shuttled between the parties, clarifying concerns, exploring options, and documenting areas of agreement. It proved more difficult to resolve the issue of when and how people should notify lessees before recreating on leased land. The committee requested and received an extension of the 60-day deadline, but the issue remained unresolved when the committee submitted its recommendations to the Land Board on January 18, 1994. The board tentatively adopted the recommendations, tabling consideration of the notification rules. DNRC and the committee then revised the existing rules based on the agreement, prepared an environmental assessment, and held four public hearings on the proposed rules.

The Consensus Council again shuttled among the participants to seek agreement on the notification issue. The day before the Land Board's next meeting, the committee finally agreed that recreationists should personally notify a lessee prior to staying overnight, using horses, or discharging firearms on leased land. If the lessee was unavailable, the recreationist could leave a note in a drop-box at the lessees ranch.

Based on the agreement negotiated among the participants, the Land Board adopted the revised rules on June 6, 1994. The lessees gained increased control over access to leased land under specified conditions. Recreationists gained increased access to

state school trust land.

### C. Informal Consultations

Montana can point to only a handful of cases that directly under the Negotiated Rulemaking Act, but agencies do rely on informal consultations to involve citizen stakeholders in the process of drafting administrative rules. The experience of the Department of Labor and Industry is representative.<sup>84</sup> The department says that it "has an informal version of negotiated rulemaking for a number of years . . . [with] processes range from inviting representatives of the interested parties to assist the department in the development of rules (especially for new programs or amendments from recently adopted legislation) to seeking informal comments from the interested parties on draft rules."<sup>85</sup> The department goes on to say that "obtaining comments from representatives of the interested parties on draft rules allows [it] to address the concerns of the interested parties . . . [and as] a result, the department cases the version of the rules formally noticed for public comment do not need significant changes prior to adoption."

The Department of Corrections realized similar success when it convened an advisory committee to redraft administrative rules licensing juvenile detention facilities. Due to the reorganization of state government in 1997 and changes in the Youth Court Act, the department submitted notice of a public hearing on revised rules licensing detention facilities in February 1998. However, the proposed rules contained some clerical problems, and the rules had to be republished. At the same time, the department solicited comments from some people affected by the rules that additional changes needed to be made. The department withdrew its initial draft of the revised rules and, following the recommendation of the Advisory Committee on Detention Standards and Administrative Rules, appointed an advisory committee of stakeholders from all areas of the state a

84. See survey response from the Department of Labor and Industry on the Use of Negotiated Rulemaking (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

85. *Id.*

86. *Id.*

87. See survey response from the Department of Corrections to the Questionnaire on the Use of Negotiated Rulemaking (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

of the youth justice system. The advisory committee met a number of times throughout the summer and fall of 1998.

A public hearing on the proposed rules was held in November 1998. Four interested parties attended and submitted both oral and written comments. Many members of the advisory committee submitted written comments in support of the process used to draft the proposed rules. The department slightly modified some of the proposed rules based on public input, and adopted the rules on January 4, 1999.

Reflecting on the process, the department says "It worked very well. It brought together all the stakeholders in juvenile detention licensing. As a result, the rules have been thoughtfully revised by the people who use them, and we have produced a set of rules that accommodate everyone's interests and goals."<sup>88</sup> The department goes on to say:

A notable, unplanned thing also happened during this process. The stakeholders in juvenile detention facilities around the state got to know each other much better, and . . . most began to feel more like colleagues within a system rather than separate entities vying with each other. This process was time consuming and work-intensive, but . . . our rules are more comprehensive, responsive, current and accurate as a result of the advisory committee process. Aside from ironing out some wrinkles, we would definitely use this type of process again.<sup>89</sup>

## V. DOES IT WORK? LESSONS LEARNED

How successful is Montana's experience with negotiated rulemaking? And what lessons can be drawn from the state's initial five years of experience? Before answering these questions, it is important to acknowledge the ongoing dialogue among scholars and practitioners over how to evaluate consensus-building processes. How do we determine if a particular project is successful? Based on what criteria? And according to whom?<sup>90</sup>

Montana's experience, placed within the context of what we know about the performance of negotiated rulemaking at the federal level and in other states, offers six lessons: (1) refine the criteria and methods for evaluating consensus-building

88. *Id.*

89. *Id.*

90. See generally David Fairman, *Evaluating Consensus-Building Efforts: According to Whom? And Based on What?* CONSENSUS (Jan. 1999).

processes, including reg-negs; (2) increase people's awareness and understanding of the place of negotiated rulemaking in the spectrum of approaches to involve citizens in administrative rulemaking processes; (3) develop guidelines to help make the most appropriate citizen involvement process to the situation; (4) clarify the legislature's role in negotiated rulemaking; (5) create incentives to use negotiated rulemaking; and (6) identify best practices for convening and managing negotiated rulemaking proceedings.

### A. Refine Evaluation Methods

What is a "successful" negotiated rulemaking or consensus-building process? Although there is some disagreement among scholars and practitioners, there also seems to be some general agreement that there are multiple criteria or indicators of success.<sup>91</sup> While different people may emphasize different indicators, a comprehensive conceptual framework for evaluation should integrate criteria focusing on outcome, quality of the process, and the transformative value of the process.<sup>92</sup> The challenge is to not only include all of the r

91. For more information on evaluating consensus-building processes, see WILLIAM L. URY, ET AL., *GETTING DISPUTES RESOLVED* (1989); GAIL BINGHAM, *ENVIRONMENTAL DISPUTES* (The Conservation Foundation, Washington, D.C. 1989); LAWRENCE SUSSKIND AND JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* (1988); FRANKLIN DUKES, *RESOLVING PUBLIC CONFLICT* (1996); ROBERT A. BARUCH JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT* (1994); and Judith Innes, *Evaluating Consensus-Building* (1998) (manuscript on file with author).

92. See MATTHEW MCKINNEY, *RESOLVING PUBLIC DISPUTES: A HANDBOOK FOR BUILDING CONSENSUS* (Montana Consensus Council, 1998). Here is one framework for evaluating not only consensus-building processes, but also dispute resolution processes. (1) **Outcomes: Was the issue resolved?** This is perhaps the first and most basic measure of success. Did all parties involved in the process meet their basic interests? It should be answered from the perspective of all the affected people and organizations. **Was the agreement implemented?** A second test of success is the extent to which the parties supported the agreement through the implementation process. If the parties voluntarily agreed to a decision, they are more likely to support its implementation. Was the agreement ratified by constituents, decision makers, or people whose support is necessary? **What impact, if any, does the implementation have on-the-ground?** Has it improved the situation? Did it really make a difference? How has the implemented agreement affected the economic, and social systems? Are there unintended consequences? (2) **Quality of the Process: How fair was the process?** Were all the groups who wanted to be involved given an adequate chance to do so? Was everyone given an opportunity to express their views? Did each participant feel that the others accepted their views as legitimate? Were all the parties given access to the technical information that was available? Were the people involved accountable to the constituencies they ostensibly represented?

indicators of success, but also to develop practical methods to measure each indicator.

The Montana Consensus Council has recently developed and tested one approach to evaluating success. Based on the assumption that participants are in the best position to evaluate the success of their negotiation efforts, the Council developed a "Participant Satisfaction Scorecard."<sup>93</sup> The scorecard incorporates 28 statements drawn from the growing body of literature on evaluating consensus building processes. The statements are grouped into three categories: outcomes, quality of the process, and working relationships (or transformation). For each statement, participants are asked to check a box indicating whether that aspect of the process is important or unimportant to them. They then indicate their level of agreement with each statement by circling a number from 1 (completely disagree) to 7 (completely agree). To date, the Council has tested the scorecard in five different consensus building forums, including the negotiated rulemaking on game farms.

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Was there a means whereby a due process complaint could be heard at the conclusion of the negotiations? Were the gains and losses of various kinds fairly distributed among the parties? Was there adequate opportunity for public review and comment? Was the process open to public scrutiny? **How efficient was the process?** What were the transaction costs—the time, money, and emotional energy expended—of the consensus process compared to other processes that could have been used to address the issue? **How wise was the agreement?** Was it based on the most relevant information? Did the participants have an opportunity to jointly gather and interpret data and information? Did the process foster an atmosphere of learning? Did the participants consider a number of options on how to improve the situation? Is the agreement flexible and adaptive to new information, interests, and ideas? Can the agreement be implemented? Is it technically, financially, politically, culturally, and socially feasible? **How stable is the agreement?** An agreement that is perceived as fair, is reached efficiently, and seems technically wise is unsuccessful if it does not endure. Does the agreement resolve the underlying problem, or is it simply another decision that fails to stick. **Was the agreement at least as good or better than the participant's best alternative to a negotiated agreement?** All things considered, could the participants have gotten a better deal somewhere else? (3) **Transformation:** Sometimes, as part of reaching an agreement, and sometimes in spite of "not" reaching an agreement, a consensus process itself may be valuable. Did the process provide an opportunity for developing and maintaining trust among people with diverse viewpoints? Were communication channels created as a result of such processes? Would the participants be willing to renegotiate in appropriate circumstances? (Social capital). Did the participants gain valuable insights about the issues and the perspectives and values of others? (Intellectual capital). Did the process improve the ability of people, organizations, communities, institutions, and society at large to solve complex, multi-party issues? (Political capital).

93. See Will Harmon, *Montana Group Tries Scorecard Approach*, Consensus (Jan. 1999).

Once the negotiated rulemaking process on game farm completed, the Montana Consensus Council distributed evaluation form to the participants. In sum, participants generally satisfied with the process, the working relationships in the group, and the outcome. Interestingly, the evaluation suggests that the participants were satisfied with the process and the interactions at the table, but less so with the outcome. On average, people disagreed most of all with the statement that the process was efficient, that is was time and money well spent. On the other hand, a representative DOL said "negotiated rulemaking allowed us to build agreement up-front, and thereby save time and money responding to inevitable challenges that emerge when we use the traditional draft-notice-comment procedure. Negotiated rulemaking works!" These somewhat contradictory conclusions emphasize the importance of clarifying the expectations and objectives of the convening agency and the stakeholders as a baseline for evaluating the success of negotiated rulemaking.

As the recent series of articles by Coglianese, Hart, and Fairman demonstrate, there is clearly a need for scholars and practitioners to continue developing multiple criteria for evaluating consensus-building processes, and practical ways to measure the criteria or indicators. The scorecard approach the Montana Consensus Council is one place to start. The results from the use of the scorecard suggest that it should be critically reviewed, refined, and further tested.

### B. Increase Awareness and Understanding

Respondents to the survey in Montana concluded that there is a need to improve people's awareness and understanding of the intent, procedures, and appropriate use of negotiated rulemaking. To foster the use of negotiated rulemaking in appropriate situations, 15 of the 19 agencies responding to the survey said that they would be interested in a short-course negotiated rulemaking. In addition to raising people's awareness and understanding of the negotiated rulemaking process, the respondents suggested several ideas that might be incorporated into an educational program:

- Compare and contrast formal negotiated rulemaking with informal consultation – what are the relative strengths and weaknesses of the different approaches?
- Acknowledge the range of possible benefits derived

negotiated rulemaking, such as better outcomes, increased understanding of the issues, and improved working relationships.<sup>94</sup>

- Highlight the experiences of agencies that have convened negotiated rulemaking proceedings. What we can learn from these experiences? What type of resources were involved in convening such proceedings? Time, money, etc.
- Examine the role and value of relying on an impartial facilitator or mediator to help convene and coordinate the negotiated rulemaking. How do participants find and pay for such services?
- Review the technical and procedural requirements to comply with the statute. Clarify provisions that are advisory relative to those that are mandatory.
- Discuss the principles of consensus building and the steps to building agreement in the context of negotiated rulemaking. Review tools and techniques for involving all affected parties.
- Provide criteria on when to use negotiated rulemaking.
- Conduct a role-playing exercise on negotiated rulemaking.

One person responding to the survey suggested that negotiated rulemaking should be incorporated into the existing class on administrative rulemaking, which is taught every two years. Other people have suggested that such a short course should be targeted to the eleven agencies that have expressed interest in using negotiated rulemaking.

### C. Match the Process to the Situation

Another lesson that emerges from Montana's experience is that negotiated rulemaking is clearly not appropriate in all situations. Of the more than 10,000 rules promulgated in the past five years in Montana, 50 percent focus on routine agency matters for which negotiated rulemaking is not appropriate. Many agencies also conclude that negotiated rulemaking is inappropriate when the informal consultation process outlined

94. In light of the Coglianese's article (see *supra* note 1) and Harter's response (see *supra* note 8), there is a basic need to clarify the objectives and value of negotiated rulemaking. Reg-neg provides another forum to foster citizen participation in public decision making; allows for negotiation among stakeholders and the responsible agency; potentially results in better informed and more widely supported rules and regulations; may reduce litigation; may shorten rulemaking time. Negotiated rulemaking processes may also result in "transformative" benefits even when they do not result in consensus outcomes. The idea here is that negotiation and mediation often improve relationships and people's understanding of each other and the issues even when the process falls short of achieving unanimous agreement.

in section 2-4-304, MCA, is sufficient to obtain the viewpoint and advice of interested persons with respect to contemplated rulemaking. Reflecting on their experience to date with negotiated rulemaking on bed and breakfast establishments Department Public Health and Human Services concludes "[m]ore than likely, we could have produced similar outcomes through the conventional rulemaking process."<sup>95</sup> The department goes on to say, however, that "the conventional process may not have resulted in the participant's support of ownership of the negotiated rulemaking process and outcomes."<sup>96</sup>

Taken together, the different experiences with informal consultations and negotiated rulemaking provide a useful typology of approaches to citizen participation in administrative rulemaking. From least intensive to most intensive, the typology includes:

1. Seeking input and advice from citizens after an initial draft of the rule is prepared but before formal public hearing process;
2. Soliciting citizen input and advice prior to preparing the initial draft of the rule;
3. Allowing stakeholders to work side-by-side with agency officials and other stakeholders to jointly prepare the initial draft; and
4. Engaging in a formal negotiated rulemaking proceeding.

This typology suggests that agency officials should spend some time assessing the rulemaking situation, and then select the process that best matches the situation. Conducting a situation assessment, usually with the assistance of an impartial facilitator or mediator, is the cornerstone of an effective negotiated rulemaking process. The likelihood of a negotiated rulemaking process resulting in a consensus process is contingent on resolving several key issues up-front: 1

95. Survey response to the *Questionnaire on the Use of Negotiated Rulemaking* from the Department of Public Health and Human Services (prepared and distributed by the Montana Consensus Council, July 1998, on file with author).

96. *Id.*

97. See Philip J. Harter and Charles Pou, Jr., *Negotiating Environmental Up-front Planning is Vital to Success*, NAT'L INST. DISP. RESOL. NEWS 4-8 (N 1997).

needs to be involved; 2) what is the appropriate role of the agency; 3) what information is needed; 4) how shall such information be acquired; and 5) what is meant by consensus? Unclear goals and faulty stakeholder involvement limit the ability of consensus processes to achieve their full power. When consensus-building processes are hastily put together, without adequate assessment or systematic consideration of the forum design, participants sometimes feel "burned," "used," or that their time has been wasted.

So, when is the use of a negotiated rulemaking process most beneficial? As mentioned earlier, the Montana Negotiated Rulemaking Act states that an agency director must determine that the use of a reg-neg procedure is "in the public interest." In making such a determination, the agency director is encouraged to consider the need for the rule, the ability to identify stakeholders and convene a balanced committee, the likelihood of reaching consensus, the availability of resources, and the agency's willingness to promote the committee's consensus recommendation.

The literature on public dispute resolution suggests some additional criteria for determining the best use of negotiated rulemaking, or any other consensus-building process.<sup>98</sup> Although there is some debate over the appropriate criteria to consider in determining the "ripeness" of a situation for consensus building, most scholars and practitioners agree to a few basic tenets:

1. **The proposed rulemaking is controversial.** Negotiated rulemaking is most useful if there is a history of animosity among the stakeholders and the responsible agency; the issue is politically-charged; the rule will be difficult to enforce without voluntary compliance; or litigation is likely over the resulting rule.

2. **The outcome is genuinely in doubt.** That is, there is sufficient countervailing power—through political influence, a commanding position of the facts, or other source—so that no party is in a position to dictate the results. This analysis assumes that you can identify the key stakeholders, their

98. For more on the appropriate use of consensus processes and negotiated rulemaking in particular, see generally GERALD CORMICK, ET. AL., BUILDING CONSENSUS FOR A SUSTAINABLE FUTURE: PUTTING PRINCIPLES INTO PRACTICE (National Roundtable on the Environment and the Economy, Ottawa, 1996); and JIM ARTHUR, A GUIDE TO PUBLIC INVOLVEMENT IN RULE MAKING (Washington State Office of Financial Management, February 1995).

interests, and resources, and conclude that the use of traditional approaches to citizen involvement, including informal consultations, are not likely to result in a widely supported outcome.

3. **The stakeholders share a common concern and agree that the issue(s) must be resolved.** They must assume that there is a problem and a need for the rule, or at least concede that a rule in some form will be adopted. This assumes that the issues are relatively well-defined and compelling from the perspective of the stakeholders. It also assumes that there is some deadline for action, so that unless an outcome is negotiated, someone else will impose a decision.

4. **The stakeholders, including the responsible agency, believe that a negotiated rulemaking process offers the best opportunity to shape a fair, wise, and stable outcome.** This means that the stakeholders have a realistic understanding of their "best alternative to a negotiated agreement" and conclude that they are more likely to achieve their interests through negotiated rulemaking than through some other alternative forum.<sup>99</sup> Another way to say this is that all parties believe that they have something to gain by negotiating and something to lose by not negotiating. This principle assumes that the stakeholders are relatively well-organized, select someone to represent their interests, and are willing to invest the necessary time, money, and people to effect participation in the process. It also assumes that the situation involves diverse issues, so the participants can trade on issues they value differently. If the participants don't have anything to trade, they are not likely to reach agreement.

5. **The responsible agency is willing to participate and implement a negotiated agreement.** The agency must make a serious commitment to the process by allocating staff time and resources, and clearly communicating to the stakeholders the agency's consistent with the formal public review and comment period will seek to implement the negotiated rule.

These criteria or guidelines help define the best or most appropriate use of negotiated rulemaking.<sup>100</sup> However, it still

99. An assessment of the best alternative to a negotiated agreement, or BIA, should include a consideration of transaction costs, the likely satisfaction with the outcomes, the potential impact on relationships with other participants, and the desirability of the outcome.

100. In short, conventional citizen involvement processes work well for conventional situations. Negotiated rulemaking should be reserved for unconventional, political

be emphasized that Montana's experience to date suggests that the basic idea of negotiated rulemaking can be effectively adapted to different situations; situations where all of these principles or necessary conditions are not satisfied. Although the negotiated rulemaking on game farms consumed twenty months, the Department of Commerce convened two short, very focused negotiated rulemaking proceedings. The legislature has mandated the use of negotiated rulemaking on three occasions for complex issues. And the State Land Board encouraged stakeholders to engage in an ad hoc negotiated rulemaking process over issues related to recreational access to state school trust land. Although this latter process was not convened under the auspices of the Montana Negotiated Rulemaking Act, it is an excellent example of how the theory of negotiated rulemaking can work in practice.

When negotiated rulemaking is not appropriate, agencies should seriously consider the pros and cons of other, less intensive, approaches to citizen involvement. Whether agencies simply provide information and education to citizens about a proposed rule, seek their input and advice before, during, or after the rule has been drafted, or convene an advisory committee or working group to help draft the rule, they should keep in mind a few guidelines. First, agencies should carefully articulate their goals and expectations for any type of citizen involvement process. They should clarify whether the process is designed to identify issues and concerns, define problems and opportunities, generate alternatives, refine options, or develop recommendations. They should also make sure that citizens and stakeholders understand that the agency reserves final decision-making power.

The second tenet to citizen involvement in administrative rulemaking is to be inclusive. Rather than consulting with a few stakeholders, try to consult with all of them, or at least consider the consequences of what may be perceived as biased, ex parte communication. Third, realize that, if the stakeholders cannot exert some control over the outcomes of the process, as in negotiated rulemaking, they may have a limited incentive to participate. Fourth and finally, realize that it will be difficult if not impossible for the stakeholders to make trade-offs among issues they value differently if they are not engaged in some type of face-to-face dialogue.

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charged situations.

#### *D. Clarify the Legislature's Role*

During the initial five years of Montana's experience with negotiated rulemaking, it appears that the legislature is inclined to use reg-neg more than state agencies. Why the legislature mandates the use of negotiated rulemaking may be difficult to assess. However, it is helpful at this point to reflect on the appropriate role of the legislature in the process of negotiated rulemaking.

As demonstrated by the case studies on guest ranches, outfitters, and guides and game farms, it is difficult for the legislature to mandate the use of negotiated rulemaking. In the case of guest ranches, outfitters, and guides, neither the legislature nor the department apparently assessed the appropriateness of a negotiated rulemaking committee convening the process. This oversight may help explain the gridlock encountered in that process. By contrast, the departments of Livestock and Fish, Wildlife and Conservation completed an assessment up-front which, among other things, demonstrated the willingness of stakeholders to participate and help shape a negotiated rulemaking process. Without completing some type of systematic assessment, it is presumptuous for the legislature or an agency to assume that stakeholders or the responsible agency want to participate in reg-neg.

These examples suggest that it may be more appropriate for the legislature to require state agencies to conduct an issue, situation, or conflict assessment to determine if there is sufficient value in convening a negotiated rulemaking proceeding. If a state agency completes such an assessment and concludes that a negotiated rulemaking proceeding is not appropriate, the agency should document the reasons for its decisions, explain how it plans to proceed, and submit a report to the legislature and other interested parties.<sup>101</sup> As an alternative, the legislature may ask its own staff, or an impartial third party, to conduct the situation assessment. Either way, this approach provides a reasonable role for the legislature to play in favor of the use of negotiated rulemaking, holds the agency accountable, and is more consistent with the principles and practice of convening a negotiated rulemaking proceeding.

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101. This recommendation is consistent with Montana law which requires an agency to notify stakeholders why it will not convene a negotiated rulemaking committee. See MONT. CODE ANN. § 2-5-106(2) (1997).

### E. Create Incentives

In addition to increasing people's awareness and understanding of negotiated rulemaking, and helping them match the process to the situation, it may be possible to create some incentives for agencies to consider the appropriate use of reg-neg. For example, perhaps there are reasonable ways to make the process less cumbersome, simpler, and more flexible. Although many agencies claim that the negotiated rulemaking act is too cumbersome, and are less likely to embrace the process the more requirements there are, they need to remember that the provisions in the act are advisory, not mandatory.<sup>102</sup> Agency officials should adopt a more entrepreneurial spirit. It may be possible, for example, to limit some of the formal public notice requirements associated with the negotiated rulemaking process if an adequate situation assessment is completed and a proposed negotiated rulemaking committee is sufficiently inclusive of all stakeholders. There may be other ways to streamline the start-up of a negotiated rulemaking process.

Another incentive, consistent with fostering an entrepreneurial spirit, is to allow citizens to request the use of a negotiated rulemaking proceeding.<sup>103</sup> Apparently, this approach is used, at least informally, by the U.S. EPA. Agencies are likely to resist this type of strategy for fear that it removes some of their authority and responsibility. Framed in a more positive way, this strategy may demonstrate to agencies that certain issues are controversial and very important to stakeholders. It can serve as a type of reality-check. Once again, it is important to remember that Montana's current negotiated rulemaking statute allows the responsible agency to not initiate such a process if it determines, through an assessment, that such a process would not be feasible or useful. In other words, it may be possible to envision a scenario where citizens ask a responsible agency to consider the possibility of a negotiated rulemaking process, and the agency concludes that such a

102. MONT. CODE ANN. § 2-5-102 (1997) states that the procedures in the act are not mandatory; they are simply advisory, and agencies and citizens are encouraged to experiment with different approaches to negotiated rulemaking.

103. For example, in its survey response to the *Questionnaire on the Use of Negotiated Rulemaking*, the Montana Office of the State Auditor said that it would be more inclined to use a reg-neg process if the stakeholders suggested the use of that process. Further, in an early draft of the proposed Montana River Recreation Management Act of 1999, the authors suggested that negotiated rulemaking should be initiated by affected recreational users or landowners within a particular watershed.

process is not appropriate. While the agency may balk at such a decision, it is also possible to use the act as an opportunity to improve everyone's understanding of the issue, build relationships, and seek agreement on an appropriate process to address the issue. Finally, perhaps the legislature could provide funding for one or more pilot projects or create some type of "Regulatory Reform Project" to explore different ways to engage citizens in administrative rulemaking with the goal of improving the substance and acceptability of rules and regulations. In Washington, for example, the legislature encouraged agencies to test the draft of a rule through the use of volunteer pilot study groups. The basic idea is to encourage citizens and stakeholders to help an agency test the practicality of a proposed rule on a limited basis before it is formally adopted and applied on a broad scale. How well can the proposed rule be administered and enforced? What are the costs? Is it feasible for regulated communities to comply with the rule? Answering these type of questions up-front can save time and money that otherwise would be spent on amendments to the rule.

### F. Affirm Best Practices

Montana's experience with negotiated rulemaking reinforces a number of practical lessons on designing and managing consensus-building forums. To the extent that negotiated rulemaking processes should be voluntary and participant designed, the negotiated rulemaking processes for game farms and the one on recreational access to state lands were successful, at least in part, because the agencies felt a compelling need to engage one another and seek a consensus. The best approach to resolving the situation was the best approach to resolving the situation. The forums involved people affected by the rule and those who may have undermined the process if not implemented, and, at least in the case of game farms, those people who would implement the agreement. The stakeholders define the problem, and the goals, and selected the participants.

By contrast, the experiences of the DPHHS suggest that it may be difficult for the legislature to mandate negotiated rulemaking. Given the results of the

104. See WASH. REV. CODE § 34.05.310 (2)(b). See also JIM ARTHUR, PUBLIC INVOLVEMENT IN RULE MAKING (Washington State Office of Water Management, Feb. 1995).

rulemaking process on guest ranches, outfitters, and guides, it is not clear that any of the stakeholders, nor the department, felt compelled to engage in a consensus seeking process. It also appears that very few, if any, of the stakeholders felt any ownership in the process since it was largely designed by the department. The different stakeholder groups were not given the opportunity to select their own representatives, and apparently had limited opportunity to define the issues and objectives, set the agenda, and develop ground rules to govern the negotiation.

The two cases from the Department of Commerce demonstrate the critical importance of joint fact-finding and mutual education. In both cases, the participants built a common understanding of the issues, gathered and interpreted data together, and shared information. The game farms and recreational access cases also illustrate the value of this key ingredient to a successful consensus-building process.

The case studies also demonstrate the need for accountability; for participants to be accountable to each other and the ground rules they adopt; for the representatives to be accountable to the constituents they represent; and for all of the participants to be accountable to the public and decision makers. In most consensus-building processes, participants are representing a constituency or group of like-minded people; they are not simply representing their own views. Given this type of arrangement, it is absolutely critical that the representatives regularly inform their constituents and seek their input and advice throughout the negotiation process. There must be sufficient time for constituents to review, revise, and ratify a final proposal. In the game farms case study, the representatives and their constituents spent nearly four months at this stage. However, that investment of time paid off during the public hearings, when no one opposed the proposed rules.

The case study on recreational access to state school trust lands illustrates the importance of keeping decision makers and the public informed of the status of the negotiation. In this case, the decision makers—the State Land Board—extended the initial deadline of the negotiation based on the progress being made.

Montana's experience with negotiated rulemaking also reinforces the principle that the stakeholders must develop a plan and stay involved during the implementation of a negotiated agreement. Reaching an agreement through a

negotiated rulemaking process is in some sense on the beginning of the formal process; the proposed rule is subject to the formal public notice-and-comment process during which objections may arise. The first task is to translate the negotiated agreement into the appropriate form of administrative rules. In the case studies on game farm recreational access, this process was sometimes difficult, insurmountable, because the stakeholders were engaged and held the agency officials accountable to the spirit and terms of the negotiated agreement. The second task is to educate participants, including the agency officials and the stakeholders, to jointly present the proposed rule to the public. In the recreational access case study, the participants jointly presented the proposed rules during an informal house prior to the formal public hearing convened by the agency. Largely because the stakeholders presented the results of the negotiated rulemaking process and explained the rationale for the outcomes, members of the general public—as peers—did not raise any objections during the formal public hearings.

Finally, the role and value of an impartial facilitator cannot be overlooked. In theory, a facilitator can assess the situation, provide negotiation training and advice, process design, coordinate meetings, document agreements, and support implementation. In the cases that were argued, it is doubtful whether the stakeholders would have made progress without the assistance of an experienced facilitator. On the other hand, the experiences of the Department of Commerce suggest that on issues that are more narrowly defined and with fewer stakeholders, it is possible for the department to use individuals with recognized leadership skills to convene and facilitate successful negotiated rulemaking processes. In retrospect, the negotiated rulemaking cases convened by DPHHS would most likely have benefited from the advice and consultation of an individual or organization experienced in assessing public policy conflicts and helping stakeholders identify appropriate forums for seeking agreement.

## VI. CONCLUSION

The use of negotiated rulemaking in Montana suggests a couple of general lessons for the field of public dispute resolution and consensus building. Consensus processes, including negotiated rulemaking, are not a panacea; they

appropriate in all circumstances. The basic challenge for citizens, officials, and practitioners is to match the process to the situation; that is, to understand when negotiated rulemaking and other consensus-building processes are most appropriate, or when another type of public involvement or dispute resolution process might be more beneficial. The guidelines presented above should help agency officials, citizens, and legislators determine when negotiated rulemaking may be most appropriate. The fact remains that negotiated rulemaking, much like consensus building in general, is as much art as science.

Another observation emerging from this study is that the purpose and value of negotiated rulemaking is broader than reducing litigation and the amount of time it takes to promulgate administrative rules. These are admirable goals and useful benchmarks to evaluate negotiated rulemaking. However, it is also important to acknowledge the transformative value of negotiated rulemaking, and the significant opportunity it provides for a more deliberative approach to citizen involvement in administrative rulemaking.<sup>105</sup> When appropriately used, negotiated rulemaking results in better informed, more widely accepted rules and regulations.

Scholars, practitioners, public officials, and citizens should keep in mind Harter's conclusion that this process is still in its adolescence. The practice of negotiated rulemaking will most likely become more consistent with the theory as agencies and interest groups gain more experience and confidence with the process. At the same time, the theory or expectations of this rulemaking format should be adapted based on experience. As suggested above, negotiated rulemaking should be considered one option in a spectrum of ways to involve citizens in administrative rulemaking.

Finally, to improve our understanding of the theory and practice of negotiated rulemaking, it would be extremely helpful to hear about the experiences of other states. How much is negotiated rulemaking be used? What are the barriers? What are the opportunities? Based on some additional systematic research, it may be useful to convene a collective of state and federal officials, scholars, practitioners, and others to examine the past, present, and future of negotiated rulemaking as a

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105. For more on deliberative approaches to public decision making, see DAVID MATHEWS, *POLITICS FOR PEOPLE* (Univ. of Ill. Press, 1994).

means to involve citizens in administrative rulemaking.

TABLE 1:

## SUMMARY OF NEGOTIATED RULEMAKING CASES 1993-1998

<i>Agency</i>	<i>Project</i>	<i>Date</i>	<i>Mandated by the Legislature</i>	<i>Facilitated</i>	<i>Results</i>
Livestock and Fish, Wildlife and Parks	Game Farms	1997 & 1998	Yes	Yes	Consensus proposal. Sixty-nine rules adopted.
Public Health & Human Services	Bed & Breakfast Facilities	1997 & 1998	Yes	No	Partial agreement. Adoption pending final agency action.
Public Health & Human Services	Guest Ranches, Outfitters & Guides	1997 & 1998	Yes	No	Partial agreement. Adoption pending final agency action.
Commerce	Fire sprinkler systems	1998	No	No	Consensus proposal. Adoption pending final agency action.
Commerce	Waste water treatment systems	1998	No	No	Consensus proposal. Adoption pending final agency action.