The Role of Mandatory Dispute Resolution in Federal Environmental Law: Lessons from the Clean Air Act

Spring, 2005

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The authors thank Lawrence Susskind, director of the MIT-Harvard Public Disputes Program, for his thoughtful review and comments on an earlier draft of this paper.

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1. Introduction

Judicial courts regularly encourage, and sometimes require, disputants to resolve their differences outside the court room through negotiation, mediation, and other forms of dispute resolution.[1] However, there are very few statutory provisions in federal natural resources and environmental law compelling disputants to work out their differences prior to litigation. And, where such provisions do exist, they have apparently not been used much.

The purpose of this article is to shed some light on the merits of statutorily mandated dispute resolution in federal natural resources and environmental law. We begin by describing section 164(e) of the Clean Air Act,[2] which mandates the use of a dispute resolution process to resolve selected types of disputes among tribes, states, and the Environmental Protection

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[1] For an introduction to this topic, see SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (Discussion Draft, July 20, 1990); and BENJAMIN SOKOLY, INSTITUTIONALIZATION OF COURT-ANNEXED ADR: AN EXAMINATION OF FIVE STATES' PROVISIONS (unpublished manuscript on file with the authors).
In Montana, for example, the Montana Supreme Court adopted Rule 54 in 1996, requiring mediation in worker's compensation cases, specific domestic relations disputes, and civil cases seeking a money judgment or monetary damages. During the three-year period from 1997 through 1999, 1,820 cases were appealed to the Montana Supreme Court, and 698 of those cases were referred to mediation under Rule 54. Of the 698 cases, 169 were settled, for a success rate of about 24 percent. Other studies demonstrate a similar degree of success.
In the summer of 2000, wildfires burned more than 300,000 acres in the Bitterroot National Forest, situated along the border of western Montana and Idaho. To expedite the implementation of a forest restoration plan, the Forest Service limited public participation and bypassed its own internal appeals process. In December 2001, Undersecretary of Agriculture Mark Rey approved a plan to remove 176 million board feet of timber from 46,000 acres on the Bitterroot. Shortly after the restoration plan was approved, seven environmental groups filed a lawsuit decrying the plan's impact on watersheds and wildlife habitat and contesting the agency's refusal to accept administrative appeals. A U.S. District Court judge sided with the plaintiffs, saying that the process violated the public's right to be involved in decision making. "It is presumptuous," the judge wrote in his decision, "to believe that the agency's final decision has a perfection about it that would not be illuminated by interested comment, questioning, or requests for justification of propositions asserted in it." He granted a temporary injunction against the logging plan until the Forest Service complied with its own established appeals process. When the Forest Service appealed that decision, the court ordered the agency to enter into mediation – with the undersecretary and regional forester present in Missoula – to settle the dispute. Another federal judge presided over the two-day mediation, and environmental groups and loggers negotiated a new plan with the Forest Service to salvage 55 million board feet of timber, prohibiting removal of any trees over 22 inches in diameter and protecting 15,000 acres of roadless area. As the timber sale moved forward, the Forest Service filed a motion in district court, arguing that the 22-inch size limit applied only to living trees, and that loggers should be allowed to cut 199 dead trees in the larger-size class. In June 2003, a federal judge denied the agency's request. This vignette is adapted from MATTHEW MCKINNEY AND WILLIAM HARMON, THE WESTERN CONFLUENCE: A GUIDE TO GOVERNING NATURAL RESOURCES (2004).

[2] 42 U.S.C. § 7474(e).

Agency. We review the statutory and administrative history of the provision, and examine the only four instances in which it was invoked. We then highlight a number of lessons learned from the experience of the Clean Air Act that might serve as useful guidance for other mandatory dispute resolution processes. Finally, we conclude by offering a few observations on the place of mandatory dispute resolution in federal natural resources and environmental law. Appendix 1 offers an overview of other statutory models to deal with disputes in federal environmental policy, ranging from intergovernmental consultations requirements to mandated mediation.

2. The Clean Air Act

A. Statutory Framework of Section 164(e)

Congress added section 164 in the 1977 amendments to the Clean Air Act in order to require the prevention of significant deterioration (PSD) in areas with relatively clean air. The legislative history of section 164 indicates congressional intent to strengthen the authority of states and Indian tribes to protect the air quality in these areas by redesignating them into more protective classifications and to protect their own air quality by participating in decisions about new permits in adjacent jurisdictions.

To date, tribal authorities governing six different Indian reservations have sought to redesignate their lands from Class II to Class I: Northern Cheyenne (1977), Flathead (1981), and Fort Peck (1983), all in Montana; Spokane in Washington (1991); Yavapai-Apache in Arizona (1996); and the Forest County Potawatomi in Wisconsin (1999). In most cases, the tribes have been motivated to act by potential development on nearby lands: "Most reservations constitute small islands within states, so there is substantial risk that a source located outside the

reservation will affect air quality within the reservation."[3] States have not acted to redesignate their lands to protect air quality, and in some cases have objected to such redesignation by Indian tribes, arguing that the tribes' decisions will limit their ability to pursue economic development.[4] Federal land managers also have not acted to redesignate any lands to Class I status.

Acknowledging that PSD redesignations and major-source PSD permit applications might result in such conflict between sovereign governments with different priorities, the 1977 Clean Air Act amendments included section 164(e), authorizing EPA to participate as a mediator and, if necessary, as a final arbiter to resolve such disputes. Initially the section was written to resolve disputes between states; the inclusion of Indian tribes was accompanied by a number of strong statements of congressional intent to strengthen both states' and tribes' rights and to reduce the discretion of the EPA in implementing the Clean Air Act.

Section 164(e) applies in two instances:

(1) A affected state or a tribe disagrees with the other's redesignation of a PSD area, or

(2) An affected state or tribe asserts that another state's proposed PSD permit for a major new emitting facility will cause or contribute to a deterioration of the affected state's or tribal reservation's air quality.

Either party may request a 164(e) dispute resolution process. If so requested, EPA must convene negotiations among the parties and, if the negotiations fail, EPA must make its own determination to resolve the dispute. Thus, in effect, section 164(e) is a binding arbitration provision with EPA in the decisionmaking position.

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[3] Craig N. Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 Harv. Env'tl L. Rev. 313, 363 (1989).

[4] *See* ARNOLD W. REITZE JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 111 (Env'tl L. Inst., 2001); William H. Gelles, *Tribal Regulatory Authority Under the Clean Air Act*, 3 Env'tl Law. 373, n. 78 (1997).

Although EPA has the final authority if a section 164(e) negotiation fails, the agency's discretion at this point is limited. Congress deliberately intended to restrict EPA's authority to disapprove a redesignation request. EPA's pre-1977 regulations allowed the agency to override a state's or tribe's classification of an area on the ground that the state or tribe improperly weighed energy, environment, or other factors. Under the 1977 amendments, by contrast, EPA's role is to determine whether the requesting state or tribe followed specific procedural requirements, ensuring that the local decisionmaking process provided ample opportunity for interested parties to express their views.[5]

Moreover, the legislative history of section 164(e) indicates that the intergovernmental dispute resolution provision was not intended to encroach on Indian sovereignty. For example, during the House of Representatives' consideration of the Conference Committee report, Congressman Rogers cautioned:

> The conference bill provides that both States and Indian tribes will continue to have the power they now have to redesignate their lands to a new air quality classification. In cases where another State may object to such a classification, and when the two jurisdictions cannot amicably come to agreement, the Administrator is granted the power to review the redesignation. But it is intended that the Administrator's review of such determinations by tribal governments be exercised with utmost caution to avoid unnecessarily substituting his judgment for that of the tribe. . . . [T]he Administrator should reverse the determination made by an Indian governing body to reclassify its land, only under the most serious circumstances.[6]

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[5] *See* U.S. Library of Congress, 4 *A* Legislative History of the Clean Air Act Amendments of 1977, 2474-75, 2613-14 (1979) (hereafter referred to as 1977 Legislative History).
[6] *Id*. at vol. 3, p. 3.

Accordingly, EPA has interpreted the scope of its discretion in this situation narrowly: "While EPA must ensure procedural rigor, it is generally inappropriate for EPA to interpose superseding Federal views on the merits of the resulting State or Tribal decisions."[7]

As one commentator observed, "Section 164(e) of the Clean Air Act Amendments expresses respect for the semi-sovereign status of Indians on their tribal lands by requiring that the EPA attempt to resolve disputes through negotiation rather than by unilateral administrative decision."[8] Another concluded that "Tribes have . . . used EPA's policy to work cooperatively with States and regulated entities to enhance tribal capacity to monitor air quality and to operate air quality programs.[9]

In assessing the dispute resolution mandate of section 164(e), it is instructive to compare the process by which federal land managers (FLMs) participate in PSD permitting decisions. An FLM charged with managing a Class I area (national park, wilderness area, etc.) must be notified of major facilities proposed near the area or potentially affecting the area. The FLM has an affirmative duty to protect air quality in Class I areas. The permitting authority must consider the FLM's evaluation of the source's impacts, and may not issue the permit if certain conditions are present unless the state's governor issues a variance. There is no intergovernmental negotiation provision in this situation: If the state issues a permit using the variance provision, and the FLM does not concur, the issue must be forwarded to the President for a final decision, which is not subject to judicial review.[10]

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[7] U.S. Environmental Protection Agency, Notice of Resolution of Dispute Concerning the Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area, <www.epa.gov/region09/air/yavapai/> (hereafter referred to as EPA Yavapai-Apache Dispute Resolution).

[8] Timothy J. Sullivan, "The Difficulties of Mandatory Negotiation (the Colstrip Power Plant Case)," in LAWRENCE SUSSKIND, LAWRENCE BACKOW & MICHAEL WHEELER, EDS., RESOLVING ENVIRONMENTAL REGULATORY DISPUTES 56, 74 (1983).

[9] Gelles, *supra* note 4 at 377.

[10] 42 U.S.C. § 7475(d)(2)(D)(ii).

FLMs play an advisory role in the case of PSD redesignations, and there is no provision for negotiation among parties with differing perspectives. A state contemplating a PSD redesignation must notify an FLM of an area that may be affected and provide 60 days for the FLM to make comments and recommendations. As with the state permitting process, there is no provision for intergovernmental negotiation: EPA's Administrator has the limited discretion to disapprove of a state's redesignation if it fails to meet the procedural requirements of the Clean Air Act or if the area proposed for redesignation is not eligible for the proposed classification.[11]

In 1997, EPA announced proposed rules to clarify PSD permit review procedures for proposed PSD sources that may adversely affect the air quality of any state or tribal Class I area, and to set forth more specific procedures for EPA's resolution of any intergovernmental permit disputes which may arise.[12] Among other purposes of the rule, EPA stated its intention

> to clarify the PSD permit review procedures in a manner that will facilitate amicable resolution of intergovernmental disputes about potential impacts on non-Federal Class I areas without the need for recourse to EPA. Additionally, EPA will examine the methods EPA should consider and the procedures it should employ in the event it is necessary for EPA to resolve an intergovernmental PSD permit dispute. In resolving any intergovernmental permit disputes, EPA will act consistent with its trust responsibilities toward Tribes.[13]

EPA also sought public comment "on whether and to what extent EPA should prescribe the procedures to be followed in resolving intergovernmental permit disputes under section 164(e)," and on "incentives EPA could create for governments to resolve their conflicts amicably."[14] Our

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[11] 42 U.S.C. § 7474(b).
[12] U.S. Environmental Protection Agency, Advanced Notice of Proposed Rules, Prevention of Significant Deterioration of Air Quality (PSD) Program; Permit Review Procedures for Sources That May Adversely Affect Air Quality in Non-Federal Class I Areas, 62 Fed. Reg. 27158 (May 16, 1997).

[13] *Id*. at 27161.
[14] *Id*. at 27165.

research did not reveal any additional information on this rulemaking process, as it apparently was never completed.

In summary, the legislative history and subsequent administrative interpretations indicate that section 164(e) was narrowly tailored to accommodate the unique sovereignty issues arising when states and tribes have differing perspectives on the best way to protect air quality in PSD areas. Section 164(e) offers an opportunity for states and tribes to enter into limited intergovernmental negotiations to resolve these disputes rather than turning first to resolution by federal administrative fiat.

B. Applications of Section 164(e)

As mentioned above, six Indian tribes have requested redesignation of their lands from Class II to Class I. In several of the cases (Flathead and Fort Peck Reservations in Montana and the Spokane Indian Reservation in Washington), the affected states did not object to the redesignation, so section 164(e) was not invoked.[15] This section describes instances in which section 164(e) has been invoked for redesignation or PSD permit issuance.

i. Northern Cheyenne-Colstrip PSD Permit (1979)[16]

The Northern Cheyenne Indian Reservation is located in southeastern Montana, approximately 150 miles east of Billings, and covers about 1,200 square miles. Its western border abuts the Crow Indian Reservation, which is much larger and more heavily populated than the Northern Cheyenne Indian Reservation. Approximately 20 miles to the north is the

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[15] For descriptions of their redesignation processes, see Joseph Kreye, *Forest County Potawatomi Request Redesignation Under the Clean Air Act*, 4 Wisc. Env'tl L. J. 87 (Winter, 1997).

[16] This case study summarizes a detailed account of the Northern Cheyenne-Colstrip negotiations published in 1983 by Sullivan, *supra* note 8, who interviewed participants and reviewed the negotiation transcripts.

company town of Colstrip, the center of a major coal-burning power complex. The Rosebud coal seam, a valuable source of low-sulfur coal, runs beneath all these lands, providing the source of energy for power production in Colstrip.

In 1973 Montana Power Company sought a state permit to construct two new electric generating plants (Units 3 and 4) to expand its electric generating potential at Colstrip. The Northern Cheyenne Tribal Council, together with environmentalists and local ranchers, opposed this expansion. Some expressed concerns about rapid growth in Colstrip (an early analysis predicted that the town's population would double with the influx of new workers), which might require increased police, fire, and health services to deal with spillover effects on the reservation. Others focused on the air quality impacts, asserting that the plant emissions would inevitably degrade the reservation's clean air. Over the course of the next several years, the parties fought their battle in a number of settings: through preparation of several environmental impact statements; in state and federal permit reviews; and in state and federal courts.

While the dispute over Units 3 and 4 was pending, the Northern Cheyenne Tribal Council requested a redesignation of its lands to Class I status. EPA granted this request on August 5, 1977, almost simultaneously with Congress' enactment of the 1977 Clean Air Act amendments. The new classification required EPA to provide additional review and require more restrictive permit conditions aimed at protecting the Northern Cheyenne Indian Reservation's air quality.

After a series of permit decisions and legal challenges, EPA announced in April, 1979, that it would issue a PSD permit for the Colstrip project. On May 8, 1979, the Northern Cheyenne Tribal Council formally invoked section 164(e), requesting that EPA convene negotiations to resolve the dispute over the proposed plant expansion. EPA responded with a request that the tribal council present a threshold case supporting their contention that the

reservation's air quality would be adversely affected by operation of Units 3 and 4, which the tribe submitted on August 17, 1979. On August 29, 1979, EPA agreed that the Northern Cheyenne had made a threshold case showing visibility impairment, thus justifying the application of section 164(e).

The negotiation process commenced in Denver, Colorado, on September 5, 1979, involving three parties: the regional office of EPA (represented by regional administrator Roger Williams), the Northern Cheyenne Tribal Council (represented by Phil Sunderland, a lawyer from Washington, D.C.), and Montana Power Company (represented by Jack Peterson, a lawyer from Butte, Montana). EPA attorney Wilkes McClave directed the negotiation sessions.

The section 164(e) process lasted for three consecutive days and concluded with no agreement among the parties. It does not appear that EPA's approach to the process aided the parties in working toward a mutually acceptable resolution; rather, the evidence suggests that the agency saw the section 164(e) process as a procedural step toward permit approval. As Sullivan concludes, "Although the EPA managed the negotiations and fulfilled its legal requirements, the rigidity of the format and the narrowness of the agenda prevented the disputing parties from reaching a settlement."[17] Certainly the tight timeline and limited representation in the process limited the opportunity for meaningful discussion and exploration of issues.

For example, at the start of the session, EPA's representative asserted the agency's intention to issue a PSD permit for the plant, and reminded participants that EPA had the power to impose a binding settlement if negotiations failed. This preliminary statement, according to a representative of the Northern Cheyenne Tribal Council, "left opponents of the plant in despair."[18] He had expected the negotiations to last over several meetings, and was not prepared

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[17] *Id*. at 68.
[18] *Id.* at 67.

to negotiate substantive permit provisions immediately. EPA denied the tribe's request for a delay and proceeded with a process that closely resembled a formal hearing, complete with full transcription and lawyers presenting statements on behalf of their clients.

Moreover, when critical questions arose about tribal religious and cultural values that might be affected by air quality degradation, the non-Indian tribal representatives struggled to provide meaningful answers. Apparently believing that the section 164(e) process was just another technical meeting, members of the Northern Cheyenne Tribal Council did not attend and were thus never consulted about these issues during the negotiation.

The difference in the parties' representation became even more important on the second day, when the discussion moved to technical aspects of the PSD permit and EPA proposed four permit conditions for the group's consideration. Montana Power Company's board chairman was present and empowered to accept three of the four conditions. By contrast, the Northern Cheyenne Tribal Council had charged its representative with pursuing a set of highly restrictive permit conditions (which likely would have precluded the proposed construction altogether) and gave him no authority to compromise this position. Thus, as Sullivan observes, "his lack of power to make concessions prevented him from matching Montana Power's concessions. This brought negotiations to an impasse."[19] The section 164(e) process concluded on September 7, 1979, after just three days.

EPA issued a PSD permit for Units 3 and 4 of the Colstrip plant on September 11, 1979, almost immediately upon conclusion of the 164(e) process. At this point, the Northern Cheyenne Tribal Council recognized that its initial position was untenable, and the parties embarked on a new—and ultimately more successful—round of negotiations under the provisions of the Montana State Siting Act. This state law gives its implementing body (the Montana Siting

[19] *Id*. at 72.

Board) broad authority to require a permittee to provide compensation for socioeconomic impacts of development, opening new topics for discussion among negotiators. The parties met in small negotiating sessions in October and November of 1979 and again in April, 1980, finally reaching a settlement in which the Northern Cheyenne agreed to drop their legal challenges and Montana Power agreed to a number of conditions aimed at helping tribal members participate in, benefit from, and monitor the impacts of the new power plants.

Sullivan concludes that the section 164(e) process failed in this case for a number of reasons:

- There was scant opportunity for the disputing parties to understand one another's interests. The process began with formal statements of positions and moved immediately into technical issues, rather than exploring the factors underlying each party's position.
- The parties had unrealistic expectations of the purpose or possible outcome of negotiations. The Northern Cheyenne Tribal Council was not prepared to move from its initial position opposing any construction, and hoped to convince the EPA to include such strict permit requirements that construction would be impossible.
- The negotiation process was unclear to the participants, so some of them came unprepared for substantive negotiations.
- The formal, legalistic proceeding discouraged direct interaction between the principals of the dispute, focusing instead on their lawyers advocating their positions. Thus, in the words of Sullivan, "the 164(e) negotiations became a permit hearing rather than true bargaining sessions." EPA officials believed that their mandate under the PSD section of the Clean Air Act limited their consideration of issues and thus required this constrained approach.[20]

[20] *Id*. at 74-77.

In the end, "the section 164(e) negotiations, although mandated by law, were negotiations in name only."[21] Nonetheless, the issues raised and interests shared during the section 164(e) process provided the starting point for the successful negotiations completed shortly thereafter as part of the state siting permit process.

Air quality impacts from the Colstrip facility again were the subject of a section 164(e) negotiation process in 2003, as is described in the fourth case study below. The Northern Cheyenne Tribal Council is the only Indian reservation governing body to invoke section 164(e) to deal with issues raised by a PSD permit.

ii. Yavapai-Apache Redesignation (1996)[22]

The Yavapai-Apache Reservation is located in the Verde Valley, approximately 90 miles north of Phoenix, Arizona. It includes five land parcels ranging from almost four to 458 acres over a range of approximately 30 miles, for a total reservation area of about 635 acres. The Verde Valley is in the heart of Arizona's redrock country and encompasses such landmarks as Sedona, Oak Creek Canyon, and the Sycamore Canyon Wilderness Area, designated as a mandatory Class I area under the Clean Air Act's PSD program. The reservation abuts several national monuments of historical and archaeological significance.

In December, 1993, the Yavapai-Apache Tribal Council submitted a request to EPA to redesignate the Yavapai-Apache Reservation from Class II to Class I. The plan's supporting documents explained: "The Yavapai-Apace Tribe desires to maintain high-quality air standards for its citizens," and acknowledged that one of the motivations for this additional protection was the Phoenix Cement Plant's plan to incinerate used tires near the reservation. EPA reviewed the

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[21] *Id*. at 77.
[22] Except as otherwise noted, this case study summarizes and incorporates excerpts from EPA Yavapai-Apache Dispute Resolution, *supra* note 7.

request and preliminarily determined that it met the applicable procedural requirements. On April 18, 1994, EPA published a notice in the Federal Register, proposing to approve the request and announcing a 30-day period during which the agency would accept public comments.[23]

The Town of Clarkdale, located near one of the reservation parcels, requested a public hearing on the proposal, which EPA held on June 22, 1994. Subsequently, EPA extended the public comment deadline until August 22, 1994. In a one-page letter dated on the final day of the comment period, the Governor of Arizona requested the initiation of dispute resolution pursuant to section 164(e) of the Clean Air Act, expressing concern that "[t]he effects of the proposed redesignation are not apparent to all of the stakeholders, and confusion exists about the potential impacts of the Agency's proposed action."[24] In response, EPA asked the state to elaborate on its concerns and offered to meet with state officials to address the need for better public understanding of the implications of redesignation.

Governor Symington wrote to the EPA on December 5, 1994: "The purpose of invoking this dispute resolution is to raise the issues of whether the Yavapai-Apache Reservation is of sufficient size to allow effective air quality management or have air quality-related values."[25] The reservation's small, scattered parcels, he argued, meant that "it would be neither realistic nor practicable to apply those requirements to all Reservation lands while distinguishing those lands from surrounding Class II areas, which would be subject to different air quality limitations."[26]

The section 164(e) process ran from October, 1994 through January, 1995. EPA first met separately with state and tribal representatives to allow each to express its concerns in a non-adversarial setting, and then the two parties met without EPA officials. Subsequently, both

[23] 59 Fed. Reg. 18346 (April 18, 1994).
[24] EPA Yavapai-Apache Dispute Resolution, *supra* note 7 at III.B.
[25] *Id*.
[26] *Id*.

parties met together with the EPA. The parties' positions, as expressed in the meeting transcripts, are summarized here from EPA's record of the dispute resolution process:

- The State of Arizona argued that the extraterritorial effects of the redesignation would be unfair to non-reservation communities: "The redesignation will have significant impacts on future growth and growth trends, business trends, job opportunities in the Verde Valley, and in a way which may or may not impact the ability to manage the area for air quality values or to effectively manage the area for air quality purposes."[27]
- Arizona further argued that managing the scattered reservation lands under a higher air quality standard than surrounding lands would "be a very untenable and unworkable arrangement."[28]
- The Yavapai-Apache Indian Tribe argued that the redesignation was an appropriate means to protect that health and welfare of its members.[29]
- Moreover, the Yavapai-Apache Indian Tribe expressed frustration at the state's late entry into the process, its delay in providing a full statement of its opposition, and its further delay in agreeing to attend the dispute resolution proceedings.[30]

After hearing the concerns expressed by the parties, EPA attempted to explore whether there was common ground for a resolution. EPA adjourned the meeting when neither party expressed an interest in further discussion. EPA subsequently encouraged the parties to meet again to resolve the dispute, but they declined. Therefore, on November 1, 1996, EPA issued a final rule approving the Yavapai-Apache redesignation to Class I.[31]

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[27] *Id.*, citing the dispute resolution transcript, p. 7.
[28] *Id.*
[29] *Id.*, citing the dispute resolution transcript at 13.
[30] *Id.*, citing the dispute resolution transcript at 11.
[31] U.S. Environmental Protection Agency, Arizona Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area, 61 Fed. Reg. 56461 (Nov. 1, 1996), codified at 40 C.F.R. Part 52, available in full-text at www.epa.gov/region09/air/yavapai/.

EPA issued a lengthy analysis of the scope of its discretion under section 164(e) as part of the record of the dispute resolution process. In this analysis, the agency justified its decision as consistent with the legislative and administrative history of section 164(e), which "indicate that so long as the prescribed procedures for public input and involvement are followed, EPA is to give to States and Tribes broad latitude in deciding what PSD classification is appropriate for lands within their respective jurisdictions."[32] EPA pointed out that major off-reservation effects of redesignation appeared unlikely—especially since the Verde Valley already has several mandatory Class I areas receiving enhanced air quality protection—and that in any case:

> [I]f there are any actual permit controversies that result from Class I redesignation, at that juncture there will be concrete facts and particularized, focused issues that are better fit for resolution than more general allegations and objections. EPA is committed to working with the State and Tribe to resolve any intergovernmental permit disputes that actually arise as a result of the Class I redesignation.[33]

As was the case in the Northern Cheyenne decision described above, "EPA noted that its review role was confined to determining whether the tribe complied with the CAA's procedural requirements, and declined to reweigh or second-guess the tribe's impact analysis."[34] A subsequent challenge in federal court upheld EPA's redesignation ruling, although the Ninth Circuit Court of Appeals reversed the agency on its use of a federal implementation plan rather than a tribal implementation plan.[35] The court remanded the decision to the EPA for new rulemaking, which has not yet been completed. Doug McDaniel, of EPA's Region 9, says there are several reasons the case remains unresolved: (1) both EPA and tribal staff have changed, so no one originally involved in the redesignation is pushing it; and (2) the cement plant adjacent to

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[32] EPA Yavapai-Apache Dispute Resolution, *supra* note 7 at IV.A.
[33] *Id.*
[34] James M. Grijalva, *Where Are the Tribal Water Quality Standards and TMDLs?* 18 Nat. Res. & Env't 63, 64 (Fall, 2003).
[35] Arizona v. EPA and Yavapai-Apache, 151 F.3d 1205 (9th Cir. 1998).

the reservation cancelled its plans to burn tires, so there is no immediate threat to reservation air quality.[36]

In this case it appears that EPA made serious efforts to encourage a fruitful negotiation process by meeting with the parties separately ahead of time, asking for help understanding their positions, and encouraging follow-up meetings after the formal negotiation hearing concluded. Nonetheless, the section 164(e) process failed to resolve the significant differences between the parties, and EPA again was in the position of making a final determination to resolve the dispute. From the available materials, it seems that EPA viewed the state's objections with skepticism and possibly saw the governor's decision to invoke section 164(e) as little more than a delaying tactic to prevent redesignation from going forward. Certainly that was the perspective of the Yavapai-Apache Tribal Council, as evidenced by their comments during the negotiation. Given this background, it is not clear that EPA was prepared to act as a neutral mediator between the parties or that the parties would view EPA as impartial.

iii. Forest County Potawatomi Community Redesignation (1999)

The Forest County Potawatomi (FCP) Community is located in northeastern Wisconsin, not far from Michigan's Upper Peninsula. The reservation covers approximately 12,000 acres, much of which is forested and managed for timber harvest and recreation. Recently opened tribal enterprises such as casinos and resorts have sharply increased employment opportunities, bringing both rapid population growth and heightened concern for environmental protection. In recent years, the tribe protested a proposed zinc mine five miles from the reservation boundary near Crandon, Wisconsin.

[36] Doug McDaniel, pers. comm. (April 28, 2004).

In order to protect reservation lands from such external threats, on February 14, 1995, the FCP Tribal Council submitted a proposal to EPA to redesignate certain FCP lands from Class II to Class I. The proposal included reservation lands that were over 80 acres in size, located in Forest County, and held in trust for the FCP Tribe by the federal government. The proposal included the necessary technical reports and maps, as well as documentation of a public notification and a public hearing held the previous September. As EPA concluded in its notice of proposed rulemaking on the matter on June 29, 1995, "the documentation submitted by the Tribal Council shows that all statutory and regulatory procedural requirements for redesignation have been met."[37]

EPA proposed a public hearing for August, 1995, but postponed the meeting after the governors of both Michigan and Wisconsin objected to the redesignation and requested formal dispute resolution pursuant to section 164(e). Neither of the states' request letters set out specific objections to the redesignation, but the governors did not hesitate to speak publicly about their concerns about the potential reach of tribal air quality regulation beyond reservation boundaries. Wisconsin Governor Tommy Thompson's spokesman claimed that the FCP Tribe's proposal would "devastate the economy of northern Wisconsin"; similarly, Michigan Governor John Engler argued that the redesignation would hinder economic development in the Upper Peninsula.[38] Wisconsin initially requested to negotiate directly with the tribe on a government-to-government basis without EPA involvement, but the FCP Tribe declined. Further, both states signed on as amici curiae in Arizona's lawsuit challenging the Yavapai-Apache redesignation, described above, supporting Arizona's position that small, scattered reservation lands are inappropriate candidates for redesignation to Class I status.

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[37] U.S. Environmental Protection Agency, Redesignation of the Forest County Potawatomi Community to a PSD Class I Area; State of Wisconsin, 60 Fed. Reg. 33779 (June 29, 1995), codified at 40 C.F.R. Part 52.
[38] Kreye, *supra* note 15 at 87-88.

In October, 1995, EPA contracted with Triangle Associates to mediate the section 164(e) negotiations. According to a representative of the state of Wisconsin, hiring a third-party mediator was essential: "State's main concern has always been with EPA and not directly with the Tribe. The State does not agree with the Class I procedural requirements and disagrees with EPA's 'rubber stamping' approval process."[39] Michigan chose not to participate in the section 164(e) negotiation, although state representatives observed the initial session.

After initial meetings with the mediator in 1997, the three parties (EPA, FCP Tribe, and Wisconsin) met in September, November, and December of 1998, and in February of 1999. Rather than a formal hearing, the negotiations encouraged face-to-face dialogue and used small break-out sessions and regular information exchanges to help the parties better understand each other's concerns.

The discussions were successful, with the parties signing a "Negotiations Concept and Agreement in Principle" on February 3, 1999. The FCP Tribe signed the agreement in July, Wisconsin signed in September, and EPA signed in October, 1999. In the resulting Memorandum of Understanding, Wisconsin agrees not to challenge EPA's approval of the FCP reservation's redesignation to Class I in exchange for the tribe's agreement to limit enforcement of Class I air quality increments to major sources within 10 miles of the reservation, as well as other concessions. Among other provisions, the parties' agreement sets forth an ongoing dispute resolution process using a Scientific Review Panel with representatives from the state and tribe. In addition, the agreement includes the following two provisions:

> (4)(b) The parties agree to discuss disputed legal and policy issues and try, in a good faith manner, to resolve them on a government-to-government basis prior to requesting a section 164(e) review.

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[39] Marty Burkholder, pers. comm. (July, 2003); EPA Yavapai-Apache Dispute Resolution, *supra* note 7 at 2003.

(4)(c) If the SRP process cannot resolve the dispute, then either original party can seek dispute resolution under section 164(e).

As Michigan did not participate in this dispute resolution process, there could still be opposition to FCP redesignation. The case remains in "predecisional" status.

iv. Northern Cheyenne-Roundup PSD Permit (2003)[40]

As described above, the Northern Cheyenne Tribal Council successfully sought redesignation of reservation lands to Class I in 1977. In 1979, EPA issued a conditional permit to Montana Power Company for the construction and operation of two coal-fired electric generating plants at Colstrip, Montana (Units 3 and 4), approximately 15 miles north of the Northern Cheyenne Indian Reservation. In 1999, PPL Montana, LLC, succeeded Montana Power Company as the owner and operator of Colstrip Units 3 and 4. The EPA permit remains in force, but the State of Montana now exercises PSD permitting authority for all air contaminant sources in the state outside of Indian reservations. Subsequent to the issuance of the EPA permit, the State of Montana has issued several preconstruction permits and also the operating permit for the Colstrip facility.

On January 14, 2002, Bull Mountain Development Company No. 1, LLP, submitted an application to the Montana Department of Environmental Quality (DEQ) for an air quality permit for two 390-megawatt pulverized coal-fired electrical generating plants to be constructed near Roundup, Montana, approximately 80 miles northwest of the Northern Cheyenne Indian Reservation. The DEQ issued a draft environmental impact statement for the project in November, 2002, and a final environmental impact statement in January, 2003.

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[40] Except as otherwise noted, the information in this case study comes from the parties' draft agreement, dated January 20, 2004 (hereafter referred to as "draft agreement"), on file with the authors

On January 24, 2003, the Northern Cheyenne Tribal Council wrote to EPA, requesting that EPA invoke its authority under section 164(e) to resolve the tribe's concerns about the project's air quality impacts. Specifically, the Northern Cheyenne Tribal Council expressed three concerns: (1) projected violations of Class I increments, including existing violations at the Colstrip facility; visibility impacts; and (3) the cumulative effect of reasonably foreseeable future development.

On January 31, 2003, the DEQ issued an air quality permit for the Roundup Project, contending that PPL had demonstrated that the project would comply with applicable air quality requirements. The Northern Cheyenne Tribal Council disputed the DEQ's conclusion and argued that the project would contribute to violations of the reservation's air quality and visibility. The Montana Board of Environmental Review upheld the state air quality permit on June 6, 2003, prompting two environmental organizations to file a lawsuit on June 9, 2003.

Meanwhile, in response to the request for a section 164(e) process, EPA retained The University of Montana's Public Policy Research Institute (PPRI) to facilitate discussions between the government parties. The permit applicant (PPL) and the two environmental groups that filed the permit challenge (Environmental Defense and Montana Environmental Information Center) inquired about participating in the process, but EPA responded that "we envision the process as involving government-to-government negotiations only, which is what section 164(e) of the Act appears to contemplate."[41]

PPRI conducted a conflict assessment in June, 2003, and summarized the parties' interests, possible outcomes, and proposed next steps in a memo shared with the Northern Cheyenne

[41] EPA letter to Steven T. Wade (May 29, 2003), on file with the authors.

Tribe, the EPA, and the Montana DEQ[42]. Representatives of these government bodies first met in Billings, Montana, on July 23, 2003, where they agreed to a work plan and ground rules for negotiations. Among other matters, the work plan proposed that the section 164(e) negotiation would seek agreement on the following two specific issues:

- Increments for sulfur dioxide and nitrogen dioxide are currently being violated in the Class I airshed over the Northern Cheyenne Indian Reservation.
- The proposed Roundup Power Plant will increase the degree to which increments for sulfur dioxide and nitrogen dioxide will be further violated in the Class I airshed over the Northern Cheyenne Indian Reservation.

The parties further agreed to meet at least monthly and to seek resolution of the issues by December, 2003.

During the next five months, the participants engaged in numerous conference calls for two reasons. First, given that participants were geographically dispersed in Denver (EPA Regional Office), Seattle (Northern Cheyenne Tribe's attorney), Helena (DEQ and EPA Montana Office) and Lame Deer (Northern Cheyenne Tribe), it was very expensive to bring people together. Second, like many complex multi-party negotiations, the participants needed to move slowly, building a common understanding on the nature of the problems, exploring alternative solutions, and discussing the feasibility of alternative solutions with their constituents. This type of

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[42] The objective of a conflict assessment, sometimes referred to as situation assessment, is to develop a common understanding of the substance of the problem, the needs and interests of the parties, and the risks associated with different procedures for resolving the issues. A situation assessment does not limit other dispute resolution or agreement building processes from moving forward. In this case, PPRI reviewed appropriate documents and interviewed people representing different viewpoints. Based on this information, PPRI prepared a short report summarizing the various parties' interests and concerns, and their options to a negotiation process. The report was distributed to all of the interviewees for review and comment, and served as a "convening" report for the first meeting. Based on the convening report and the first meeting, the participants jointly designed a negotiation process – consistent with their joint understanding of section 164(e) -- to meet their specific needs and interests.

negotiation is often best conducted in a series of two to four sessions, rather than full day or multi-day sessions.

In addition to the conference calls, the participants did meet face-to-face two more times, once in Billings and once in Denver. The mediator also shuttled back and forth among the participants, helping clarify issues, interests, options, and potential packages.

As the discussions progressed, it became clear that the tribe wanted new permit conditions placed on operations of the Colstrip Units 3 and 4, the subject of the 1979 section 164(e) negotiation. This raised issues about the scope of the present section 164(e) process, as an EPA attorney pointed out to the parties that EPA's authority extends only to the Roundup permit and does not allow the agency to compel PPL to make changes in its Colstrip operations. The agency's limited authority certainly would have restricted EPA's options to resolve the dispute if the section 164(e) process did not result in an agreement between the parties, but it did not prevent the state and the tribe from exploring conditions they could agree to beyond the scope of EPA's decision-making authority. In the end, this opportunity for broader discussions opened the door to successful negotiations.

The section 164(e) negotiation concluded with a Memorandum of Agreement signed by the State of Montana on February 13, 2004, by the EPA on February 27, 2004, and by the Northern Cheyenne Tribal Council on April 22, 2004. EPA's regional administrator signed the agreement as a "non-party," noting that "EPA recognizes the Parties' agreement and intends to participate in certain activities under this Agreement . . . ."[43]

The parties agreed to a number of conditions aimed at ensuring compliance with Class I increments on the reservation (including permit conditions imposed on the existing Colstrip Units 3 and 4), as well as monitoring and evaluation of actions needed to deal with visibility

[43] Draft Agreement at 4.

impacts. The agreement further commits the parties to work together to resolve disputes before resorting to legal challenges:

> Any dispute which arises under this Agreement shall in the first instance be the subject of informal negotiations between the Parties. The period for informal negotiations shall not exceed twenty (20) working days from the time the dispute arises, unless such period is modified by written agreement of the Parties. The dispute shall be considered to have arisen when one Party sends the other Party a written Notice of Dispute. The dispute notice shall set forth the specific points of the dispute, the basis for objection of the disputing Party, and any matters or other information which the disputing Party considers necessary or appropriate. Either Party may request the assistance of an impartial mediator to help resolve the dispute, or the selection of a mediator will be made jointly by the Parties.[44]

In response to a "participant satisfaction scorecard" distributed by the Public Policy Research Institute at the conclusion of the section 164(e) negotiation, five of the participants shared their thoughts about the process. Most concluded that the negotiation was more costly and time consuming than alternative options (which they defined as either negotiating outside of the 164(e) process or doing nothing), but all agreed that—generally speaking—a collaborative approach was appropriate in this situation and that they would recommend such an approach in the future. Several recurring comments noted intergovernmental conflicts that persisted beyond the end of the negotiation, threatening the integrity of the agreement. Apparently not all parties felt that EPA fully bought into the negotiation process and supported the agreement reached by the state and the tribe at the conclusion of the process.

3. Lessons Learned from Section 164(e) Negotiations

Although each application of section 164(e) is based on a unique factual situation, some points of comparison provide insights into the reasons that some negotiations have proved more

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[44] *Id*. at 10-11.

fruitful than others. In the limited experience to date, the following factors appear relevant to the potential success of a section 164(e) negotiation:

A. The Process Supplements Other Legal Proceedings

Negotiation and collaboration is often viewed as a replacement for the legal process or requirements for public participation. On the contrary, negotiation and collaboration are intended to make public participation and the legal process work better. They are designed to supplement and complement the formal decision-making process.

As demonstrated in the four cases above, section 164(e) negotiations do not require any party to give up any legal right as a result of participating in negotiations. Negotiation creates a forum in which disputants can explore and better understand each other's interests than is often the case in more formal, rigid legal proceedings (and most public participation processes as well). Negotiation and collaboration are very flexible procedures, and are most effective when they are adapted – consistent with existing laws, policies, and regulations -- to meet the unique needs and interests of people in a particular situation. Mandatory negotiation simply requires a good faith effort at resolving differences before moving on to unilateral decisions by an administrative agency, litigation, or other means to make decisions and resolve disputes[45].

B. Clarify the Roles of EPA

Section 164(e) places EPA in an awkward position, as the agency is both a government agency with final decisionmaking authority and the convener of disputing parties. As a regulatory authority, EPA is concerned with implementation of the Clean Air Act, and will

[45] For a recent review of the degree to which negotiation and collaboration is being integrated into natural resource decision-making more generally, see McKinney & Harmon, *supra* note 1.

necessarily bring enforcement concerns to the negotiating table. In addition, the federal government has a special relationship as a trustee for Indian tribes. As such, a federal agency attempting to act as a neutral facilitator between states and tribes likely faces questions about its impartiality or its conflicting loyalties.

In two of the cases described above (the original Colstrip permit case and the Yavapai-Apache redesignation case), EPA ran the negotiations itself. In the Colstrip case, EPA convened a formal hearing, with the federal agency presiding over the parties, one of which was the EPA itself. At the outset, EPA set the parameters of the discussion, most importantly stating that the issuance of the permit (to which the tribe objected altogether) was not in question. There was no mediation, but merely an opportunity to provide input into an essentially completed decision.

In the Yavapai-Apache case EPA worked more diligently to assess the parties' interests, meeting separately with the state and the tribe. In the end, however, the agency held a formal meeting at which all comments were transcribed. When the parties were unable to reach resolution of their disputes, EPA exercised its authority under section 164(e) to make a final decision. This approach resembles a model of dispute resolution known as "med-arb," in which the mediator serves as arbitrator if mediation fails. Ury, Brett and Goldberg conclude that this model has both advantages and disadvantages, including the possibility that "[w]hat appears to be a negotiated resolution may be perceived by the parties as an imposed one . . . . Moreover, because the parties know that the neutral may decide the dispute, they may withhold information that would be useful in reaching a mediated settlement."[46] In this case, some parties indicated

[46] W.L. URY, J.M. BRETT & S.B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 57 (1988). *See also* ANN L. MACNAUGHTON & JAY G. MARTIN, ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS 49-51 (2002) (application of "med-arb" to environmental disputes).

distrust of EPA acting as a neutral third party, and likely did not share fully during the advance meetings.

By contrast, in both of the more recent applications of section 164(e)—the Forest County Potawatomi redesignation case and the Roundup permit case—EPA chose to hire a professional mediator to provide neutral third-party facilitation. The mediator met or spoke with the parties separately to assess their interests and concerns. EPA participated in the group discussions as what might be described as an "interested observer," providing technical input, perspective on regulatory options, and clarifications of legal questions. Both cases resulted in satisfactory agreements, so EPA did not have to resort to making a final "resolution" decision. The parties appeared to have been satisfied with the service provided by the mediators.

Perhaps EPA should view its role as a catalyst for dispute resolution rather than as an agent for resolving the dispute—acknowledging, of course, that the agency is charged to act as arbiter if negotiations fail. Thus, when section 164(e) requires the agency to step into a PSD dispute, the agency should set in motion the best possible dispute resolution process with a professional mediator, identify the appropriate parties to be involved and encourage their full participation, participate with meaningful communications and information sharing, and contribute technical and legal expertise as needed throughout the process. Of course, EPA also plays the role of final decision-maker, particularly when the negotiation process fails to provide a mutually satisfying result.

C. Provide an Efficient, Structured Process

Congress provided EPA with no guidance for the process it should use to "enter into negotiations with the parties involved to resolve . . . disputes."[47] Thus, each case has demonstrated a different approach, from the short and formal to longer, more complex processes involving informal conversations in the later cases.

For example, the 1979 Colstrip case lasted just three days and involved no dialogue or discussion. Parties communicating through their lawyers in a formal hearing will emphasize their positions rather than share their interests and work toward mutually satisfactory solutions. As described above, the Yavapai-Apache case extended over a longer period and included informal meetings to explore the parties' concerns but ended with a short, formal meeting. The long time frame in that negotiation did not arise from ongoing negotiations, but rather appears to have been caused by parties' reluctance to communicate with one another.

Both the Forest County Potawatomi redesignation and the Roundup permit cases demonstrate that a section 164(e) negotiation need not extend over a long period to be successful. Neither lasted more than six months. In the Roundup case, the parties acknowledged at the outset the need for a timely resolution to ensure influence over the state permitting process, and set a goal of December, 2003, for settlement. This required tightly scheduled meetings and a number of telephone conference calls, but the parties responded favorably to the deadline and accomplished their negotiations within the agreed-upon period.

A clearly structured process is a necessary condition for any successful multi-party negotiation. While each process must be tailored to the unique needs and interests of the parties, scholars and practices have articulated a set of "best practices" to design effective processes.[48]

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[47] 42 U.S.C.A. § 7477(e).
[48] LAWRENCE SUSSKIND, SARAH MCKEARNAN, AND JENNIFER THOMAS-LARMER, EDS., THE CONSENSUS BUILDING HANDBOOK (1999).

Two key elements in designing an effective process are getting the right people to the table and creating an interest-based agenda.

D. Get the Right People to the Table

Who should participate in a section 164(e) negotiation process? This appears to be an unresolved question. In the 1979 Colstrip case, negotiating parties included the permit applicant (Montana Power Company), represented for at least part of the hearing by the company's board chairman. In the other cases, however, EPA has limited participation to government entities, despite the acknowledged impacts decisions will have on regulated industries and other interests. In the 2003 Roundup case, several affected parties (the permit applicant and two environmental groups that had filed a lawsuit concerning permit issuance) inquired about participating in the section 164(e) process but were denied this opportunity. It is entirely possible that their participation might have contributed substantive technical information or helped shape the agreed-upon conditions of agreement. Just as importantly, interested parties excluded from a negotiation process have no stake in the success of a negotiated agreement and may seek to discredit it or challenge it in another forum. In that situation, the parties to the agreement have not moved very far toward a long-term solution to their dispute.

At the same time, it is also true that failure to participate in negotiations may compromise these others' ability to challenge the final agreement or EPA resolution in court. For example, the Ninth Circuit Court of Appeals ruled that the Arizona Chamber of Commerce had no standing to challenge Yavapai-Apache redesignation because "the Chamber did not participate in either the EPA redesignation proceedings or the dispute resolution proceedings."[49]

[49]Arizona v. EPA and Yavapai-Apache, *supra* note 35 at 1210.

Acknowledging the difficulty of this exclusion, the 2003 Roundup negotiation parties agreed at the beginning of the process "to keep other potentially affected parties, including power plant owners and operators and environmental groups, informed of the direction of the negotiation and to seek their input and advice as appropriate."[50] The participants did this in a very informal, sporadic way, and it remains to be seen if any of the other "stakeholders" will challenge the process and its outcomes.

Finally, it clearly matters which representatives from the negotiating parties participate in the process. The 1979 Colstrip case demonstrated the importance of communicating early with participants to ensure the parties are informed, prepared, and appropriately represented. The process should also be flexible enough to take a break when parties need to check back with their constituencies for information and support. By contrast, early in the 2003 Roundup negotiation, the parties drafted a work plan, which included not only a list of stakeholder groups but also stated that each stakeholder group would include individuals with decision-making authority, legal expertise, and technical expertise.

In the final analysis, the best practice is to make sure that all stakeholders – defined as any person or organization that is interested in or affected by an issue, any decision-making body or institution that is needed to implement the outcome of a dispute resolution process, and any person or organization that may challenge the process and/or its outcomes – are adequately represented.[51]

E. Create an Interest-based Agenda

[50] Clean Air Act 164(e) Negotiation, Northern Cheyenne Indian Reservation: Suggested Work Plan and Ground Rules (Draft, July 10, 2003).
[51] For specific strategies on how to get the right people to the table, see Susskind et al., *supra* note 48.

Section 164(e) provides both a broad opportunity for discussion and a narrow scope of resolution. The statute does not prescribe the topics that parties may address in their negotiations, nor the range of solutions that might be included in their agreement, but it does limit EPA's discretion if the negotiations fail and the agency must resolve the dispute. Acknowledging the uncertainty, in 1997 EPA sought public input "on whether EPA should address . . . some of the potential measures and tools that may be employed to resolve intergovernmental disputes and, if so, what approaches may be appropriate."[52]

In the two cases in which negotiating parties failed to reach agreement—the 1979 Colstrip case and the Yavapai-Apache case—EPA limited parties' discussions to the scope of the agency's ultimate narrow, carefully constrained decisions. This is unfortunate, because the objectors in both instances had far broader concerns than technical violations of PSD increments. The Northern Cheyenne, for example, wanted to address socioeconomic impacts of the expanded Colstrip facilities, but these simply were not on the table for discussion until the parties subsequently met to negotiate a state siting permit. Similarly, the state of Arizona's intention in invoking section 164(e) appears to have been an attempt to draw attention to the confusion and concerns of non-Indians in the Verde Valley, some of whom believed that the tribe's policies would unfairly constrain economic development in their communities. EPA was unable to address these concerns except by assuring the state that they were speculative at this point and would be addressed more appropriately in the context of a PSD permit application.

The parties to the Forest County Potawatomi redesignation settlement included (among other things) provisions to clarify the procedures for reviewing PSD permits in the future—offering more certainty than would otherwise be available to potentially affected parties. Apparently they had to convince EPA that a broader scope of discussion was appropriate in Sec. 164(e)

[52] 62 Fed. Reg. 27165.

negotiations.[53] Further, by agreeing to a dispute resolution procedure, they reduced the possibility that section 164(e) will have to be invoked to resolve future permit disputes. Similarly, the parties that successfully negotiated resolution of the Roundup permit dispute went beyond the scope of EPA's authority and essentially looked at the reservation's air quality as a regional—rather than a site-specific—issue.

These cases illustrate the importance of how a section 164(e) process is framed and viewed by the parties. If EPA presents the process as a procedural step toward a final agency decision, then the scope of issues that may be considered is necessarily narrow. On the other hand, when EPA offers the negotiation process as a forum for productive, creative solutions, the parties themselves may reach far more satisfying solutions.

4. The Place of Mandatory Dispute Resolution

Mandating the use of negotiation, mediation, arbitration, or some other form of dispute resolution is obviously not the only way to resolve disputes that emerge in the context of federal natural resources and environmental law. In fact, the variety of statutory models outlined in such laws – summarized in Appendix 1 -- begins to suggest the possibility of a more comprehensive, robust system to prevent and resolve disputes – and, to clarify the place of mandatory dispute resolution in such a system.[54]

In recent years, the field of dispute resolution has moved beyond the application of dispute resolution procedures in isolated, ad hoc cases. People engaged in what is referred to as "dispute resolution systems design" seek to design comprehensive systems for dealing not with

[53] Marty Burkholder, pers. comm.. (May 5, 2004).
[54] See Appendix 1 for a review of alternative statutory models to prevent and resolve disputes.

just a single dispute, but the stream of disputes that often arise in nearly all relationships, communities, and institutions.

In *Getting Disputes Resolved*, William Ury, Jeanne Brett, and Stephen Goldberg identify three basic ways to resolve disputes: reconcile the disputants' underlying interests, determine who is right, and determine who is more powerful. The "best" approach to resolve a particular dispute can be determined by considering the four following criteria:

1. How satisfied are the stakeholders likely to be with the outcomes of a particular process?
2. What is the chance that the issue will be resolved – and not recur – through one process or another? That is, how sustainable is the outcome likely to be?
3. What are the likely costs – time, money, and emotional energy – of relying on one process rather than another?
4. How will the use of one process over another impact the relationships among stakeholders?

These four criteria are related. Dissatisfaction with outcomes may lead to the recurrence of disputes, which strains relationships and increases transaction costs. Because these four different costs typically increase or decrease together, it is useful to refer to them collectively as "the costs of disputing."

Based on these criteria, the core proposition of the theory of dispute systems design is that integrating interests (through negotiation, mediation, and consensus building) is less costly than determining who is right, which in turn is less costly than determining who is more powerful. This does not mean that focusing on interests is always better than resorting to rights or power, but simply means that it tends to result in greater satisfaction with outcomes, less recurrence of disputes, lower transaction costs, and less strain on relationships.

In light of this analytical framework, *Getting Disputes Resolved* goes on to present six principles of dispute systems design: (1) Put the focus on interests; (2) Build in "loop-back" procedures that encourage disputants to return to negotiation; (3) Provide low-cost rights and power back-up procedures; (4) Build in consultation before, feedback after; (5) Arrange procedures in a low-to-high cost sequence; and (6) Provide the motivation, skills, and resources necessary to make the procedures work.

Using this theoretical framework, the existing statutory models, when taken together – provide at least the beginning of a more comprehensive "system" to prevent and resolve disputes. By combining the various public participation and dispute resolution mechanisms into one system – from consultation to consistency to unassisted negotiation to voluntary mediation to mandatory dispute resolution to agency recommendation – it would be possible to create a more robust system. The system would start trying to prevent unnecessary disputes by engaging people early and often throughout the decision-making process.[55] Many studies demonstrate that it is possible to build a common understanding and broad-based agreement – thereby preventing needless disputes – by providing meaningful opportunities for public participation early and often throughout the process.

However, the proposed dispute resolution system also recognizes that in some cases it may not be possible to resolve all disputes, and thus it is important to provide low-cost procedures to resolve disputes before moving to litigation and other rights and power-based procedures. It is important to emphasize that not all disputes related to federal natural resources and environmental law can or should be resolved by reconciling interests. The problem is that rights and power procedures often become the forums of first resort, and are frequently used where

[55] The core values of the International Association for Public Participation, the EPA's recently adopted public participation policy, and the collaborative planning recommendations of the U.S. Forest Service Committee of Scientists all provide good examples of how to do this.

they are not necessary. The goal in designing a more effective dispute resolution system is to resolve most disputes by integrating interests, some by determining who is right, and the fewest by determining who is more powerful.

This system of dispute resolution would be mandatory in two senses. First, people would be required to move through the system one step at a time. For example, the states of Montana and Wyoming incorporated a dispute resolution system into the Yellowstone River Compact in 1996. The compact provides an institutional framework for managing the interstate river. The dispute resolution system moves from unassisted negotiation to facilitation before the states can resort to voting and then litigation to resolve disagreement over river management.

In some cases, it might also be valuable to mandate a certain type of dispute resolution process, as in the Clean Air Act and the Clean Water Act. Given the growing use of courts to strongly encourage, if not require, mediation and other forms of dispute resolution short of litigation, we believe that it is time to expand the use of mandated dispute resolution beyond its currently limited application. Given that the courts are apparently going to insist that disputants engage in these alternative forms of dispute resolution, perhaps now is the time to structure the processes in such a way that they not only empower people to resolve their own differences, but also addresses the concerns people may have with mandatory dispute resolution.[56]

To illustrate how this system might be integrated into federal natural resources and environmental law, consider the National Environmental Policy Act. The attached table describes how interest-based approaches could – hypothetically -- be integrated into each step of the NEPA process. For a real-life example, the voluntary mediation option that was integrated

[56] For example, who will be allowed to initiate the process and under what circumstances? Who will participate in the process? Should negotiation sessions be open to the public? What is the status of information and proposals exchanged during the dispute resolution process? What are the fallback procedures if the dispute resolution process fails? How might mandatory dispute resolution procedures influence the relative distribution of power?

into the decision-making and dispute resolution process of the Alberta Environmental Appeals Board appears to be successful.[57] Apparently, 80 percent of the parties seeking to challenge environmental agency decisions at the provincial level now opt for mediation. The take-home lesson of this study is that mediation can be offered as a voluntary (rather than a mandatory) option; if it meets certain tests and is run well, it will be chosen most of the time.

Our approach to designing more effective dispute resolution systems for federal natural resources and environmental law is experimental. While there has been some work on the merits of institutionalizing alternative forms of dispute resolution in natural resources and environmental policy, we believe that there is a tremendous need and value to promoting thinking as well as experiments along these lines.[58] Bingham cautions that "much remains to be learned about how to draft statutes that specify general procedures for negotiation, mediation, or arbitration of environmental disputes," noting the difficulty in specifying in advance which parties belong at a negotiation table and which ground rules will foster productive work among various combinations of parties. Moreover, she notes: "It is also not clear what effect establishing specific rules has on parties' incentives to negotiate in good faith or at all."[59] Brock concludes that "the design complexity, political controversy, and intersection with existing regulatory and administrative practices makes institutionalizing alternative dispute resolution mechanisms more difficult than using ADR to resolve individual site-specific disputes."[60] We

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[57] Matthew Taylor, Patrick Field, Lawrence Susskind, & William Tilleman, *Using Mediation in Canadian Environmental Tribunal: Opportunities and Best Practices*, 22 Dalhouise L.J., 51 (1999).
[58] *See, e.g.*, GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE 149-50 (1986); Jonathan Brock, *Mandated Mediation: A Contradiction in Terms*, 14 Villanova Env'tl L.J. 57 (1991); Matthew McKinney, *Designing a Dispute Resolution System for Water Policy and Management*, Negotiation J. 153, 160-61 (April 1992).
[59] Bingham, *supra* note 58 at 53.
[60] *Id*.

also suspect that there is much to learn from international environmental law about the place of mandatory dispute resolution in federal natural resources and environmental law.[61]

[61] For a good start on this body of knowledge, see Alfred Rest, *Enhanced Implementation of International Environmental Treaties by Judiciary – Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration*, 1 Macquarie J. of Int'l & Compar. Env'tl L. 1 (2004).

Integrating Interest-based Strategies into NEPA

Key Project Steps	Collaborative Possibilities
Project Conception	Consult an experienced facilitator, mediator, or consensus-builder to help determine what type of collaboration may be appropriate If some type of collaboration may be appropriate, include resources (time, money, and staff) in your project plan and budgets
Pre-project Analysis	Use an impartial third party to assess the issue, situation, or conflict Identify parties, issues, and options on how to proceed
Develop Proposed Action	Consult stakeholders -- citizens and other officials -- in developing a proposed action; seek agreement on proposed action Interview parties one-on-one; convene stakeholder groups; convene a broad-based, multi-party group Foster mutual education through joint fact finding and exchanging information
Scoping	Consider different processes for gathering public input and advice (public meetings, open houses, surveys, stakeholder meetings, study circles, etc.) Use impartial facilitator to convene and manage large, controversial public meetings
Validate the Issues	Based on the public input and advice, consult stakeholders to foster a common understanding of the NEPA significant issues
Develop Alternatives	Convene a working group of stakeholders to develop alternatives Encourage citizens and other stakeholders to develop their own alternative

	Use stakeholders as a sounding board to ensure that the range of alternatives responds to NEPA issues and unresolved issues
Identify Preferred Alternatives	Use expert panels and stakeholder groups to help analyze alternatives Use agreed-upon criteria to evaluate alternatives Clarify the distinction between facts (science) and values (goals or desired future conditions)
Analyze EA or DEIS Public Comments	Convene a working group of stakeholders to review public comments, clarify dominant themes, validate or revise NEPA issues, and identify criteria for the selected alternative
Select Alternative	Before the responsible official announces the selected alternative, he/she may consult stakeholders to confirm decision and rationale
Appeal	Resolve outstanding issues through informal, non-adversarial processes of negotiation and mediation
Litigation	Consult Department of Justice and Office of the General Counsel Seek opportunities for settlement negotiations, mediation, and/or arbitration
Post Decision	Convene a working group to monitor and evaluate implementation, and to suggest appropriate changes to the plan of action

Appendix 1: Alternative Statutory Models to Prevent and Resolve Disputes

A review of federal natural resources and environmental laws reveals three different models to prevent and resolve disputes.

A. Consultation

A number of federal statutes require federal agencies to enter into "consultation" with one another and sometimes with states prior to making final decisions. Generally speaking, while the consultation is mandatory, the lead agency need not defer to the other agencies or the states, and there is no mechanism to resolve identified differences. Nonetheless, this procedural requirement may serve as an important opportunity for criticism and concerns to be made public, and often does influence the lead agency's final decision. As one commentator wrote: "Consultation is designed to slow down headlong rushes to complete ill-considered projects and to provide an outside opinion on possible consequences for biological resources."[62] The examples below illustrate the variety of procedural formalities expressed in such consultation requirements.

The Fish and Wildlife Coordination Act of 1934 requires that any federal agency proposing a water impoundment or diversion project (or any private party requiring a federal permit for such a project) must consult with the U.S. Fish and Wildlife Service, Department of the Interior, and the appropriate state wildlife official "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development."[63]

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[62] Robert L. Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 Env'tl L. 451, 456 (Spring, 2004).
[63] 16 U.S.C. §. 662(a).

The lead agency must "give full consideration" to reports and recommendations received through this process, and must incorporate "such justifiable means and measures for wildlife purposes" as the agency determines are necessary "to obtain maximum project benefits."[64]

The National Environmental Policy Act of 1969 requires federal agencies to prepare environmental impact statements prior to approving major federal actions that may significantly affect the environment.[65] Prior to preparing the EIS, the statute directs responsible federal officials to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved," and requires that all comments received be made available for public review and be included in all agency review processes.[66] According to one commentator, while the EIS requirement "opened the floodgates for public participation in all aspects of environmental policy," the consultation mandate is only beginning to be realized as more collaborative approaches to policy development and implementation emerge from the "the total policy gridlocks of the 1990s."[67] (See the table supra, p. ___, suggesting more collaborative approaches to implementing NEPA.)

Despite compelling arguments as to contrary congressional intent, courts have interpreted NEPA as an essentially procedural statute, mandating consultation and public disclosure, but not environmentally benign decisions. The closest we have to such a mandate is section 7 of the Endangered Species Act of 1973, which requires agencies undertaking actions that may affect a listed or proposed species to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service to determine how best to protect the affected populations and their

[64] 16 U.S.C. § 662(b).
[65] 42 U.S.C. § 4332.
[66] *Id*.
[67] Margaret A. Shannon, *Will NEPA be 'An Agenda for the Future' or Will it Become 'A Requiem for the Past'?: A Book Review of the National Environmental Policy Act: An Agenda for the Future*, 8 Buffalo Env'tl L.J. 143, 151 (Fall, 2000).

habitat.[68] The consulting agency's determination must be given substantial weight; in fact, the law prevents the action from going forward if the agency determines that there will be "jeopardy" to the listed species and that no reasonable or prudent alternatives to the proposed actions are available.[69] (Such determinations are exceedingly rare: a 1995 study found that only 0.005 percent of a total of 100,000 consultations yielded jeopardy opinions that halted federal actions.[70]) This standard, argued one observer, "added a powerful, substantive bite to the old resource management consultation procedure."[71] Yet the time, expense, and conflicts engendered in this process have prompted some to call for more cooperative alternatives such as conservation agreements between private parties and government agencies.[72]

B. Consistency

A number of federal statutes encourage or direct agencies to ensure that their decisions are "consistent" with state and local laws to the extent practicable. The extent to which these provisions guide or control federal agency decisions vary depending on the statute and the history of federal primacy over the particular resource at issue.

For example, the Federal Land Policy & Management Act[73] governs the public lands managed by the U.S. Bureau of Land Management. The statute directs the agency to ensure that resource management plans are "as consistent as possible with existing officially adopted and

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[68] 16 U.S.C. §. 1536.
[69] *Id*..
[70] U.S. Fish & Wildlife Service, Facts About the Endangered Species Act (1995), *cited in* JASON F. SHOGREN, ED., PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT: SAVING HABITATS, PROTECTING HOMES, 73 (1998).
[71] Fischman, *supra* note 62 at 456.
[72] *See, e.g.*, John F. Turner & Jason C. Rylander, "The Private Lands Challenge: Integrating Biodiversity Conservation and Private Property," *in* Shogren, *supra* note 70 at 92-137 (describing, among other examples, a conservation agreement between Plum Creek Timber, federal, and state officials to allow timber harvest in Montana's Swan Valley while providing grizzly bear habitat enhancement, thus preventing the need for a section 7 consultation).
[73] 43 U.S.C. §§1701-84.

approved resource related plans, policies, or programs of other Federal agencies, State agencies, Indian tribes and local governments,"[74] and must assist in resolving identified inconsistencies.[75] A state governor who objects to a proposed resource management plan with such identified inconsistencies may appeal its approval within the BLM, but the agency has no obligation to change its plans to address such issues, and there is no process specified to resolve such disputes outside of judicial review of the administrative action in federal court. In such a challenge, the standard of review is "arbitrary and capricious," so that "the BLM is provided with the ability to ignore state and local plans if it can provide a rational basis for doing so."[76] As one observer concluded, Congress enacted provisions such as this to encourage federal agencies to be informed by state and local concerns but did not intend to compromise the authority of the federal government over these resources,[77] nor to provide any substantive guidance for intergovernmental conflict resolution.

A different model of consistency appears in the federal Coastal Zone Management Act,[78] which authorizes states to develop and administer federally funded coastal resource management plans that meet federal standards. Federal activities in zones covered by approved plans must be conducted in a manner that "is, to the maximum extent practicable, consistent with state approved [plans]."[79] Private actions requiring federal permits or licenses in these zones require even stricter compliance with state-adopted standards. In these cases, the state must certify that such actions will be consistent with the coastal management plan; essentially, states have a veto

[74] 43 U.S.C. § 1712(c)(9).
[75] *Id*.
[76] Jeffrey L. Beyle, *A Comparison of the Federal Consistency Doctrine Under FLPMA and the CZMA*, 9 Virginia Env'tl L. Rev. 207, 222 (Fall, 1989).
[77] Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands?* 3 Hastings West-Northwest J. of Env'tl L. & Policy 193, 206 (1996).
[78] 16 U.S.C. §§ 1451-64.
[79] 16 U.S.C. § 1456(c).

power over federally licensed or permitted activities in lands within the zone. The federal government retains a great deal of authority over the scope of state authority,[80] and the veto power does not extend to actions on federal lands, but the CZMA offers a significant opportunity for state government officials to work cooperatively with federal officials in land-use decisions along their coastlines.

C. Intergovernmental Dispute Resolution Processes

1. Coastal Zone Management Act

In addition to providing a process to determine the consistency of state and federal coastal management plans, the Coastal Zone Management Act contains a provision requiring the Secretary of the Interior, with the cooperation of the Executive Office of the President, to "seek to mediate the differences" between federal agencies and states over development, initial implementation, and administration of coastal management plans.[81] The CZMA does not prescribe the manner of mediation but does require that it include public hearings in affected local areas.

The CZMA's implementing regulations provide some additional guidance for this process, although their emphasis is on the voluntary nature of the mediation. "In certain cases," it states, "mediation by the Secretary . . . may be an appropriate forum for conflict resolution."[82] The parties must first attempt to resolve their differences themselves, but either party may request "informal assistance" from the Assistant Administrator in the case of serious disagreement.[83] If this does not resolve the problem, either party may submit a written request for the Secretary to

[80] *See, e.g.*, Beyle, *supra* note 76 at 212.
[81] 16 U.S.C. § 1456(h).
[82] 15 C.F.R. § 923.54(a).
[83] 15 C.F.R. § 923.54(b)

engage in mediation.[84] This mediation process "shall last only so long as the parties agree to participate,"[85] and shall terminate if either party withdraws or if the process extends beyond fifteen days and the parties do not agree to an extension.[86] Perhaps most significantly, the regulations make clear that state or federal agency parties may choose whether to participate in this process: "judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process" provided by law.[87] In other words, the only mandatory aspect of the mediation process provided in the CZMA is the obligation of the Secretary of the Interior to make it available to state and federal governmental bodies experiencing a serious disagreement.

2. Clean Water Act

The closest parallel to section 164(e) appears in the Clean Water Act's provision for recognizing the sovereign authority of Indian tribes.[88] In addition to requiring EPA to promulgate regulations specifying how the agency will treat tribes as the equivalent of states for implementation of the Clean Water Act (sometimes referred to as the "Tribes as States" provision), section 518(e) provides that:

> The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.

[84] 15 C.F.R. § 923.54(c).
[85] 15 C.F.R. § 923.54(d).
[86] 15 C.F.R. § 923.54(e).
[87] 15 C.F.R. § 923.54(f).
[88] 33 U.S.C. § 1377(e).

In regulations adopted pursuant to this statute, EPA outlined a detailed process for when and how to invoke a dispute resolution mechanism.[89] (These are far more detailed provisions than have been adopted to guide implementation of Clean Air Act section 164(e).) Either the state or a tribe may request EPA to resolve such a dispute, but the parties must explain the steps they have taken to resolve it before involving the agency.[90] EPA's regional administrator must notify interested individuals and groups[91] and has the discretion to "include an NPDES permittee, citizen, citizen group, or other affected entity"[92] The regulations authorize EPA to use (in descending order of preference) mediation, arbitration, and a "default procedure" in which EPA makes a recommendation to resolve the dispute.[93]

Most importantly, although the statute appears to give EPA broad authority to resolve disputes if mediation or arbitration fails, the agency declined this role, explaining in its rulemaking comments: "The default procedure is simply the Agency reviewing available information and issuing a recommendation for resolving the dispute. EPA's recommendation in this situation would have no enforceable impact."[94] The legislative history does not demonstrate conclusively that Congress intended EPA to resolve disputes under the Clean Water Act in the same fashion as it did under the Clean Air Act, but one commentator who studied the record concluded that the Clean Water Act "can also support a reading that Congress intended to authorize a stronger role" than that provided by section 164(e) of the Clean Air Act.[95] Regardless of this possibility, "the Agency has consistently taken the position that it cannot

[89] *See* 40 C.F.R. § 131.7.
[90] 40 C.F.R. § 131.7(c)(2).
[91] 40 C.F.R. § 131.7(d).
[92] 40 C.F.R. § 131.7(g)(2).
[93] 40 C.F.R. § 131.7(f). For a very similar dispute resolution system, see the Yellowstone River Compact Commission, described in McKinney & Harmon, *supra* note 1 at 243-44.
[94] 56 Fed. Reg. 64,888 (Dec. 12, 1991).
[95] Denise D. Fort, *State and Tribal Water Quality Standards Under the Clean Water Act: A Case Study*, 35 Nat. Res. J. 771, 792 (Fall, 1995).

resolve disputes over the objections of parties."[96] Another commentator suggested that EPA's reluctance to make binding decisions in such cases argues in favor of state-tribal compacts to resolve water quality disputes.[97]

Despite this different interpretation of statutory authority, the agency's experience implementing the Clean Water Act section 518(e) dispute resolution mechanism is instructive to our analysis of Clean Air Act section 164(e). For example, we discussed earlier unresolved questions concerning which parties should participate in a 164(e) negotiation process. In a 1996 decision, the Ninth Circuit Court of Appeals upheld EPA's interpretation of Clean Water Act's section 518(e) when the City of Albuquerque objected to the agency's requirement that only states or tribes could initiate the process. The Tenth Circuit Court of Appeals reasoned as follows:

> The need for a dispute resolution mechanism to resolve unreasonable consequences stems from the possibility that two sovereigns—a state and a tribe—may impose different water quality standards on a common body of water. It is reasonable, therefore, to allow only those two sovereigns to initiate the dispute resolution process to resolve their differences rather than to include affected permittees such as Albuquerque. As successfully occurred throughout the negotiated settlement in this case, the dispute resolution mechanism allows the state and tribe to invite third parties to participate.[98]

Thus, although regulated entities or environmental groups may not initiate a dispute resolution process, there is nothing in the statute preventing their participation once it is started.

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[96] *Id*. at f.n. 109.
[97] Robin Kundis Craig, *Borders and Discharges: Regulation of Tribal Activities Under the Clean Water Act in States with NPDES Program Authority*, 16 UCLA J. of Env'tl L. & Policy 1 (1997-98).
[98] City of Albuquerque v. Browner, 97 F.3d 415, 427 (10th Cir. 1996).