

A SOLUTION UNDER PRESSURE: INTEGRATING FACILITATIVE PRACTICES
INTO WATER-RELATED CIVIL LITIGATION

by

DAVID J. KOLLER

A THESIS

Presented to the Conflict and Dispute Resolution Program
and the Graduate School of the University of Oregon
in partial fulfillment of the requirements
for the degree of
Master of Science

June 2017

THESIS APPROVAL PAGE

Student: David J. Koller

Title: A Solution Under Pressure: Integrating Facilitative Practices into Water-Related Civil Litigation

This thesis has been accepted and approved in partial fulfillment of the requirements for the Master of Science degree in the Conflict and Dispute Resolution Program by:

Adell Amos	Chair
Todd Jarvis	Member
Richard Margerum	Member

And

Scott L. Pratt	Dean of the Graduate School
----------------	-----------------------------

Original approval signatures are on file with the University of Oregon Graduate School.

Degree awarded June 2017.

© 2017 David J. Koller

THESIS ABSTRACT

David J. Koller

Master of Science

Conflict and Dispute Resolution Master's Program

June 2017

Title: A Solution Under Pressure: Integrating Facilitative Practices into Water-Related Civil Litigation

The broad scope of this research concerns the field of conflict and dispute resolution, also referred to as alternative dispute resolution (ADR). ADR practices have developed in both executive and judicial branches of government since the early 1900's. The goal of this paper is to evaluate how ADR practitioners working in water-related civil litigation can apply facilitative practices prior, during, and after the proceeding to reduce harm, cost, and time of litigation and increase the overall satisfaction of the parties when the proceeding has been resolved. To achieve this goal, a framework is constructed and applied to a case study in Cascade Locks, Oregon. This framework is not a way to avoid a court proceeding through use of alternative dispute resolution; instead this paper seeks to add facilitative practices to a civil litigation process to make the entire process more efficient to the parties and effective in resolving the dispute.

CIRRICULUM VITAE

NAME OF AUTHOR: David J. Koller

GRADUATE AND UNDERGRADUATE SCHOOLS ATTENDED:

University of Oregon, Eugene
University of Wisconsin-Milwaukee
University of Wisconsin-Waukesha

DEGREES AWARD:

Master of Science, Conflict and Dispute Resolution, 2017, University of Oregon
Graduate Certificate, Nonprofit Management, 2017, University of Oregon
Bachelor of Arts, History, Philosophy, 2009, University of Wisconsin-Milwaukee
Associate of Arts and Science, 2006, University of Wisconsin-Waukesha

AREAS OF SPECIAL INTEREST:

Environmental Conflict Resolution
Collaborative Planning and Management
Ancient and Medieval Warfare
Ethical Philosophy

PROFESSIONAL EXPERIENCE:

Graduate Intern, University of Oregon Title IX Program, Eugene, 2017
Small Claims Mediation Clinic Participant, Lane County Circuit Court, Eugene, 2016
Graduate Intern, Southern Willamette Forest Collaborative, Oakridge, Oregon, 2016
Graduate Research Assistant, University of Oregon Legal Studies Program, Eugene, 2016
Nonprofit Clinic Participant, University of Oregon Legal Clinic, Eugene, 2016

GRANTS, AWARDS, AND HONORS:

Philosophy Departmental Honors, 2006, University of Wisconsin-Waukesha

ACKNOWLEDGEMENTS

My sincere thanks to Associate Dean Amos, Professor Jarvis, and Professor Margerum for their patient assistance and wisdom in the preparation of this research manuscript. Special thanks also go out to the Law School and Conflict & Dispute Resolution Master's Program faculty and staff for their professional and academic support through this three-year process. Most of all, to my family and friends who stayed true through these past three years and offered their love, whether comforting or tough, thank you. An inspiration is what you are to me.

TABLE OF CONTENTS

Chapter	Page
I. INTRODUCTION	1
Intent and Background	2
Outline	8
II. RESEARCH METHODS	9
III. THE CURIOUS CASE OF CASCADE LOCKS, NESTLE, AND THE CONFEDERATE TRIBES OF THE WARM SPRINGS INDIAN RESERVATION	12
IV. AN OVERVIEW OF ENVIRONMENTAL FACILITATION AND CIVIL LITIGATION	17
What is Facilitation?	17
Why Use Facilitation?	31
American Civil Procedure	34
V. INTEGRATING FACILITATIVE PRACTICES PRIOR TO A LEGAL PROCEEDING	38
VI. THE FACILITATOR’S ROLE DURING A LEGAL PROCEEDING	49
VII. INTEGRATING FACILITATIVE PRACTICES POST LEGAL PROCEEDING...	52
VIII. APPLICATION OF THE FRAMEWORK TO A HYPOTHETICAL WATER-RELATED CIVIL LITIGATION	54
IX. FACILITATION RESOURCES	61
X. CONCLUSION	63
REFERENCES CITED	66

LIST OF TABLES

Table	Page
1. Tenets of Facilitation and Collaborative Decision-Making	30

CHAPTER I

INTRODUCTION

The year was 2015 and the city of Cascade Locks, Oregon was divided by conflict. The Cascade Locks Port Commission had been working closely with Nestle Water North American since 2008 to plan the construction of a commercial bottled water plant in the city, which would bottle water from the nearby Oxbow Springs (House, 2015). Local environmental organizations, including Food & Water Watch, the Sierra Club, and Bark, moved to create awareness and opposition to the proposed bottling plant, worrying about the ecological effect the plant might have on the area (Keep Nestle Out of the Gorge, 2016). The Confederate Tribes of the Warm Springs Indian Reservation moved to oppose the bottling plant because of its proximity to the Oxbow Fish Hatchery (Quirke, 2016).

Community members in Cascade Locks argued both in favor and opposition to the effect a commercial bottled water plan would have on their city. Public town hall meetings were held to discuss the bottling plant, but these only widened divisions within the community (Jarvis, 2016). In 2016, Hood River county, in which the city of Cascade Locks resides, banned commercial bottling plants from the county through a ballot measure, but discussion still lingers around the plausibility of a bottling plant in the city of Cascade Locks (House, 2016).

INTENT & BACKGROUND

The broad scope of this paper and the framework being developed here concerns the field of conflict and dispute resolution, also referred to as alternative dispute resolution. Alternative Dispute Resolution (ADR) has many different applications and practices, including international negotiation, family mediation, small claims mediation, community facilitation, hostage negotiations, environmental mediation & facilitation (Alternative Dispute Resolution, 2017). Despite many of these topics being long-standing community issues, the practice of ADR has developed as an academic study within the past 50 years (George Mason University, 1988).

While professional specializations such as negotiation and arbitration have been traditionally handled by legal practitioners (HG, 2017), ADR has emerged as a separate discipline because legal proceedings often do not address the underlying conflicts that cause the dispute to need legal redress in the first place. ADR primarily focuses on repairing personal relationships and addressing the underlying disputes in a way that collaboratively involves all stakeholders. The general goal in most ADR practices is to prevent the parties from going through a time-consuming and expensive legal proceeding, while also coming to a more mutually agreeable resolution. Legal proceedings are still prominent in the process of dispute resolution, but they often focus on the immediate and overlying dispute, while the causes and impacts of the dispute remain unaddressed.

This concept of integrating ADR and civil litigation is innovative, but ADR has been used in-conjunction with litigation for hundreds of years. In 1888, the United States Congress instituted the Arbitration Act and in 1913 the United States Department of Labor mediated 33 labor disputes during its first year as a federal department (Barrett &

Barrett, 2009). Civil alternative dispute resolution continued to grow and integrate with labor law, unions, and worker's rights through World Wars I and II (Barrett & Barrett, 2009).

In 1990 the United States Congress passed the Administrative Dispute Resolution Act, intended to promote the use informal dispute resolution procedures in governmental administration disputes "to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in federal courts" (Administrative Dispute Resolution Act, 1996). In 1998, the Administrative Dispute Resolution Act was followed up by the Alternative Dispute Resolution Act, which cited five main benefits of ADR: greater satisfaction to the parties; innovative methods of resolving disputes; greater efficiency in achieving settlements; reducing the backlog of pending cases in federal courts; and that mediation has been shown just as successful in resolving disputes in trial courts as it has in appellate courts (Alternative Dispute Resolution Act, 1998).

Dispute resolution practices continue to develop in both executive and judicial actions. Executive branches of government, such as departments of labor, family & human services, or human resources, rely on mediation and arbitration to settle administrative disputes (Administrative Dispute Resolution Act, 1996; US EEOC, 2017). The United States Forest Service, Bureau of Land Management, National Oceanic & Atmospheric Administration, and Army Corps of Engineers use public participation through facilitated collaborative planning and management groups for community input on department projects (McKinney, 2015; Smith, 1992; NOAA, 2010; US Army Corps, 2016). These collaborative facilitations are partially intended to prevent disputes from

arising in situations where they otherwise might by gaining input from community stakeholders.

Local, state, and federal judiciaries have also started using arbitration, mediation, and negotiation to settle disputes outside of court, as an alternative to litigation (Alternative Dispute Resolution Act, 1998; Lane County Circuit Court, 2014; US Courts, 2014). ADR and legal proceedings have a tradition of being used in-relation, but often separately, from one another, such as using mediation to settle small claims disputes instead of those disputes going to a circuit court (Lane County Circuit Court, 2014). There are also examples of how to use mediation within large water civil litigations to resolve those disputes outside of a courtroom (McGovern, 2006; Moore et al., 2001). However, the use of facilitative ADR practices to make already standard judicial dispute resolution methods, such as mediation, negotiation, arbitration, or litigation, more efficient has yet to be seen.

The goal of this paper is to evaluate how ADR practitioners working in legal proceedings can apply facilitative practices prior, during, and after the proceeding to reduce harm, cost, and time to the parties and increase the overall satisfaction of the parties when the proceeding has been resolved. To achieve this goal, a framework is constructed and applied to a specific case study to illustrate the practicalities. This framework is not a way to avoid a court proceeding through use of dispute resolution; instead this paper seeks to add facilitative practices to a civil litigation process to make the entire process more efficient to the parties and effective in resolving the dispute. This is the purpose of facilitation – “to increase the likelihood, strength, or effectiveness” of a process (Merriam-Webster, 2017). This framework is an emulsifier, which examines

methods of combining both practices in facilitation and dispute resolution to form a collaborative effort using whichever dispute resolution method suits the parties; a solution which, more efficiently than before, can address the legalities, administrative policies, underlying issues, and interpersonal relationships of the dispute.

This framework is still in its infancy and there are many practicalities that need to be worked out. Some of these shortcomings are discussed at the end, as well as highlighting the merits, at the end of this paper. The practicalities of this framework will develop as facilitation practitioners continue to build their practices in the field. This framework does not apply exclusively to water-related disputes. The framework could be adapted to any dispute, whether local, state, or federal, which involves many parties who all have investment in seeing the dispute come to a mutually beneficial resolution for the betterment of the community, state, or country. There is also an important integrated legal element, which is what separates this framework from other's in the field; this is intended to be used as a single process, involving both prominent elements of American Civil Procedure and facilitated collaborative planning among stakeholders.

This work will focus specifically on water-related disputes within community development projects and how a combined process of facilitation, dispute resolution, and civil litigation can help fully address the concerns of water rights and water-based community disputes. Prior to a legal proceeding, a constructive ADR process can help identify the underlying issues and concerns on all sides to help the legal proceedings run more smoothly. Following a legal proceeding, collaborative planning can help distribute large monetary damages awarded to parties and provide a more sustainable outcome to prevent the issue from re-occurring. Facilitation and mediation can also help determine

and resolve any outlying relationship or personal issues that the formal legal process was unable to address. As a matter of practicality, the case studies in this paper will focus exclusively on the prior appropriation water rights law dominant to the western United States.

Some readers may question whether combining the practice of facilitation into water-related civil litigation is realistic. Since 1950, the world population has grown from 2.5 billion to 7.4 billion people (World-o-Meters, 2016). While the world population is growing, our freshwater supplies remain stagnant. A continual population growth will result in decreased water supply per person and would likely cause increased conflict between communities, especially for those living in areas where water is already scarce. Input from the communities will need to be integrated into state statutes governing water resources to efficiently balance local community use with state-wide need. A facilitated collaborative planning and management process involving fundamental stakeholders is the most efficient way of gaining that input (Scholz & Stiftel, 2005).

The importance of public decision-making around how to use freshwater supplies increases as the population grows. Some Federal and State governments have already made collaborative planning a necessary part of both research grants and dispute resolution practices around water-related issues (US Army Corps of Engineers, 2016; Cook, 2013). In 2012, the State of Oregon adopted an Integrated Water Resources Strategy to meet present and future in-stream and out-stream water needs (Oregon Water Resources Department, 2012). This strategy was built from the “bottom-up” by holding

collaborative planning sessions in eleven Oregon cities (Oregon Water Resources Department, 2012).

Collaborative planning is useful for policy-making at a local and state level, but does not serve as well in a judicial proceeding. Large water civil litigations, such as the ones discussed here, often have thousands of participants already party to the litigation (McGovern, 2006). Adding stakeholders may harm the process by creating extraneous input from outside sources, which will take time and resources to organize and integrate into the proceeding. Input from stakeholders may not be allowable during an adjudication; a judge could consider the input from stakeholders to be hearsay (Cornell Law School, 2017). During a settlement, attorneys and parties may consider input from outside stakeholders to be superfluous to the dispute and overcomplicate the issue. While collaborative input does not serve well in civil litigation, there are facilitative practices which can benefit large proceedings. The following framework will build on this concept of integration by evaluating methods of integrating facilitative practices into water-related legal proceeds, such as civil adjudications and settlements.

OUTLINE

This paper will follow a sequential layout divided into ten sections. The second section describes the methods and sources used to research and shape this framework. The third section provides a timeline of the Cascade Locks and Nestle Waters bottling plant disputes, which will be referenced as a case study throughout this research. The fourth section defines facilitation and collaborative dispute resolution and describes those processes within community water resource disputes. The fifth section analyzes the benefits of facilitation practices when integrated prior to legal proceedings. The sixth section addresses the facilitator's role during a legal proceeding. The seventh section analyzes how facilitative practices can be integrated post legal proceeding. The eighth section applies the framework to the Cascade Locks scenario, including hypothetical situations of how the developed framework could be used in conjunction with a legal proceeding around that dispute. The ninth section provides information on resources available for facilitating groups. The final section covers conclusion statements, including merits and shortcomings of the research, and opportunities for future research.

CHAPTER II

RESEARCH METHODS

Discussing the research methods used to gather evidence for this study is important before discussing the framework and its foundation. A case study on community water conflicts is presented to illustrate a practical application of the framework. A few different factors went into choosing and researching the Cascade Locks scenario. Geography is an important factor since water law varies by state and has drastically different applications in the western and eastern United States (Thompson, Leshy, & Abrams, 2012). A case study in Oregon is used because of familiarity with Oregon water law and the geography of the area. There are also cultural characteristics to consider; Oregon generally values both fiscal liberty and ecological preservation. Culture values play a prominent role in community disputes, so having experience and knowledge in cultural values helps analyze and assess the dispute.

The research on Cascade Locks and the proposed Nestle Waters bottling plant began in Todd Jarvis's course on Environmental Conflict Resolution during Winter 2016 term. The course covered videos created by Oregon State University students and by different parties to the dispute during the previous year's town hall meetings. The videos were followed by a class discussion about the merits and shortcomings of the facilitated town hall meetings. The scenario of Cascade Locks and the Nestle Bottling Plant is interesting because of the development of these town hall meetings and their detrimental effect on the dispute; instead of helping manage and resolve the dispute, these meetings aggravated the parties and created a wider divide between conflicting perspectives.

At the end of the Environmental Conflict Resolution, a final synopsis was written about the Cascade Locks and Nestle Bottling Plant dispute from which this case study developed. The first step in researching the case study was to get a clear concept of the timeline of events. Understanding a conflict timeline is important for a resolution practitioner, who needs to be able to put discussions during the resolution process into context with background information. Most of the dates were reported through the Oregonian and OregonLive by Kelly House, who has done an excellent job covering developments on the Cascade Locks/Nestle Bottling Scenario (House, 2015). David Hollingsworth also provided an excellent timeline of the dispute (Hollingsworth, 2015). Other perspectives were offered by meeting minutes from the Cascade Locks Port Commission, Hood River News articles, and public statements from the Keep Nestle Out of the Gorge Coalition.

Once a timeline for the dispute was established, more research was conducted into the motives of each group to support or oppose the proposed water bottling plant. One of the most important steps in any dispute resolution process is to understand each party's perspective, so the resolution practitioner understands both sides of the situation and can help each party build mutual understanding between each other (Kaner, 2014; NOAA, 2010). Opinion articles from the Keep Nestle Out of the Gorge Coalition, the Confederate Tribes of the Warm Springs Indian Reservation, and pro-Nestle supporters were examined to gain different perspectives on the issue Keep Nestle Out of the Gorge, 2015; Godowa-Tufti, 2016; King, 2015).

An element of personal interviews was considered for this study, but dismissed for two reasons. First, while the proposed Nestle Waters bottling plant dispute is a

prominent aspect of this research study, the study is not exclusively analyzing the scenario in Cascade Locks. Second, given that an intensive examination of the Cascade Locks scenario is not the primary goal of this research and instead only serves as an applied model for the proposed framework, the benefits of gathering and processing information from open-ended interviews does not warrant the effort to conduct legitimate and ethical participatory research. The referenced opinion articles provide enough material to support the goal of the Cascade Locks scenario in modelling the proposed framework.

CHAPTER III

THE CURIOUS CASE OF CASCADE LOCKS, NESTLE, AND THE CONFEDERATE TRIBES OF THE WARM SPRINGS INDIAN RESERVATION

The following case study is presented to help assess the theories described throughout this paper onto an actual scenario. There are six reasons why the Nestle Bottling Plant dispute in Cascade Locks was chosen as a case study for this framework. First, the scenario is a prominent multi-party water dispute; exactly the kind of conflict for which this framework is designed. Second, the scenario involves both interpersonal conflicts and legal issues, which could potentially develop into a litigation. The dynamic of interpersonal conflicts and legal issues makes the case study favorable for two reasons. The threat of litigation makes the Cascade Locks scenario favorable because the conflict has developed enough to give concrete examples but still allows for hypothetical situations. The interpersonal conflicts and legal issues are easy to distinguish separately and study on their own because of the city's small population, while still understanding how they are connected.

Third, Cascade Locks is a small American town; the population was 1,144 people in 2016 (Suburban Stats, 2016). A dispute over a water bottling plant occurring in such a small city demonstrates that large multi-party water disputes can happen in any community along a major waterway. Fourth, the Nestle bottling plant case has an appealing "Big Corporation v. Underdog Community" feel to the dispute. Keep Nestle Out of the Gorge used the underdog narrative to help gain support and promote their cause (Keep Nestle Out, 2013). Fifth, the Cascade Locks scenario is a manageable dispute for this study. If this research paper was just studying a specific scenario without

also building a framework, then an adjudication with more parties encompassing a greater geographical area and longer timeline would have been chosen, such as the Snake River Basin Adjudication or Klamath Basin Adjudication. Sixth, there have been at least six professionally facilitated town hall meetings between the citizens, local government, and Nestle representative in Cascade Locks. Not only have these facilitations failed manage the conflict from escalating, but sometimes they seemed to do more harm than good. These are not optimal examples of well-processed facilitations and this framework is an opportunity to consider what could have been done differently.

The Nestle bottling plan dispute began on November 19th, 2008 when the Nestle Corporation gave a presentation to the Cascade Locks Port Commission on their desire to build a bottling plant in Cascade Locks (Hollingsworth, 2015). Discussions around the specifics of the bottling plant began in February 2009 between the Port Commission, Nestle, the city of Cascade Locks, and Tennison Engineering, an independent consulting firm hired to compose a draft of the city's water rights and resources (Hollingsworth, 2015). The water rights draft was completed and an agreement was reached between the city and the Oregon Department of Fish & Wildlife by May 2009 (Hollingsworth, 2015).

The agreement between ODFW and Cascade Locks allowed ODFW to grant 0.5 cubic feet of water per second to the city of Cascade Locks, who will then sell the water to Nestle for use in their bottling plant (House, 2015). This means that Nestle will bottle approximately 100 million gallons of water per year from the Oxbow Springs in Cascade Locks to be sold around the northwestern United States (House, 2015). Environmentalist organizations around the Columbia River, including Food & Water Watch, Local Water Watch, the Sierra Club, and Howl, began reacting almost immediately to protect both the

water of the Columbia River and the salmon fish hatchery located nearby Cascade Locks into which the Oxbow Springs reservoir feeds.

Four town hall meetings were organized in Cascade Locks by the city council and sponsored by Nestle in September 2009, March 2010, November 2010, and May 2011 (Hollingsworth, 2015). These town hall meetings were facilitated by professionals from the Pacific Northwest, from as far away as Seattle and as close as Hood River. The facilitators poorly conducted intake from the Cascade Locks community before the meetings, not foreseeing important issues that arose during the meetings. The meetings were also not conducted in a neutral and inclusive fashion, as Mr. Palais, the Nestle Representative for the Northwest America division, was allowed to moderate portions of the meetings. These town hall meetings were unsuccessful in convincing the citizens that the bottling plant will contribute to the city's economy and minimally affect the ecosystem. Mr. Palais began orchestrating annual BBQ's every year in May and community charities on behalf of Nestle to gain popularity with the citizens in Cascade Locks.

In 2008, roughly ten environmentalist organizations banded together and formed a collaborative aptly titled the "Keep Nestle Out of the Gorge Coalition" (Keep Nestle Out of the Gorge Coalition, 2016). This coalition petitioned Governor Kate Brown and Director Melcher to change the agreement between Nestle and the ODFW to a sale of the Oxbow Springs water right instead of simply allowing Cascade Locks to sell the water to Nestle. The general difference between the two is that a transition of water rights involves public involvement from Oregon residents while the sale of water is private if it is allowed by the ODFW (Oregon Legislative Counsel Committee, 2013). The

coalition's efforts finally paid off in September 2015 when Governor Kate Brown requested that the ODFW revoke its application to allow Nestle a share of the Oxbow Springs water right (House, 2015). This request came under pressure from petitioning by the environmental coalition, demonstrations and fasts at the state capitol by the Confederate Tribes of Warm Springs, and the effects of the drought on Oregon's ecosystem during summer 2015.

Two more town halls occurred following Governor Brown's request for a transfer of water rights, one in May 2015 and a follow up later in the year. The evidence found through readings illustrates how poorly the Nestle town hall meetings were handled. Every reference reflects negatively towards town hall meetings in Cascade Locks. On May 17, 2016, Hood River County voters passed the Hood River County Water Protection Measure (DeGraw & del Val, 2016). The measure banned industrial scale water bottling across the whole county (DeGraw & del Val, 2016). The measure was brought on primarily by the dispute in Cascade Locks, which resides in Hood River county, in-combination with the state-wide drought that occurred over the summer 2015 (DeGraw & del Val, 2016).

On June 3, 2016, Oregon Fish & Wildlife Director, Curt Melcher, announced that he would continue forward with a Water Exchange Application for the Columbia River Gorge, although details of the transition were unclear (DeGraw & del Val, 2016). Gordon Zimmerman, a city counselor in Cascade Locks who supports the Nestle bottling plant, has expressed that the city government will continue to pursue all the steps up until the point when bottling plant would be built (Lehman, 2016). This statement came after an Oregon judge approved the application for the water rights transfer from OFWD to the

City of Cascade Locks in November 2016 (Lehman, 2016). Filing, review, and acceptance of a water rights transfer are just the first steps in the actual transfer of a water right in the state of Oregon (OWRD, 2016). The entire transfer process may take more than a year before the measure banning bottling plants in Hood River County is re-examined (Lehman, 2016).

CHAPTER IV

AN OVERVIEW OF ENVIRONMENTAL FACILITATION AND CIVIL LITIGATION

Understanding the structures of both facilitation and civil litigation separately from each other is the first step in discovering how facilitation can be integrated into a civil procedure. The following section will describe what facilitation is, including the basic tenets of facilitation and the association between facilitation and collaborative planning, and why facilitation is most commonly used, including specific organizations who use facilitation and qualifications for facilitators who might apply this framework. The overview of facilitation will be followed by a brief working description of the American civil procedure system to frame the context of the rest of the paper.

WHAT IS FACILITATION?

A practical way to develop a definition of facilitation is to look at the expectations of a professional facilitator and a formal facilitation process. The facilitator employs their expertise in group process to assist the group in working towards a common goal through participation of all members, mutual understanding of different perspectives and interests, and shared responsibility for the outcome (NOAA, 2010; Kaner, 2014). The facilitator's goal is to create a structure by which the group can guide themselves through processes and disagreements to address a problem. Collaborative groups, government organizations, and academics have varied perspectives on the expectations of a facilitator during this process. In this section, six of those perspectives will be described and

evaluated. Five aspects of facilitation will be formed from these perspectives to summarize what information is important to the framework.

Before defining facilitation, the relation between facilitation and collaborative planning must be clarified for to avoid confusion throughout the rest of this framework. The practice of facilitation is often used in-conjunction with collaborative planning and public participation, but not all facilitations involve collaborations and not all collaborations are facilitated. The crossover between facilitation and collaboration means that the two processes share a lot of common traits and practices. Throughout this report, collaborative practices may be described or attributed to the case study or framework. The application of collaborative practices does not imply that public participation will be part of this framework; the collaborative practices just also work within the process of facilitation being described.

For the purposes of clarity, outside of this section, facilitation will be used in this paper describe the process of a dispute resolution professional, specifically trained in planning, organizing, and managing group discussions (i.e. the facilitator), moderating a group of participants who have gathered to deliberate and resolve an issue, namely a multi-party water-related civil litigation. More specific qualifications for facilitators will be recommended in the following “Why Use Facilitation?” section.

Many different explanations of facilitation and collaborative planning processes have been presented by experts, so narrowing down to which explanations should be used here is difficult. Three different factors are taken into consideration when choosing the explanations of facilitation and collaborative planning; prominence, application, and variety. The first factor taken into consideration is who the most prominent experts are in

the fields of facilitation and collaborative planning. Larry Susskind and Sam Kaner come up right away and the International Association of Facilitator's follows closely behind.

The second factor is the application of facilitative and collaborative processes within the field of environmental or water dispute resolution. The National Oceanic and Atmospheric Association and the Army Corps of Engineers both regularly employ professionally facilitated collaborative planning and management to assist in addressing water disputes and problems. Larry Susskind is also prominent within the study of environmental dispute resolution and public participation. The third factor is presenting a variety of perspectives on facilitation. While studying experts from the field of environmental facilitation is useful to maintain a theme, including experts who offer a breadth of different interpretations of facilitation and a facilitator's role will add variety.

The first explanation of a facilitator's role comes from the International Association of Facilitators (IAF), the most prominent organization of professional facilitators in the world. The IAF Statement of Values and Code of Ethics identifies eight values that every facilitator should be aware of during facilitation: *client service; conflict of interest; group autonomy; processes, methods, and tools; respect, safety, equity, and trust; stewardship of process; confidentiality; and professional development* (International Association of Facilitators, 2016). This code of ethics was developed by facilitators within the IAF across the world. The code represents a wide-variety to cultural beliefs and reflects those different ideologies. The IAF code is still only recognized within that specific community of roughly 250 facilitators, which only represents a small fraction of the entire facilitation community worldwide (International Association of Facilitators, 2016).

The IAF's code of ethics focuses on the principles of professionalism, cultural diversity, and cooperative interaction (International Association of Facilitators, 2004). These principles are embodied in the eight values mentioned above. *Client Service* defines who facilitators work for as both their sponsors and the group being facilitated. *Conflict of Interest* states that facilitators should be forthcoming with any conflicts of interest, personal biases, or affiliations of which they are consciously aware in each facilitation. *Group Autonomy* states that facilitators should seek a mindful agreement to participate from group members.

Processes, Methods, and Tools states that facilitators will choose the appropriate tools to reach agreement for each group meeting and will avoid unnecessary steps. *Respect, Safety, Equity, and Trust* states that these four values are essential to "elicit and honor the perspectives of all." *Stewardship of Process* clarifies that the facilitator's job is to guide the process and minimize their personal impact on group reasoning and decision-making. *Confidentiality* states that information of group participants will be respected and not shared with outside parties. *Professional Development* is a promise that facilitator's will continuously seek opportunities to enhance their skills (International Association of Facilitators, 2004). These eight values will be compared as a group to other definitions of facilitation later in this section.

The National Oceanic and Atmospheric Association (NOAA) Coastal Services Center offers a third perspective of collaboration and the facilitator's role in their guidebook *Introduction to Planning and Facilitating Effective Meetings*:

A facilitator is someone who uses knowledge of group processes to design and deliver the structure needed for effective meetings. Facilitators can be individuals from outside

the group or organization, or an internal team member or meeting leader. Helping plan the agenda is a key function of this role. Facilitators help the group members decide where they want to go, but the group itself deliberates and makes the final decisions. At the meeting, a facilitator acts as a “content-neutral” person who leads the group through the agenda—but does not contribute to the substance of the discussion and has no decision-making authority (National Oceanic and Atmospheric Association, 2010).

The NOAA guidebook follows this brief definition with more specific facilitator functions, beliefs, and characteristics. Specific facilitator functions include: help to define meeting purpose and objectives; design meeting process and agenda; guides discussion; ensures assumptions are tested and that discussion is inclusive; remaining as unbiased as possible to group discussion; active note-taking of prominent points and decisions; and assistance executing decisions made during group meetings (National Oceanic and Atmospheric Association, 2010).

The NOAA guidebook attributes five beliefs which will help a facilitator accomplish their main functions: *a group of individuals, working together, can accomplish more than one person working alone; everyone’s opinion is of equal value, regardless of rank or position; people are committed to ideas and plans that they have helped create; participants will act responsibly in assuming accountability for their positions; and the process – if designed well and sincerely applied – can be trusted to achieve results.* Finally, the NOAA guidebook attributes six characteristics that make a facilitator more successful at achieving their functions: *neutrality on the issue being discussed or decided upon; no decision-making authority; acceptable to all members of the group; some knowledge of the issue being discussed so the facilitator can follow the*

conversation and keep track of it; trust in the group to make the right decision for itself; and ability to synthesize and organize ideas quickly (National Oceanic and Atmospheric Association, 2010).

One of the greatest strengths of facilitation is the ability to build consensus between participants in the process through participatory decision-making. Participatory decision-making is the core of collaboration and the process which the facilitator is hired to moderate. Coming to agreement through consensus and participation has some benefits over parliamentary rules and Robert's Rules of Order (Kaner, 2014). First, all participants of the collaborative are encouraged to share their knowledge and opinions on the topic in discussion. Second, by actively listening to everyone's thoughts around the table, participation encourages mutual understanding of each other's perspectives on the issues. Mutual understanding does not mean that participants must agree with each other, but that participants simply understand the viewpoints of everyone present. Third, when participants understand each other's perspective, they can create more inclusive solutions. A benefit of inclusive solutions is that they have been developed by all participants and share the values of all participants, not just the most influential of the group. Fourth, the group feels a sense of shared responsibility about the success of the solutions they develop and shared responsibility in implementing those decisions (Kaner, 2014).

In "Beyond Consensus", Rich Margerum presents a definition of collaboration which can also be useful within facilitative processes. Collaboration is, "...an approach to solving complex problems in which a diverse group of autonomous stakeholders deliberates to build consensus and develop networks for translating consensus into results" (Margerum, 2011). Stakeholders in a collaborative process could be individuals

within a specific group or organization, individuals representing their own needs and interests, representatives for a community, group, or organization, or any combination thereof (Margerum, 2011). Within the context of water-related civil litigation, the stakeholders are also participants, not from the community, but parties to a litigation autonomously participating in a modified process of American civil procedure. The participants still seek to build consensus about facts, perspectives, and interests towards the goal of efficiently resolving their dispute.

Margerum continues by identifying seven aspects of a collaborative process, which he refers to as the Seven C's; *collaboration, communication, consultation, conflict resolution, consensus building, cooperation, and coordination* (Margerum, 2011). A collaborative process does not need to incorporate all Seven C's. A process may have a combination of these C's, although collaboration, communication, and conflict resolution tend to play an important role in all collaborative processes (Margerum, 2011). Any combination of these C's can play a role in collaborative process in a combination of ways and which C's play a role greatly depends on the purpose of the collaboration. Communication can occur from one party out to the rest or between each party. Cooperation can occur between parties, who then all report to a superior, or include the manager as an equal party in the process. Collaborations can form to solve conflicts in a community, address departmental problems in an organization, address shared resources of a group, or help multiple parties divide shared resources.

In chapter 5 of the book "Breaking Robert's Rules," Lawrence Susskind and Jeffery Cruikshank also outline eight useful steps towards creating consensus in a collaborative group that can assist in further clarifying the definitive practices of

facilitation (Susskind & Cruikshank, 2006). *Pursuing deliberations in a nonjudgmental fashion* means that the group is working together towards agree upon goals and objectives in a fashion that shows respect, active listening, and a focus on shared interests rather than singular positions. *Separating “inventing” from “committing”* refers to the process of open brainstorming and safely making suggestions that aren’t agreed upon, while withholding criticism of ideas on the table. *Creating subcommittees and seek expert input when appropriate* emphasizes the importance of using joint fact-finding and bringing in outside experts to create a pool of information for the group to use.

Using single-text procedure refers to the process of creating a single “text” that combines the separate knowledge, perspectives, and ideas of all group members into a unified document. *Modifying the agenda and ground rules as necessary* illustrates an important distinction between Robert’s Rules and collaboration, which is the group’s ability to change the agenda or readjust ground rules that are not working towards accomplishing their goals and objectives. *Setting a hard line for ending deliberations* means creating a reasonable deadline for the collaborative to move from contemplation to action. *Building on prior relationships* means to create a network of people everyone in the group knows to rely upon for resources and knowledge; basically, use the people you already know to build and assist the collaborative before forming all new relations. *Emphasizing mutual gain* is the foundation of a collaborative process; it means working towards a solution that works for all members of the group in a non-zero-sum environment (Susskind & Cruikshank, 2006).

In the article, “Fifteen Things We Know About Environmental Dispute Resolution” Larry Susskind illustrates important aspects of consensus building and

collaboration within the context of environmental ADR (Susskind, 2012).¹ As the fifteen aspects are listed, descriptions are given of how each applies to the framework being built here:

- 1) *Can be used “upstream” and “downstream” during policy-making* – This is emphasized further on in this framework during sections 4 and 6, but the idea is that collaborative planning can occur both before and after the creation of a policy to incorporate the knowledge and opinions of the community.
- 2) *EDR only works if the parties are motivated to come to the negotiating table* – Susskind points out that having different motivations for doing so is fine, if those motivations get the parties to cooperate in the process. This is especially useful advice for particularly charged legal proceedings, where a facilitator might have difficulty getting parties with polarized stances to agree on anything.
- 3) *EDR needs a process manager; ideally, a professional mediator or facilitator* – This reinforces the importance of having an appropriately trained facilitator leading the collaborative process during a legal proceeding.
- 4) *The parties in EDR must have a chance to participate in or at least approve the agenda, ground rules, selection of parties, timetable, and other elements of process design before EDR begins* – This is a general rule of collaborative planning; the parties should feel ownership and responsibility for the process and the facilitator should manage/moderate the process. Ownership and responsibility is also important

¹ Environmental Dispute Resolution (EDR)

in a legal setting so the parties will support the statutes and policies that come out of the proceeding.

- 5) *It is perfectly reasonable, even necessary, for a facilitator or mediator to get involved in a variety of away-from-the-table activities on behalf of the group* – This is covered in more detail in the sections 4 of the framework, specifically in the facilitator’s role of helping with the logistics of discovery and coordination of settlement conferences.
- 6) *EDR works best when there are opportunities for joint fact finding and they are managed by a facilitator or a mediator* – This point is especially important for section 4 of the framework around the process of discovery; joint fact finding during discovery has the potential to eliminate arguments over the validity of information later on and possibly eliminate some extraneous issues of the dispute, if both parties agree on the facts.
- 7) *EDR should always emphasize value-creating opportunities (not just zero sum choices)* – One of the benefits to this framework is the openness to build value in a legal settlement both prior and during the proceeding. This would seem to apply more during a settlement than a court trial since the parties have far less control over value creation during a trial.
- 8) *EDR can never substitute for statutorily-mandated decision-making by public officials or agency staff. It can, however, supplement whatever formal decision making is required by law* – This is the crux of the framework being created; public officials should create legal statues in-response to legal proceedings around water disputes in their communities, as they are held to do, but with input from a

collaborative legal process involving the community members and parties towards whom the statutes and settlement applies.

- 9) *EDR will, of necessity, take different forms in different constitutional contexts around the world* – Geography, regional water usage, community policies, and local water laws (i.e. prior appropriation or riparian), among other variables, will alter how this framework is applied.
- 10) *EDR can rarely, if ever, be precedent setting* – At first glance, this may seem to dispute what is being built here; fortunately, this framework is all about dispute resolution. Susskind’s point seems to be that EDR alone can rarely set the precedent necessary to create a legal statute. Recognizing this as a shortcoming of EDR and strength of the legal system was one reason why the framework seeks to integrate both processes.
- 11) *EDR can include opportunities for confidential give-and-take* – The application here is around what level of confidentiality should be practiced between the facilitator, attorneys, and parties involved in the dispute so that there is enough information to solve the dispute and create a public statute while still maintaining respect for the parties.
- 12) *There are substantial advantages to creating EDR “systems” rather than treating each EDR opportunity anew* – This is another purpose of the framework; to create an EDR system which is integrated into the current system of civil procedure and water law.
- 13) *The costs of EDR need not be shared equally by the parties* – Fortunately, there are already processes in place for how legal fees should be divided. Although not much

space will be spend discussing the topic of fees here, the Oregon State Bar has more information on how fees are handled in settlement conferences (Oregon State Bar, 2009).

14) *It is possible to evaluate and improve EDR efforts* – This is what the framework being created here seeks to do, both for evaluation and improvement of current methods.

15) *Parties involved in EDR should consult legal counsel* – This is self-evident within the context of this framework and is assumed that the parties will already have consulted counsel prior to the start of this process.

Using these perspectives on facilitation and collaborative decision-making, the following table (Table 4.1: Tenets of Facilitation and Collaborative Decision-Making) has been composed to assist in better understanding the tenets outlined above. The provided perspectives of facilitator expectations and guidelines fit into five categories: core values of facilitation, facilitation ground rules and practices, facilitation purpose, facilitator qualifications, and facilitator characteristics. Group decision-making and joint fact-finding involve inclusive and often challenging communication. The facilitator’s purpose is to help moderate the litigation process and to offer consultation on how the process unfolds.

Not every facilitator is qualified to do the specific work of facilitative civil litigation. As both Susskind and the National Oceanic and Atmospheric Association point out, a facilitator should know the basic subject matter of what the group is discussing to keep up with the conversation (Susskind, 2012; NOAA, 2010). A facilitator moderating a water-related civil litigation will need the six qualities applicable to all facilitator’s, which NOAA expresses in their guidebook and are described earlier in this

section (NOAA, 2010). A facilitator working within this framework will also need to know typical hydrological and legal terminology and a working knowledge of water law, American civil procedure, and basic hydrological concepts. Learning about the geography, culture, social structure, and politics of the region being disputed will also prove incredibly useful, so the facilitator should have some background in research.

Now that there is a clearer picture of what facilitation is and how facilitation and collaborative decision-making interact, examples will be given in the following section of when and why facilitation is used. These examples will specifically focus on legal disputes, mainly within executive branches of government, and water resource disputes.

Core Values	Ground Rules & Practices	Goal	Facilitator Qualifications	Facilitator Characteristics
Full Participation	Pursue deliberations in a nonjudgmental fashion	Collaboration	No Conflict of Interest	No decision-making authority
Mutual Understanding		Consultation	Background knowledge of the issue(s) being discussed	Acceptable to all members of the group
Inclusive Solutions	Separating “inventing” from “committing”	Conflict Management		Knowledgeable in Process, Methods, and Tools
Shared Responsibility	Creating subcommittees and seeking expert input when appropriate	Conflict Prevention	Excellent Written and Oral Communication	
Respect, Safety, Equity, and Trust		Consensus Building		
Client Service	Using single-text procedure	Cooperation	Ability to synthesize and organize ideas quickly	Neutrality on the issue(s) being discussed
Group Autonomy		Coordination		
	Modifying agenda and ground rules as necessary			Strong Moral Principles
	Setting a hard line for ending deliberations			Consistent Professional Development
	Building on prior Emphasizing mutual gain relationships			Stewardship of Process

Table 4.1: Tenets of Facilitation and Collaborative Decision-Making

WHY USE FACILITATION?

The practice of facilitation can work more effectively than other ADR or legal proceedings in a variety of situations. There are four main types of ADR practices; negotiation, mediation, arbitration, and facilitation. The type of collaboration we are discussing here assumes the involvement of a facilitator who is moderating the group, so any concepts discussed about facilitation here also apply to collaboration when mentioned throughout this thesis. Negotiation occurs between two or more parties who are in dispute without the aid of a neutral third party. The parties manage the process and determine the outcome. If the parties are unable to control the process and come to an agreement on their own, they may turn to arbitration or mediation as alternatives (SchoolTalk, 2016).

Arbitration occurs when two parties disagree over a resource or relationship and call on an arbitrator or arbitration panel to hear both parties' sides and form a decision for the parties. This process is based on a simplified version of a court trial, with the process and decision left primarily up to the arbitrators (Civil Procedure, 2016). The process of arbitration is more time-saving and cost-effective than going to trial and parties sometimes have control over who arbitrates the dispute. Arbitration is not the most beneficial ADR method for disputes discussed here because the process is intended to replace a formal legal proceeding and gives the parties minimal autonomy over the final decision.

Mediation occurs when two parties are in dispute over a resource or relationship and call in a neutral third party, referred to as the mediator, to assist them in resolving

their disagreement. The parties are still responsible for determining the outcome, but the mediator guides the conversation to maintain respect and efficiency. Mediation is one of the most commonly used means of alternative dispute resolution in United States Courts and is preferable when parties want more control over the process and are interested in maintaining a working relationship afterward (Judicial Council of California, 2017).

There is sometimes confusion between the practices of facilitation and mediation because the two practices share similar traits (Moore, 2016). Facilitation most closely resembles mediation because both the facilitator and mediator act unbiased towards parties, have no investment in the outcome, and are responsible for managing the process with respect and equity (Moore, 2016). The primary difference between mediation and facilitation is the goal and the focus. The process of mediation seeks to settle a dispute using a method where the parties have control over process and outcome; the focus of mediation is on resolving a dispute between parties (Moore, 2016). The process of facilitation seeks to make a specified task easier by modifying the group's approach to that task; the focus is on assisting parties improve the process they use to reach their goal (Moore, 2016). Public participation and collaborative planning processes are generally more associated with process-orientated facilitation than resolution-oriented mediation, although there are exceptions where mediation has used input from stakeholders (McGovern, 2006; Moore et al., 2001).

The importance of public participation in water rights and water-related disputes is no surprise, given the importance of water as a resource and the number of people who can be affected by a slight change in a single water-system. This could be a small stream or irrigation ditch adjoining multiple properties or a large river with multiple

communities along its shores. Water is a critical resource for all people to use for survival and recreation. When there is a need for public participation, local, state, and federal organizations often bring in facilitators to moderate the discussion. Facilitation and collaborative planning are becoming the preferred methods of state and federal governments when handling natural disputes (US Army Corps of Engineers, 2016; National Oceanic and Atmospheric Association, 2010).

Public input is required in many states to obtain or transfer a water right. This is different than collaborative processes because the input is mandatory and often in written form, not a voluntary process through a collaborative group. In Oregon, part of the process of exchanging water rights is to allow for a period of public input. The Oregon Water Resources Department states on its website about attaining new water rights, “After an application is submitted to the Department, a notice is published and comments may be made from either the public and/or other state agencies” (Oregon Water Resources Department, 2016). Oregon is not an outlier in understanding the necessity for community input and collaborative planning around water rights and water resources.

Federal organizations recognize the importance of public participation as well. The Army Corps of Engineers Institute for Water Resources Collaboration and Conflict Resolution program works in three areas of collaboration around water rights and water-related conflicts: collaboration and public participation; shared vision planning; and collaborative modeling for decision support (US Army Corps of Engineers, 2016). Collaborative planning through a professional facilitation process is optimal for addressing water disputes, given the significance of water disputes and acceptance of collaborative practices by federal, state, and local government entities.

These examples focus on water disputes within executive branches of government and not disputes in federal or state judicial branches. As stated towards the beginning of this paper, judicial disputes are often resolved through mediation, negotiation, arbitration, or litigation. Facilitation is used to manage local disputes and prevent them from getting to the stage where they would become a civil litigation. During the research, no examples were found of a facilitative process occurring during a civil litigation or other legal settlement. However, there may be room for facilitative practices in civil litigation even if it has never been tried. Before considering how facilitation might be integrated into a civil litigation, a brief description of American Civil Procedure should be presented.

AMERICAN CIVIL PROCEDURE

If we want to understand how collaborative planning could work within a legal proceeding, then we need to understand how litigation happens. There are many different types of legal proceedings, but the two most prominent categories are civil litigation and criminal prosecution (Civil Law Self-Help Center, 2017). Criminal prosecution is “an action or proceeding instituted in a proper court on behalf of the public for the purpose of securing the conviction and punishment of one accused of crime” (Criminal Prosecution, 2017). Civil litigation “distinguishes lawyer Court work in the non-criminal stream of actions in law. (Civil litigation) encompasses not just the representations made in Court but also the pre-trial procedures including interlocutory hearings, and the post-trial procedures such as costs and enforcement of a judgment” (Civil Litigation, 2017).

This framework will focus on how collaborative planning can fit into civil litigation and procedure. Civil litigation was chosen above criminal prosecution because the concept behind the framework is to help provide a more democratic method of getting input about laws and practices to help communities govern natural resources, not prosecuting specific parties who have broken the law. The framework here is also intended to apply to a specific kind of civil litigation; one in which a community is facing a dispute over water, or any other natural resource, which requires statutes and legal procedure, but also affects the livelihood of most community members. Two case studies are given at the end of this research, which illustrate examples of the kind of legal disputes to which this framework would optimally apply.

There are entire law school courses on the rules of American Civil Procedure (ACP). The following description is not intended to be a thorough and inclusive analysis of ACP, but simply an overview for purposes of clarify rules of ACP enough for the applied framework to make sense. There are six steps to ACP: Complaint/Summons, Answer, Discovery, Motion, Settlement or Trial, and Resolution (Findlaw, 2017). There is also a possibility for appeal by a higher court following the resolution, however the framework seeks to prevent that by building mutual interest between parties.

The first step of civil procedure is for the lawyer representing the plaintiff to file a complaint of the legal issues which are being pursued upon the defendant by the plaintiff. A summons and complaint is then delivered to the defendant by the plaintiff's lawyer or a designate of court system. In some court districts, the act of serving a complaint to the defendant formally initiates the civil proceeding. The defendant and their lawyer must answer the complaint within an allotted time, depending on the guidelines of the court

district. The answer might include which parts of the complaint the defendant admits, contests, and any defense the defendant has for their actions. The defendant may also include counter-claims against the plaintiff in their response, in which case the plaintiff must submit their own answer to the defendant within a specific allocated time.

Once the defendant has submitted their answer to the complaint, then both parties may begin discovery. During the process of discovery, both parties exchange information that is important towards building their respective cases. There are three methods that may be used for discovery: written question, documents, and depositions. Written questions, commonly called “interrogatories”, are sent to parties who under oath to answer the questions truthfully. No more than 25 questions may be asked per written interrogatory and parties must answer each question to the best of their ability within 30 days of being served the interrogatory (Civil Procedure, 2016). A document requested during discovery may be either an electronic or tangible and generally must be delivered within 30 days of the request being served. Documents may need to either be produced (i.e. shown that they exist) or copied and sent to the requesting party, as outlined in the document request notice (Civil Procedure, 2016). A deposition is a formal statement made outside of the court proceeding but intended for use in a legal proceeding, usually verbally by a witness in an interview with either the plaintiff or defendant’s attorney (Deposition, 2017).

After the plaintiff and defendant’s attorneys have gathered enough evidence they need to make their case, they may attempt to reach a settlement agreement outside of court, or go to trial. Settlement is common and often preferable because it gives the parties more autonomy over the terms of their agreement than letting a judge decide. The

parties can also give a motion to get rid of part of the case because the law already clearly dictates a result or because there is no dispute between parties about the facts of that part of the case (FindLaw, 2017). If settlement does not occur or fails to find a resolution, then the case will be tried by an appropriate court, either by a judge or jury. This framework will focus primarily on the role that collaborative planning can play within the steps of discovery and settlement. To begin, we will look at how a facilitated collaborative planning process can make a difference in the steps prior to attempting a settlement or going to trial.

The following three sections will build the framework of how facilitation can be used to make water-related legal proceedings more efficient and less costly. The sections are divided chronologically: prior, during, and post-legal proceeding. Each section will briefly discuss the parts of the proceeding to which the framework is being applied, describe the facilitative practice that is being integrated, and then will explain how the facilitative practices might look in-action.

CHAPTER V
INTEGRATING FACILITATIVE PRACTICES PRIOR TO A LEGAL
PROCEEDING

The four aspects of how to integrate collaborative planning into a legal proceeding prior to settlement have been presented in a somewhat prioritized order: first, the facilitator can make sure all the logistics are clear and in order; second, the facilitator should assist the parties clarifying the goal of the litigation and separating issues within the litigation by their importance towards accomplishing the goal; third, the facilitator should assist the parties in a process of joint fact-finding and scientific facilitation by ensuring that all the experts and information the parties need to pursue those goals can be attained and assisting the parties with an expert process of sorting through the information and scientific perspectives; and finally, although this step should be a conversation throughout the entire process of discovery, the facilitator should assist the parties in deciding whether adjudication² or a form of alternative settlement is appropriate for resolving the prominent issues in the litigation. When the parties have clarified their goals', and found the information they need to make their cases, then the group can move onto the process of reaching a negotiated settlement or court ruling.

The real work of a legal process starts prior to the proceeding during the process of discovery (Harris & Brickley, 2017). Prior to the process of discovery, during the process of filing a formal complaint and response, the facilitator would not have much of

² Adjudication is "a judicial decision or sentence" (Adjudication, 2017).

a role because a third party would only complicate the process of correspondence. One of the most important roles a facilitator has prior to any group meeting is the role of coordinator (Margerum, 2011). During the process of discovery, a facilitator can assist with coordinating discovery and preparing for the settlement or litigation in three ways: assisting with the communications and logistical needs for a smooth proceeding; clarifying each party's goals; and ensuring the appropriate experts are available and parties have all the necessary information.

One of the most important responsibilities of a facilitator prior to a group meeting is making sure all the specifics are in order and this is also the case for a facilitator assisting with a litigation. The practice of helping plan the litigation and keeping the process running smoothly is mentioned by Susskind in *15 Things*; "It is perfectly reasonable, even necessary, for a facilitator or mediator to get involved in a variety of away-from-the-table activities on behalf of the group" (Susskind, 2016). Planning during discovery includes making sure there is a location for people to meet, everyone knows about meeting locations and times, and that people are kept in the loop about information that is prominent to them. In what will be called the "coordination and logistics" piece of the framework, a facilitator can make sure that all the pieces of discovery are running smoothly to ensure a timely resolution. This practice includes responsibilities like making sure each party is receiving the information they requested and following up if they are not.

This practice may seem extraneous since duties like this are normally handled by a legal assistant or the court. However, water-related civil litigations often affect a large population and have many stakeholders involved. For instance, the Snake River Basin

Adjudication in Idaho had more than 150,000 water rights claims associated with it, including “virtually every city in Idaho, every irrigation district, reservoir company, canal company, and water company. Most major Idaho companies were parties as well as Idaho Power Company, the State of Idaho, and a number of farms and ranches” (McGovern, 2006). An extra set of eyes helping to coordinate documents moving between parties during a large multi-stakeholder proceeding might prove beneficial.

The second responsibility of facilitator during a collaborative planning process is to assist in clarifying a group’s goals and unifying the group to work towards them. Whether this is a commission working to restore an aquifer, a company trying to appropriate a new water right, or a party seeking to create a new administrative water policy, the group needs to have a clear goal in mind and understand what objectives and processes must be worked through to attain that goal. In the Cascade Locks scenario, this may mean identifying steps in addressing the dispute of whether Hood River County can legally prevent Nestle from constructing a commercial bottling plant within the Cascade Locks urban boundary.

In a civil proceeding, this would be the optimal time to begin the discussion of settling out of court through negotiation or mediation, or adjudicating. The conversation of “settlement or adjudication” may apply to the whole litigation or the litigation may be broken down into parts. Each of the parts will then be separately evaluated for the merits and shortcomings of adjudication or an alternative settlement process. Although making the decision of “settlement or adjudication” before completing discovery is generally too early, placing the option on the table can create discussion about each participant’s values, depending on what they see the better option to be.

Using hypothetical scenarios, such as whether to settle or adjudicate, to determine each participant's values is a common tactic in ADR (Susskind, 2006). In the instance of facilitating a civil litigation, the tactic can be used to have participants openly express the pros and cons that they see for either settlement or adjudication. If participants are willing to communicate their initial opinions on settlement or adjudication to the other stakeholders, then the group can begin building consensus and forming a cooperative mindset. The facilitator should stress Susskind & Cruikshank's guideline on separating "inventing" from "committing" at this stage and remind the parties that these are initial brainstorming conversations (Susskind & Cruikshank, 2006).

Many issues around a legal dispute can be resolved prior to a settlement or adjudication by the parties simply agreeing about what they are arguing. During any dispute, it is common for parties to be unclear about the terms of a dispute or make assumptions about a topic without even being aware that they are making the assumptions. For instance, during the initial Cascade Locks town hall meeting, the facilitators and city administrators assumed that most complaints would be about the environmental impact of the proposed bottling plant; instead, the attendees were more concerned about the extra traffic that the plant might create (Jarvis, 2016). If the facilitators would have done more intake interviews to clarify important issues, then more time could have been taken during the town hall meetings to address the prominent concerns about traffic.

During a legal proceeding, a party might think that a specific outcome will settle their dispute with another group, when the dispute is realistically around a different issue that the proposed objective would not resolve. By letting participants communicate their

concerns and perspectives, each party can more accurately understand their own perspective and the perspective of the other party, clarify each party's sides of the dispute with one another, and create a space for discussion around the desires of each party (Kaner, 2014). When there is mutual understanding between the parties, then there is room for the creation of non-zero sum resolutions (Susskind, 2012).

Clarifying the issue can be difficult to do when we are party to a conflict because our emotions are charged and our instincts are on the defensive. When in conflict, we take many things more defensively than we should. A facilitator, working with the parties and their attorneys, can assist in laying some of the outlying issues to rest and set others in the "parking lot" to address post-settlement, so that the attorneys can focus on the real legal issues of the proceeding. When outlying issues have been cleared away, the parties will have a better understanding of what is being disputed to develop arguments for prosecution and defense, which will lead to a timelier resolution, whether the parties choose to settle instead of adjudicate.

The most effective way for a facilitator to clarify the key issues of a proceeding is to hold a group meeting with the parties and attorneys. This intake meeting should be held early on the pre-proceeding process around the time of scheduling conference (Harris & Brickley, 2017). Some general steps for having a meeting to clarify issues would be: lay down ground rules about respect and interaction with other participants; clarify the facilitator's role, mainly that they are not a decision-maker, but a moderator to help guide the discussion; start building trust by opening up any easy conversation that requires participants to actively listen, but isn't too emotionally charged – the purpose of

this is to build trust, promote active listening, and develop the problem mutually with interests instead of from adverse perspectives.

In complex, multi-party water disputes, there will likely be more than one of these collaborative meetings required to clarify issues prior to a settlement discussion, depending on the number of parties and grievances. By understanding perspectives, the parties will be in a better spot to resist taking unwavering positions and begin searching for mutual interests to build a mutually beneficial legal settlement during the proceedings. Identifying key interests and avoiding positional perspectives will help the parties build mutual interest in core issues during a settlement process or adjudication and reduce the probability of being distracted by tangential concerns (Susskind & Cruikshank, 2006; Kaner, 2004). A discussion of mutual interests will also help the parties manage and resolve outlying disputes after the prominent issues have been resolved, which will be discussed further in Section 6 of this framework.

A facilitator's third responsibility prior to the proceeding is to assist the parties in the process of discovery. This could mean the facilitator helps coordinate expert witness interviews or coordinate information between parties. Coordinating expert witnesses and information between parties can avoid disputes over information later in the process. For example, if both the Nestle Representative in Cascade Locks and the "Keep Nestle Out of the Gorge" Coalition need an expert hydrologist to show how taking water from Oxbow Springs would affect the water temperature and the nearby salmon hatchery, then they could either each get their own hydrologists or share on a team of hydrologists. If they each relied on their own hydrologists, then they risk arguing over the validity of data provided by the other party, should the data sets not match. If both parties shared a team

of hydrologists and agreed that the data their team found would be acceptable to the parties, then there would be no bickering over differences in data. Finding a team of hydrologists together, with assistance from a facilitator, would also take less time overall than each party finding their own experts during discovery.

The process of working through discovery as a coordinated team, instead of separate and adversarial parties, is commonly known in facilitation as *joint fact-finding*. This process occurs when a group is, “addressing a factual dispute by forming a single fact-finding team comprised of experts and decision-makers representing both sides of a conflict. The team works together in an effort to come to agreement regarding relevant facts, often in the form of scientific, technical, or historical claims” (Schultz, 2003). This method of using mutually agreeable experts and disseminating the information as a group is mentioned by Susskind and Cruikshank as an important element of collaboration (Susskind & Cruikshank, 2006). Susskind also mentions in 15 Things that collaboration among parties works best when joint fact-finding is encouraged (Susskind, 2012). Joint fact-finding can help build consensus, cooperation, and greater understand of the other party’s perspective (Margerum, 2011; Kaner, 2014).

Joint fact-finding has three core values: all parties collaborate on research; shared information and resources; and a single-text procedure to combine findings into one document (Schultz, 2003; Susskind & Cruikshank, 2006). In the joint fact-finding process, the parties must first determine what information they need to find to present their cases. The information could be mutually beneficial to each side or beneficial to only one party. Next the parties must agree on sources of information that they both find acceptable. These sources could be experts, consulting firms, documents, or any other

sources, if all the parties involved can agree on the sources' legitimacy and capability of the sources to find the information which the parties desire.

In the above example of Cascade Locks, the mutually agreeable hydrologists could present their findings to both parties at the same time in a facilitated session. The parties could disseminate the information as a group to ensure that both parties understood the expert's data and understand the importance and context of the data to the other party. The shortcoming of joint fact-finding is getting parties, who are most likely in an adversarial mindset, to agree on a process and resources (Schultz, 2003). Coming to terms of agreement over how to coordinate discovery might take more time upfront than the parties are willing to allow. To counter this objection, the facilitator should remind the parties that investing some time now will save even more time later, if the parties can build trust and respect towards each other, the process, and the documented research (Schultz, 2003).

Discovering the information and expert perspectives needed for the litigation does not mean that the parties will value information equally or that experts will all agree with one another. Disagreement about how to interpret data sets is common among experts in the scientific community. Through the process of confirmation bias, parties will favor information that proves their own preconceptions about the dispute rather than interpreting all information equally (Heshmat, 2015). When paired, opposing expert perspectives and confirmation bias can derail a resolution process as parties bicker over their own perspectives instead of focusing on common interests (Ury, 2007).

There is a process for resolving competing views and bias perspectives by scientific experts over data is called *scientific mediation* (Abrams, 2013; Moore, Jarvis, &

Wentworth, 2015). Scientific mediation allows a group to discuss a data set or the findings of a study within the context of a specific topic, the scope of which will be agreed upon by the group at the beginning of the process (Moore, Jarvis, & Wentworth, 2015). The experts converse in a facilitative forum to analyze the research and create a shared interpretation that will serve the needs of the participants while maintaining scientific integrity (Margerum, 2011; Moore, Jarvis, & Wentworth, 2015). This often comes in a formal written agreement between experts and parties on how to interpret the findings, although informal agreements are also possible (Moore, Jarvis, & Wentworth, 2015).

Scientific mediation is commonly used within public policy disputes over managing natural resources (Ozawa, 1996; Moore, Jarvis, & Wentworth, 2015). It can also be adapted for disputes around data during discovery in a natural resource civil litigation. If the parties are already participating in a joint fact-finding process during discovery and a disagreement over the interpretation of findings arise, then a scientific mediation process would serve well to resolve the disagreement. For instance, if there is disagreement in the Cascade Locks scenario around how a change in water temperature caused by bottling 0.5 cubic feet per second from the Oxbow Springs could affect the nearby Oxbow Hatchery, a scientific mediation panel could be convened to form an agreement with the parties on how the data should be interpreted within the context of the litigation.

The last step to integrating a facilitative framework prior to a civil proceeding is for the facilitator to assist the parties and their attorneys in deciding if they should settle through an ADR process or go to adjudication. The facilitator has two responsibilities in

this phase: to assist the parties work through the process of deciding which issues need to be adjudicated and which issues can be settled informally; and to assist the parties in prioritizing those issues up to the point of whether the end resolution of the dispute may be an adjudication or settlement. This phase should occur after the process of discovery has been completed, so the parties have a clear understanding of the prominent issues within the litigation and have all the necessary information to weigh perspectives on those issues.

As mentioned earlier, the question of whether to settle or adjudicate can be determined for the whole litigation and can also be determined for separate issues within the litigation. There are sometimes legal cases that need specific adjudicated before an alternative process can be used for informal settlement³. Within the context of the Cascade Locks scenario, the dispute may be able to come to resolution through an alternative settlement process, such as negotiation or mediation. First, an Oregon court will most likely have to adjudicate over whether terms of Measure 14-55, which bans commercial water bottling in Hood River County, are legal within Oregon state statutes.

The first step of this phase is to evaluate all the prominent issues in the litigation to determine which are negotiable in settlement and which should be adjudicated. This will require coordination between the facilitator and attorneys, as clients often misevaluate how well their cases will hold up in adjudication (Moffitt, 2017). All the prominent issues should be known to participants through previous stages in the pre-

³ An example of a dispute which had to be adjudicated prior to going through an alternative settlement process is the Klamath River Basin Adjudication (Bateman, 2013; Klamath, 2014).

litigation process. Determining which issues should be adjudicated or settled will most likely take multiple facilitated meetings, as the attorneys and clients evaluate each issue and determine the best form of resolution while being guided through the process by the facilitator.

Once this process is complete, the parties and attorneys will be ready to move onto the second step and the final step in the pre-litigation process, which is determining the order of resolving those issues. During standard civil procedure, this step would normally be handled by the attorneys (Harris & Brickley, 2017). The importance of adding a facilitative method in this step is to allow the parties an opportunity to participate in creating the litigation agenda and process. Larry Susskind notes the importance of group participation in designing the process so parties feel greater ownership of the process and more responsibility for the outcome (Susskind, 2012). Incorporating group agenda building into a civil litigation process also allows for greater mutual understanding of each party's goals and interests for the litigation (Kaner, 2014). Once the parties have agreed on which issues should be adjudicated or settled, and a clear agenda for the proceedings has been developed, the parties can now move onto the process of resolving their dispute.

CHAPTER VI

THE FACILITATOR'S ROLE DURING A LEGAL PROCEEDING

The options available to a facilitator of their role during the legal proceeding greatly depend on whether the parties choose to pursue settlement or adjudication. The facilitator will, as mentioned previously, assist them in the process of deciding in a way which allows the parties to mutually participate, approve, and form a sense of ownership and responsibility over their decision (Susskind & Cruikshank, 2006; Kaner, 2014; NOAA 2010). The facilitator, who has no decision-making authority, should help the parties decide in a neutral and unbiased way without any conflicts-of-interest (IAF, 2004; NOAA, 2010). The group should decide for itself whether they would like to adjudicate or go through an alternative method of settlement.

If the group chooses to adjudicate, then the facilitator will be of little use during the proceeding. The court has staff which can handle the responsibilities a facilitator otherwise would. There is already a well-established court procedure in place which is difficult to find ways to improve through facilitative practices during the proceeding. The facilitator's role, if the group were to choose adjudication, would be minimal.

If the group chooses to go through an alternative means of dispute resolution, then the facilitator may have many more opportunities to interact. Facilitators sometimes train as mediators, so the facilitator could also act as a mediator during the settlement. If the mediator was a judge or another party, the facilitator could assist the mediator by filling them in with background information on the case from a neutral perspective. If the attorneys decided to negotiate on their own, then the facilitator could assist in the logistics of the negotiation. Regardless of the form of settlement, the facilitator would

likely have more opportunities to participate than if the group chose to adjudicate. More opportunities to participant means more billable hours for the facilitator.

Here the facilitator reaches a curious dilemma. A legal conflict-of-interest is “a term used to describe the situation in which a public official or fiduciary who, contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefit, typically pecuniary.” (Conflict of Interest, 2017). The American Bar Association’s Model Rules for Professional Conduct state that a conflict-of-interest exists if, “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer” (American Bar Association, 2017). The potential financial benefits to the facilitator of the group choosing to settle rather than adjudicate create a conflict-of-interest to the facilitator prior to the proceeding when the facilitator is assisting the group in deciding which form of resolution would be better for the group to choose. Knowledge of settlement being a more personally lucrative route for the facilitator than adjudication may bring the facilitator’s neutrality into question.

Titling this section around what the role of a facilitator during the legal proceeding might be is somewhat of a misnomer. The facilitator should not play a role in the proceeding while the proceeding is in-process to remain neutral when assisting the group in their decision prior to the proceeding. The facilitator should still closely follow the proceeding because, as we are about to see, they will have an important role to play after the proceeding has been resolved. While the proceeding is underway, regardless of

whether it's a settlement or adjudication, the facilitator should monitor the proceeding to their best ability and prepare for their post-litigation responsibilities.

There is one role the facilitator could perform outside of the legal proceeding while the proceeding is in-process. The media is often used by groups to influence public opinion about prominent social topics (Manzaria & Bruck, 2017). A public perception of media bias towards the opposing social group can lead to distrust of media sources during community disputes (Gunther, 1992). To avoid the perception of media bias when reporting civil litigations, the facilitator could act as a neutral reporter between parties in the litigation and their constituents.

The facilitator could hold community meetings, like the town halls held in Cascade Locks, while the litigation is in-process. The purpose of these meetings would be to relate and clarify information about the legal proceeding, while also intaking concerns from the community. These town halls would serve two goals: to provide a more personal method of reporting than the represented communities are receiving through mass media; and for the facilitator to gain input on outlying interpersonal disputes that may arise after the prominent disputes have been resolved. These town hall meetings would not serve to offer input from the represented communities to the parties in the litigation because that would overcomplicate the process.

CHAPTER VII

INTEGRATING FACILITATIVE PRACTICES POST LEGAL PROCEEDING

There are two primary purposes that a facilitation process can serve after a legal proceeding: dividing damages among multiple parties and addressing outlying person disputes that were not appropriate to address in adjudication or settlement.

Many research grants, whether private or public, require a collaborative planning and management effort between researchers (Tachibana, 2013). I hypothesize that the same process could be applied to large damages rewarded to multiple groups at the end of a legal proceeding. Water-related proceedings sometimes have multi-million dollar settlements awarded between different parties (McGovern, 2006). A facilitator could assist in properly distributing these large settlements, which would help maintain a sustainable agreement and potentially alleviate post-settlement work for the court.

An example of how this might work can be found in the settlement agreement from the mediated Snake River Basin Adjudication. Part of the final settlement agreement included “federal funding of approximately \$200 million and an agreement of a cooperative management process for maintaining water quality and flows of creeks and streams” (McGovern, 2006). McGovern notes that such an arrangement would have never formed out of an adjudication (McGovern, 2006). However, we may imagine that the damages awarded to a community through an adjudicatory process could be equally as substantial, although not including the direct order for cooperative management. “Cooperative management” in McGovern’s settlement implies a participatory process of planning and management around how to use the federally allocated funds to maintain “water quality and flows of creeks and streams” (McGovern, 2006). This situation is ripe

for a facilitator and if one has already been working with the clients prior to the settlement arrangement, then he or she would be perfect for the post-settlement participatory decision-making that would be required.

Another use of facilitation following a legal proceeding is resolving outlying personal and social disputes that court practitioners may not be trained to handle. This is the primary purpose of Appropriate Dispute Resolution (ADR) and facilitation is the most efficient branch of ADR to resolve community disputes. Legal proceedings are emotionally taxing on individuals and the court system offers very little relief afterward to the toll that these proceedings can take on a community. A dispute like the one occurring now in Cascade Locks over the Nestle bottling plant has already torn the community apart and created animosity among community members who were once on good terms. A legal proceeding may only intensify the animosity present there. Facilitation can begin the conversations needed to help a community recover from the social and emotional damage that water-related disputes and legal proceedings can cause.

It's important to note that additional forms of dispute resolution may be necessary to fully mend the rifts created by a community water dispute. A facilitative process following a legal proceeding can bring underlying issues to the surface and may be able to manage disputes to prevent further issues from arising. Facilitative processes are not designed to resolve present disputes, however, and mediation between parties may be needed to fully resolve personal disputes (Moore, 2016). The benefit of facilitation is to raise awareness of these underlying disputes so that they can be effectively resolved. Now that the framework has been developed, a scenario will be presented to which the framework can be roughly applied and shown in action.

CHAPTER VIII

APPLICATION OF THE FRAMEWORK TO A HYPOTHETICAL WATER-RELATED CIVIL LITIGATION

The following hypothetical scenario is an application of how facilitative practices would look if applied to a civil litigation over the proposed Nestle Bottling Plant in Cascade Locks, Oregon. The exact details of the legal issues are extraneous; the purpose of this scenario is to show the facilitative practices in-action, not to debate what matters could be legally disputed about the mandate to ban industrial bottling plants or the capabilities of the eco-system to support bottling massive amounts of water.

For the purposes of this scenario, we will imagine that Nestle, Cascade Locks Port Commission, Oregon Fish & Wildlife, and local Cascade Locks business owners are disputing Hood River County's mandate to ban the industrial bottling of water in Hood River County. The defendant's in this case will be the Hood River County government, the Confederate Tribes of Warm Springs Indian Reservation, the fifteen organizations comprising the "Keep Nestle Out of the Gorge" Coalition, and local businesses and farmers concerned with water scarcity.

The most opportune time to bring in a facilitator is around the time of the scheduling conference (Harris & Brickley, 2017). One of the shortcomings of this framework is how the parties will go about deciding to involve a facilitator and who to choose in the first place. This will be a difficult decision to make, given that the parties are in a dispute and probably not communicating with each other outside of their attorneys. The most likely scenario would be that a judge would mandate the parties to attempt a facilitative process, like the way mediation is mandated by small claims courts

(Lane County Circuit Court, 2017). The attorneys representing each party would then evaluate and choose a facilitator based on the qualifications mentioned in section 3, “What Is Facilitation?”.

When the attorneys have agreed on a facilitator, then the facilitator can begin initial investigative footwork. During this initial investigation, the facilitator can interview stakeholders separately to determine their willingness to take part in a facilitative process. The facilitator can also take this time to learn about the local geography, culture, social relations, economy, and any other information that might be pertinent to keep in context throughout the entire process. Within the context of Cascade Locks, the facilitator would interview the representatives of all the parties being legally represented in the dispute. The facilitator would ask those individuals if there is anyone else he or she should talk to and continue networking until he or she has talked to an adequate number of people – for Cascade Locks, this could total a few hundred interviews.

Once the parties have filed their pleadings and responses, the facilitator, attorneys, and stakeholders would begin the process of discovery. The number of meetings required over the process prior to a legal proceeding varies by the complexity of the issues. For Cascade Locks, the following 2-hour meetings are recommended:

- 1) Initial “Meet & Greet” – This meeting would be very informal, open to the public, and cover background information about the lawsuit including: an interactive timeline of events up to this point, an interactive geographical map of the area, question & answer session with the facilitator, a place for inquiries that need follow-up from the facilitator, and a rough agenda. This could occur immediately

prior to the process of discovery. Food should be provided to entice people to attend. The meeting could prove useful for the facilitator to network with people he or she has not yet. The purpose of the interactive timeline and maps are to for people to share their perspectives about how they saw events occurring. Experts and journalists could also be invited to attend this meeting. In Cascade Locks, the Kelly House from the Oregonian could provide the beginning of a timeline for the bottling plant dispute and the Oregon Water Resources Department could provide information on hydrology and geography in the area.

- 2) Initial Facilitated Meeting – This meeting would follow a more formal agenda and focus on parties understanding the process of participatory decision-making. At this meeting, the facilitator would state the goals for the process, including joint fact-finding and the eventual decision to choose between adjudication or settlement.
- 3) Expertise and Information Meeting – These meetings would occur before joint fact-finding sessions and would focus on the parties agreeing on what experts or sources of information they prefer to use for the discovery process. Since agreeing on experts and informational sources could prove lengthy, there may have to be two or three of these meetings, with an exact date chosen for deliberation during the Initial Facilitated Meeting or the first Expertise and Information Meeting.
- 4) Investigative Meetings – During these meetings, the experts would present their data and for discussion by the parties. This is the parties’ opportunity to investigate issues within the dispute and participate in joint fact-finding. The

discussion would not focus on whether the information presented is acceptable, but how each party perceives the information, what assumptions they make about the information, and how the information might play a role in a resolution to the dispute. One word of caution for this step is if there is an expert in either party that might dispute the findings of the information presented. For example, in the Cascade Locks dispute, a representative from the Oregon Fish & Wildlife Department might dispute information from the Oregon Water Resources Department or a hydrologist from Oregon State University if OFWD's information contrasts what is being presented. The facilitator can deter this by reminding all participants that they agreed to accept the information presented for the purposes of resolving the dispute.

- 5) Scientific Facilitations – These meetings would be designed should any disputes arise around biases in perspectives about the research findings. These facilitated meetings would have a mediation theme and be used to discuss differences in perception of the findings, then determine the best way to interpret the findings within the context of the litigation. Specific examples of this might include the effect of increased traffic on the roads between the bottling plant and the highway, the economic impact of the bottling plant on Cascade Locks, the effect of the water temperature variation on the Oxbow Hatchery, or other ecological effects caused by the decreased water flow from the Oxbow Springs.
- 6) Dispute Resolution Meetings - The final meetings that will be held prior to the legal proceeding is the meeting where the parties decide whether adjudication or settlement will serve their goals better and form a litigation agenda. The

formation of an agenda should follow meetings deliberating the form of resolution that best serves each disputed issue. These conversations will take more than one meeting, given the weight of the decision on resolving the dispute, but Susskind and Cruikshank's wisdom of "setting a hardline for ending deliberations" should be considered (Susskind & Cruikshank, 2006). There are two reasons for setting a hard line: to avoid lingering on the decision until the process becomes too lengthy to support and so that no one uses a lengthy process to pressure the other party towards a certain course. The method of deliberation should be left up to the parties, but the facilitator should stress a fair and equitable process. The facilitator should also stress taking the information they gained during the Investigative Meetings to weigh on what their chances realistically are of finding a fair resolution either in adjudication or settlement.

When the parties have deliberated, then the attorney's may move forward with the route the parties have chosen to resolve their dispute. At this point, the attorney's may want to collect the facilitator's notes, which is acceptable, as the notes may prove substantial evidence in any form of dispute resolution process.

During the proceeding, the facilitator would take a background role, as discussed in section 5. Following the proceeding, the facilitator and parties would once again gather for discussions around how to divide the monetary damages to create a more sustainable resolution and if there were any outlying issues that the court or settlement could not address. This would require two types of participatory meetings:

- 1) Distribution of Monetary Damages – These meetings would focus on actions like those of the Snake River Basin Adjudication settlement. For example, if the

plaintiffs won the Nestle v. Hood River County case and Nestle, the Port Commission, OFWD, and local business leaders were rewarded a \$50 million settlement, the facilitator could play an important role in guiding the discussion of how to use that money to have the most benefit to the economy of Cascade Locks, while doing the least harm to the surrounding ecology. The participants of these meetings would include stakeholders from all parts of Cascade Locks and the surrounding area, including some of the defendants of the Nestle v. Hood River County case. The facilitator would have to use his or her best judgement whether to begin these discussions before or after she or he began discussing underlying community disputes.

- 2) Underlying Community/Personal Disputes – As stated in section 6, disputes come hand-in-hand with aggressive behavior and can often permanently damage relationships between people in the community who were on good terms prior to the dispute. This has already occurred in Cascade Locks between stakeholders for the Nestle Bottling plant and stakeholders against the bottling plant. In a scenario like Cascade Locks, the facilitator should begin town hall meetings for anyone who wants to attend within one week of the legal settlement. The reason for this is to address any underlying resentment for the settlement in a constructive way before the feelings have time to fester. The meetings are voluntary and intended for people to voice concerns or appreciation for the settlement agreement. As these meetings continue, the facilitator can begin to direct the conversation at other underlying issues that may have increased resentment between parties during the dispute. For instance, there may be underlying resentment for the Port

Commission Board in Cascade Locks for not representing the needs of the community and only representing their own ends. As underlying issues begin to surface, the facilitator can begin discussions and brainstorm around resources available in the community to address the issues, such as mediation services or city council meetings. The purpose of Underlying Community Dispute meetings is not to resolve the disputes, but simply bring disputes to the surface so they do not grow worse.

The intent of these two types of meetings is to prevent future disputes through awareness of underlying issues and mutual accountability of the settlement agreement or court verdict. In a scenario, such as Cascade Locks, these discussions may last a year or more. The exact timeframe varies depending on the depth of the issues and breadth of the settlement agreement or verdict. In the final two sections of this paper, some tools will be presented to assist a facilitator in enacting this framework and some conclusory remarks will be made.

CHAPTER IX

COLLABORATIVE PLANNING TOOLS

Perhaps the most definitive work on facilitation processes is Sam Kaner's "Facilitator's Guide to Participatory Decision-Making" (Kaner, 2014). The most recent 3rd edition contains the four participatory values given earlier in this paper, followed by approximately four hundred pages of useful advice and practices to use during a facilitation session. The book also contains useful terms and steps to overcome parts of a facilitation that might stump a less experienced facilitator.

The University of Wisconsin-Madison Office of Quality Improvement has a Facilitator's Tool Kit, which is a useful resource for any group decision-making process (Thayer-Hart, 2007). Some of the tools offered in this kit can be applied to the aspects of a pre-legal proceeding facilitation process. One technique for having each party understand each other goals is active listening, which involves each party encouraging, restating, and reflecting on the other party's concerns and goals around the dispute (Thayer-Hart, 2007). Flowcharting and group brainstorming techniques such as "Root Cause Analysis" and a "Cause and Effect Diagram" will help hone in on and clarify concerns to reach more definitive goals (Thayer-Hart, 2007).

When finding stakeholders, the Facilitator's Tool Kit discusses gathering information from stakeholders who are not present in the room through use of web surveys or mailings (Thayer-Hart, 2007). To determine what data is most important to discover in a joint fact-finding process, parties could write down information which they would like verified or to know more about, place the different pieces of information all on one sheet, then prioritize which information is most to least important and which

pieces of information both parties have in common. One version of this information priority process is called a snow field, but the Facilitator's Tool Kit refers to a similar process called an "importance/satisfaction diagram" (Thayer-Hart, 2007).

The Facilitator's Tool Kit offers specific questions that help a facilitator deal with difficult parties in meetings and could also help in dealing with animosity between two parties in a community healing process. During moments of destructive team behavior, the facilitator should ask themselves questions like, "Can I identify a pattern (in the party's behavior)?", "If I do not intervene, will another group member?" or, "Is the group too overloaded to process the intervention?" The Tool Kit also offers approaches to intervention, ranging from preventing the behavior before it occurs to high-level intervention.

CHAPTER X

CONCLUSION

The practices of facilitation play an important role to managing the resolution of water-related disputes. Hopefully, this research has been convincing that these practices can also play a prominent role within a legal proceeding by streamlining the proceeding beforehand and resolving damages done to community relations afterward. While the facilitative practices that were discussed in this research were not new to the field, the application presented here is new. There is no relevant situation where facilitative practices have been applied to a legal proceeding of any type. The framework developed in this research is new to the field of dispute resolution and fits the intent of the Dispute Resolution Act of 1998; “Alternative Dispute Resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements” (Alternative Dispute Resolution Act, 1998).

There are both merits and shortcomings to this research. The strongest merit of this research are the innovative practices and approach it offers to American Civil Procedure. Innovation sometimes comes with disdain from parties who are satisfied with the standard practice and do not perceive a need for change. The shortcoming of this research is also in its innovation; the legal community may be slow to accept methods of integrating facilitative practices into civil litigation because American Civil Procedure is such a long-standing practice.

The framework may also appear impractical because the examples provided are only hypothetical – there are no real examples of facilitative practices being applied to a civil litigation. One response to this objection would be, “Make it so.” More research needs to be done about how to practically apply this framework before it is test in the field. Some ideas for future research are given below. The best approach to practically testing this framework in the field would be to apply the different phases separately. Attempting to integrate the outlined facilitative practices before, during, and after three different civil litigations, respectively, would allow to study the outcomes of the framework while reducing the risk to litigants and attorneys.

This research is the beginning of a much larger conversation on the development of facilitative practices and ADR into judicial proceedings and there are many opportunities for research moving forward. Research can still be done around how ADR practices can collaborate with legal proceedings. The most practical opportunity for research would be a comparative cost-benefit analysis of a settled litigation and where adding facilitative practices might have reduce time and expenses. A cost-benefit comparison would also help evaluate what success means in a facilitated civil litigation, which is a topic covered only briefly in this research.

More research into opportunities for joint fact-finding and how scientific mediation could be incorporated into legal proceedings would take this framework further. Scientific mediation could be adapted to fit a facilitative process, as outlined in this research. Developing the application to other civil litigations could create more practical opportunities for joint fact-finding.

Additional research can also be done around specific case studies to which this framework could apply. Updates to this research could be made as the dispute in Cascade Locks develops. The Cascade Locks scenario is different from other water-related disputes because no litigation has occurred yet and the number of parties are relatively small. There are many other water disputes around the country that could be analyzed through this framework, some of which would be of similar size to Cascade Locks and others which would be larger. For instance, specific studies could be written on how the framework might apply to the Snake River Basin or the Klamath Basin disputes. A comparison could be written between a hypothetical application and the actual outcome of a settled water civil litigation.

The research on this proposed framework is the first step in a process towards the practical integration of facilitative practices into water-related civil litigation. More research and testing will need to be completed before the framework can be introduced in a way that benefits and does not harm a proceeding. Although this may seem to be a small first step, getting the conversation started on using an old form of ADR in a new way paves the road for greater work in the future.

REFERENCES CITED

- Abrams, N. (2015). What is scientific mediation? *Big Think*. Retrieved from <http://bigthink.com/in-their-own-words/what-is-scientific-mediation>
- Adjudication. (n.d.). In *Merriam-Webster Dictionary Online*. Retrieved from <https://www.merriam-webster.com/dictionary/adjudication>
- Alternative Dispute Resolution. (n.d.). In *Wex Legal Dictionary and Encyclopedia*. Retrieved from https://www.law.cornell.edu/wex/alternative_dispute_resolution
- American Bar Association. (2017). Rule 1.7 Conflict of Interest: Current Clients. *Model Rules of Professional Conduct: Client-Lawyer Relationship*. Retrieved from http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html
- Barrett, J. T., & Barrett, J. P. (2004). *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement*. Retrieved from <https://www.adr.gov/events/2009/may7-2009-materials-history.pdf>
- Bateman, B. (2013). *The Oregon Water Resources Department Completes Klamath River Basin Adjudication (1975-2013)*. Retrieved from http://www.oregon.gov/owrd/ADJ/docs/2013_03_07_Klamath_River_Basin_Adjudication_Media_Release_Final.pdf
- Judicial Council of California. (2017). *ADR Types and Benefits*. Retrieved from <http://www.courts.ca.gov/3074.htm>
- Civil Law Self-Help Center. (2017). *Types of Cases*. Retrieved from <http://www.civillawselfhelpcenter.org/self-help/getting-started/court-basics/56-types-of-cases>
- Civil Litigation. (n.d.). In *Duhaime's Law Dictionary*. Retrieved from <http://www.duhaime.org/LegalDictionary/C/CivilLitigation.aspx>
- Civil Procedure. (2016). In *Wex Legal Dictionary and Encyclopedia*. Retrieved from <https://www.law.cornell.edu/rules/frcp>
- Conflict of Interest. (2008). In *West's Encyclopedia of American Law, Ed. 2*. Retrieved from <http://legal-dictionary.thefreedictionary.com/conflict+of+interest>
- Congress of the United States of America. (1996). *The Administrative Dispute Resolution Act of 1996*. Pub. Law 104-320. Retrieved from <http://www.adr.gov/pdf/adra.pdf>

- Criminal Prosecution. (n.d.). In *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* Retrieved from <http://thelawdictionary.org/criminal-prosecution/>
- Curtis, M., Jarvis, T., and Wentworth, A. (2015). *Scientific Mediation*. Retrieved from <https://www.mediate.com/articles/JarvisT1.cfm>
- Degraw, J. and Del Val, A. (2016, June 21st). ANOTHER VOICE: Governor Brown: Respect the will of Hood River voters. *Hood River News*. Retrieved from <http://www.hoodrivernews.com/news/2016/jun/22/another-voice-governor-brown-respect-will-hood-riv/>
- Deposition. (n.d.). In *Discovery and Federal Rule of Civil Procedure 11*. Retrieved from https://nationalparalegal.edu/public_documents/courseware_asp_files/researchLitigation/PreTrialPractice/Discovery.asp
- Facilitate. (n.d.). In *Merriam-Webster Dictionary Online*. Retrieved from <https://www.merriam-webster.com/dictionary/facilitate>
- FindLaw. (2017). *What to Expect – A Lawsuit Chronology*. Retrieved from <http://litigation.findlaw.com/filing-a-lawsuit/what-to-expect-a-lawsuit-chronology.html>
- George Mason University. (1988). *Mission Statement: Conflict Analysis and Conflict Resolution*. Retrieved from <http://ahistoryofmason.gmu.edu/items/show/299>
- Godowa-Tufti, K. (2016, April 18). Nestle Water Battle: Warm Springs Tribal Members Speak Out. *Censored News*. Retrieved from <http://bsnorrell.blogspot.com/2016/04/nestle-water-battle-warm-springs-tribal.html>
- Gunther, A. (1992). *Biased Press or Biased Public? Attitudes Toward Media Coverage of Social Groups*. *Public Opinion Q*, 56(2): 147-167. Retrieved from <https://academic.oup.com/poq/article-abstract/56/2/147/1845671/BIASED-PRESS-OR-BIASED-PUBLIC-ATTITUDES-TOWARD>
- Haas, J. (2009). *Judicial Settlement Conferences*. Retrieved from https://www.osbar.org/public/legalinfo/1220_JudicialConferences.htm
- Harris, B. and Brickley, S. D. (2017). Chapter 9: Steps in Civil Case. *Business Law Basics*. Retrieved from <http://www.businesslawbasics.com/chapter-9-steps-civil-case>
- Heshmat, S. (April 23, 2015). What is Confirmation Bias? *Psychology Today*. Retrieved from <https://www.psychologytoday.com/blog/science-choice/201504/what-is-confirmation-bias>

- Hearsay. (n.d.). In *Wex Legal Dictionary*. Retrieved from <https://www.law.cornell.edu/wex/hearsay>
- HG Legal Resources. (2017). *Alternative Forms of Dispute Resolution*. Retrieved from <https://www.hg.org/article.asp?id=7928>
- Hollingsworth, D. E. (2015). *Cascade Locks Port Commission Nestle Timeline (Rev A)*. Retrieved from <https://www.timetoast.com/timelines/test-2f04c7eb-5163-48a9-978d-af68632ac98e>
- House, K. (2015, March 6). Of Oregon's 31 water bottlers, none as controversial as Nestle. *The Oregonian*. Retrieved from http://www.oregonlive.com/environment/index.ssf/2015/03/post_42.html
- House, K. (2015, November 6). Gov. Kate Brown asks for new approach to Nestle water deal. *The Oregonian*. Retrieved from http://www.oregonlive.com/environment/index.ssf/2015/11/gov_kate_brown_asks_wildlife_d.html
- House, K. (2016, May 17). Anti-Nestle ballot measure: Bid to block Cascade Locks water plant succeeds. *The Oregonian*. Retrieved from http://www.oregonlive.com/environment/index.ssf/2016/05/anti-nestle_ballot_measure_in.html
- International Association of Facilitators. (2016). *Homepage: Find a Facilitator*. Retrieved from <https://www.iaf-world.org/site/>
- International Association of Facilitators. (2016). *Statement of Values and Code of Ethics*. Retrieved from <https://www.iaf-world.org/site/pages/statement-values-code-ethics>
- Islam, Shafiqul, and Susskind, L.E. (2013). *Water Diplomacy: A Negotiated Approach To Managing Complex Water Networks*. RFF Press: New York.
- Jarvis, T. (2016). Bottled Water Brush Off Debriefing. *Rainbow Water Coalition Blog*. Retrieved from <http://rainbowwatercoalition.blogspot.com/2016/06/bottled-water-brush-off.html>
- Kaner, S. (2014). *Facilitator's Guide to Participatory Decision-Making*. Jossey-Bass: San Francisco.
- Keep Nestle Out of the Gorge. (2016). *Homepage timeline of articles*. Retrieved from <https://keepnestleout.wordpress.com/>

- Keep Nestle Out. (2013). *Keep Nestle Out of the Gorge – About*. Retrieved from <https://keepnestleout.wordpress.com/about/>
- King, S. (2015, May 6). A Thirsty Company and a Hungry Town. *The Portland Mercury*. Retrieved from <http://www.portlandmercury.com/portland/a-thirsty-company-and-a-hungry-town/Content?oid=15572932>
- Klamath. (2014). Klamath Basin Adjudication. *Klamath County Circuit Court*. Retrieved from <http://www.courts.oregon.gov/Klamath/pages/water.aspx>
- Lane County Circuit Court. (2017). *Mediation/Arbitration*. Retrieved from <http://www.courts.oregon.gov/Lane/Mediation/pages/mediationpage.aspx>
- Manzaria, J. and Bruck, J. (n.d.). *Media's Use of Propaganda to Persuade People's Attitude, Beliefs and Behaviors*. Retrieved from https://web.stanford.edu/class/e297c/war_peace/media/hpropaganda.html
- Margerum, R. (2011). *Beyond Consensus*. MIT Press: Cambridge, MA.
- McGovern, F.E. (2006). *Mediation of the Snake River Basin Adjudication*. Retrieved from http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2362&context=faculty_scholarship
- McKinney, M. (2015). *Public Participation: Lessons Learned Implementing the 2012 US Forest Service Planning Rule*. Retrieved from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3840868.pdf
- Moffitt, M. (2017, January 11). In lecture notes from *Law of Settlement*. University of Oregon Law School: Eugene, OR.
- Moore, C., Jarvis, T., and Wentworth, A. (2015). *Scientific Mediation*. Retrieved from <https://www.mediate.com/articles/JarvisT1.cfm>
- Moore, L. (2016). *Mediation/Facilitation – What's the Difference?* Retrieved from <http://lucymoore.com/mediation-facilitation-whats-the-difference/>
- Mulvihill, P. (2015, June 23). Cascade Locks holds town hall on Nestle. *Hood River News*. Retrieved from <http://www.hoodrivernews.com/news/2015/jun/24/cl-nestletownhall/>
- National Oceanic and Atmospheric Administration. (2010). Introduction to Planning and Facilitating Effective Meetings. *Social Science Tools for Coastal Programs*. Retrieved from <https://coast.noaa.gov/data/digitalcoast/pdf/effective-meetings.pdf>

- Oregon Legislative Counsel Committee. (2013). *CHAPTER 537—Appropriation of Water Generally*. Retrieved from https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013ors537.html
- Oregon State Bar. (2014). *Lawyer's Fees*. Retrieved from <https://www.osbar.org/public/legalinfo/933.htm>
- Oregon Water Resources Department. (2012). *Integrated Water Resources Strategy*. Retrieved from https://www.oregon.gov/owrd/Pages/law/integrated_water_supply_strategy.aspx
- Oregon Water Resources Department. (2016). *Learning About and Applying for Water Rights*. Retrieved from https://www.oregon.gov/owrd/pages/wr/index.aspx#Learning_About_and_Applying_for_Water_Rights
- Ozawa, C. P. (1996). Science in environmental conflicts. *Sociological Perspectives*, 39(2).
- Quirke, S. (2015, November 1). Nestle Versus Natives. *The Southeast Examiner*. Retrieved from <http://www.southeastexaminer.com/2015/11/nestle-verses-natives/>
- Tachibana, C. (2013, September 13). Navigating Collaborative Grant Research. *Science Magazine*. Retrieved from <http://www.sciencemag.org/careers/features/2013/09/navigating-collaborative-grant-research>
- Ury, W. (2007). *Getting Past No: Negotiating with difficult people*. New York: Bantam Books.
- Scholz, J. T., & Stiffler, B. (2005). *Adaptive governance and water conflict: new institutions for collaborative planning*. Retrieved from <http://www.loc.gov/catdir/toc/ecip0514/2005017107.html>
- SchoolTalk. (2016). Retrieved from <http://www.schooltalkdc.org/faqs/index.cfm?ID=63>
- Schultz, N. (2003). Joint Fact-Finding. *Beyond Intractability*. Retrieved from <http://www.beyondintractability.org/essay/joint-fact-finding>
- Smith, S.R. (1992). Proceedings of the Symposium on Social Aspects and Recreation Research, 1992: *Facilitating Backcountry Use of Bureau of Land Management Wildlands*. Albany, CA: United States Department of Agriculture. Retrieved from <https://www.nrs.fs.fed.us/pubs/18055>

- Stockton, S.L. & White, K.D. (2005). *US Army Corps of Engineers' Collaborative Approach to 21st Century Challenges Posed by Global Change*. Netherlands: Springer.
- Suburban Stats. (2016). *Population Demographics for Cascade Locks, Oregon in 2016 and 2017*. Retrieved from <https://suburbanstats.org/population/oregon/how-many-people-live-in-cascade-locks>
- Susskind, L. (2012). *15 Things We Know About Environmental Dispute Resolution*. Retrieved from <https://www.pon.harvard.edu/daily/dispute-resolution/environmental-negotiations-and-15-things-about-environmental-dispute-resolution/>
- Susskind, L. and Cruikshank, J. (2006). *Breaking Robert's Rules*. Oxford University Press: Oxford, England.
- Thayer-Hart, N. (2007). *Facilitator's Toolkit*. Retrieved from <http://oqi.wisc.edu/resourcelibrary/uploads/resources/Facilitator%20Tool%20Kit.pdf>
- Thompson, B., Leshy, J., and Abrams, R. (2013). *Legal Control of Water Resources, 5th Ed.* American Casebook Series. West Group: Vienna, VA.
- United States Army Corps of Engineers. (2016). *The Mission of CPCX*. Retrieved from <http://www.iwr.usace.army.mil/About/TechnicalCenters/CPCXConflictResolutionPublicParticipation.aspx>
- United States Equal Employment Opportunity Commission. (2017). *Federal Sector Alternative Dispute Resolution*. Retrieved from <https://www.eeoc.gov/federal/adr/>
- United States Federal Courts. (2014). *Dispute Resolution in Federal Courts: New Study to Look at How It's Working*. Retrieved from <http://www.uscourts.gov/news/2014/01/23/dispute-resolution-federal-courts-new-study-look-how-its-working>
- World O Meters. (2016). *Current World Population*. Retrieved from <http://www.worldometers.info/world-population/>