

ARTICLES

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

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Judicial courts regularly encourage, and sometimes require, disputants to resolve their differences outside the courtroom through negotiation, mediation, and other forms of dispute resolution.¹ There are, however, very few statutory provisions in fed-

¹ For an introduction to this topic, see SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1990); and BENJAMIN SOKOLY, INSTITUTIONALIZATION OF COURT-ANNEXED ADR: AN EXAMINATION OF FIVE STATES' PROVISIONS (unpublished and undated manuscript on file with the authors). In Montana, for example, the Montana Supreme Court adopted Rule 54 in 1996, requiring mediation in worker's compensation cases, specific domestic-relations disputes, and civil cases seeking a money judgment or monetary damages. MONT. R. APP. P. 54. During the three-year period from 1997 to 1999, 1820 cases were appealed to the court, and 698 of those cases were referred to mediation under Rule 54. MATTHEW MCKINNEY & WILLIAM HARMON, THE WESTERN CONFLUENCE: A GUIDE TO GOVERNING NATURAL RESOURCES 162-63 (2004). Of the 698 cases, 169 were settled, for a success rate of about 24 percent; other studies demonstrate a similar degree of success. See *id.* at 163. In the summer of 2000, wildfires burned more than 300,000 acres in the Bitterroot National Forest, situated along the border of western Montana and Idaho. *Id.* at 162. To expedite the implementation of a forest-restoration plan, the U.S. Forest Service limited public participation and bypassed its own internal appeals process. *Id.* In December 2001, Undersecretary of Agriculture Mark Rey approved a plan to remove 176 million board feet of timber from 46,000 acres on the Bitterroot. *Id.* Shortly after the restoration plan was approved, seven environmental groups, decrying the plan's impact on watersheds and wildlife habitat, filed a lawsuit contesting the Agency's refusal to accept administrative appeals. *Id.* A U.S. district court judge sided with the plaintiffs, holding that the process violated the public's right to be involved in decision making: "It is presumptuous to believe that the agency's final decision has a perfection about it that would not be illuminated by interested comment, questioning, or requests for justification of propositions asserted in it." *Id.* (quoting Katharine Q. Seelye, *Judge Overrules Decision Allowing Logging of Burned Trees*, N.Y. TIMES, Jan. 9, 2002, at A14, available at http://www.fire.uni-freiburg.de/media/news_01102002_us2.htm). The court granted a temporary injunction against the logging plan to continue until the Forest Service complied with its own established appeals process. *Id.* at 162. When the Forest Service appealed that decision, the court ordered the Agency to enter

eral natural-resources and environmental law compelling disputants to resolve their differences prior to litigation. Where such provisions do exist, they apparently have not been much used.

The purpose of this Article is to shed some light on the merits of statutorily mandated dispute resolution in federal natural-resources and environmental law. We begin by describing section 164(e) of the Clean Air Act (CAA),² which mandates the use of a dispute-resolution process to resolve selected types of disputes among Indian tribes, states, and the Environmental Protection Agency (EPA). We review the statutory and administrative history of the provision and examine the only four instances in which it was invoked. We then highlight a number of lessons learned from the experience of the CAA that might serve as useful guidance for other mandatory dispute-resolution processes. Finally, we conclude by offering a few observations on the place of mandatory dispute resolution in federal natural-resources and environmental law. Appendix 1 offers an overview of other statutory models of dispute resolution in federal environmental policy, ranging from intergovernmental consultation to mandated mediation.

I

THE CLEAN AIR ACT

A. *Statutory Framework of Section 164(e)*

Congress added section 164 in the 1977 amendments to the CAA to require the prevention of significant deterioration of air quality (PSD) in areas with relatively clean air.³ The legislative history of section 164 indicates congressional intent to strengthen the authority of states and Indian tribes (1) to protect the air

into mediation with the Undersecretary and the regional forester present in Missoula. *Id.* Thereafter, environmental groups and loggers negotiated a new plan with the U.S. Forest Service to salvage 55 million board feet of timber, prohibiting removal of any trees more than twenty-two inches in diameter and protecting 15,000 acres of roadless area. *Id.* As the timber sale moved forward, the Forest Service filed a motion requesting clarification of the settlement agreement, arguing that the twenty-two-inch size limit applied only to living trees, and that loggers should be allowed to cut 199 dead trees in the larger-size class. *Id.* In June 2003, a federal judge denied the Agency's request. *Id.*; see also Sherry Devlin, *Ruling Protects Dead Bitterroot Trees*, MISSOULIAN, June 28, 2003, available at <http://www.missoulian.com/articles/2003/06/27/news/local/news03.txt>.

² 42 U.S.C. § 7474(e) (2006).

³ Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

quality in these areas by redesignating them into more protective classifications, and (2) to protect their own air quality by participating in decisions about new permits in adjacent jurisdictions.⁴

To date, tribal authorities governing six different Indian reservations have sought to increase air-quality protection by redesignating their lands from Class II to Class I: the Northern Cheyenne (1977), the Flathead (1981), and the Fort Peck (1983), all in Montana;⁵ the Spokane in Washington (1991);⁶ the Yavapai-Apache in Arizona (1996);⁷ and the Forest County Potawatomi in Wisconsin (1999).⁸ In most cases, the tribes have been motivated by potential development on nearby lands; “most reservations constitute small islands within states, so there is substantial risk that a source located outside the reservation will affect air quality within the reservation.”⁹ States have not redesignated their lands to protect air quality,¹⁰ and in some cases have objected to such redesignations by Indian tribes, arguing that the tribes’ decisions will limit their ability to pursue economic development.¹¹ Federal land managers (FLMs) also have not redesignated any lands to Class I status.

Acknowledging that PSD redesignations and major-source PSD permit applications might result in this type of conflict between sovereign governments with different priorities, Congress included section 164(e) in the 1977 CAA amendments. Section 164(e) authorizes the EPA to participate as a mediator and, if necessary, as a final arbiter to resolve such disputes.¹² Initially, the section was written to resolve disputes between states; the decision to include Indian tribes was accompanied by strong statements of congressional intent to strengthen both states’ and

⁴ See H.R. REP. NO. 95-294, at 1-2 (1977), reprinted in 4 LIBRARY OF CONGRESS, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 2468-69 (1978) [hereinafter LEGISLATIVE HISTORY OF 1977].

⁵ 40 C.F.R. § 52.1382(c) (2006).

⁶ 40 C.F.R. § 52.2497(b)-(c) (2006).

⁷ 40 C.F.R. § 52.150(a)-(b) (2006).

⁸ Joseph Kreye, *The Forest County Potawatomi Request Redesignation Under the Clean Air Act*, 4 WIS. ENVTL. L.J. 87, 87 (1997).

⁹ Craig N. Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 HARV. ENVTL. L. REV. 313, 363 (1989).

¹⁰ See ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 111 (2001).

¹¹ See, e.g., discussion *infra* Part I.A.2.

¹² 42 U.S.C. § 7474(e) (2006).

tribes' rights, and to reduce the EPA's discretion in implementing the CAA.¹³

Section 164(e) applies in two instances: (1) an affected state or a tribe disagrees with the other's redesignation of a PSD area, or (2) an affected state or tribe asserts that another state's proposed PSD permit for a major new emitting facility will cause or contribute to a deterioration of the affected state's or tribal reservation's air quality.¹⁴

Any party to an intergovernmental CAA dispute may request a section 164(e) dispute-resolution process.¹⁵ If so requested, the EPA must convene negotiations among the parties, and if the negotiations fail, the EPA must make its own determination to resolve the dispute.¹⁶ Thus, in effect, section 164(e) is a binding arbitration provision with the EPA in the decision-making position.

Although the EPA has final authority to resolve a dispute if a section 164(e) negotiation fails, the Agency's discretion at that point is limited. Congress deliberately restricted the EPA's authority to disapprove a redesignation request.¹⁷ The EPA's pre-1977 regulations allowed the Agency to override a state's or a tribe's classification of an area if the state or tribe improperly weighed energy, environment, or other factors.¹⁸ Under the 1977 amendments, by contrast, the EPA's role is to determine whether the requesting state or tribe followed specific procedural requirements, thereby ensuring that the local decision-making process provided ample opportunity for interested parties to express their views.¹⁹

Moreover, the legislative history of section 164(e) indicates the intergovernmental dispute-resolution provision was not intended to encroach on the sovereignty of Indian tribes. For example, during consideration of the House Conference Committee Re-

¹³ H.R. Res. 733, 95th Cong. (1977), *reprinted in* 3 LEGISLATIVE HISTORY OF 1977, *supra* note 4, at 326.

¹⁴ 42 U.S.C. § 7474(e).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. 56,450-02, 56,454 (Nov. 1, 1996), for a summary of this portion of the legislative history.

¹⁸ *Id.*

¹⁹ See H.R. REP. NO. 95-294, at 1-2, 146-47 (1977), *reprinted in* 4 LEGISLATIVE HISTORY OF 1977, *supra* note 4, at 2468-69, 2613-14.

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port, Congressman Rogers, Chairman of the House Subcommittee on Health and the Environment, cautioned,

The conference bill provides that both States and Indian tribes will continue to have the power they now have to redesignate their lands to a new air quality classification. In cases where another State may object to such a re-classification, and when the two jurisdictions cannot amicably come to agreement, the Administrator is granted the power to review the redesignation. But it is intended that the Administrator's review of such determinations by tribal governments be exercised with utmost caution to avoid unnecessarily substituting his judgment for that of the tribe. . . . [T]he Administrator should reverse the determination made by an Indian governing body to re-classify its land, only under the most serious circumstances.²⁰

Accordingly, the EPA has narrowly interpreted the scope of its discretion in such situations: "While EPA must ensure procedural rigor, it is generally inappropriate for EPA to interpose superseding Federal views on the merits of the resulting State or Tribal decisions."²¹

As one commentator observed, "Section 164(e) of the Clean Air Act Amendments expresses respect for the semi sovereign status of Indians on their tribal lands by requiring that the EPA attempt to resolve disputes through negotiation rather than by unilateral administrative decision."²² Another concluded, "Tribes have . . . used EPA's policy to work cooperatively with States and regulated entities to enhance tribal capacity to monitor air quality and to operate air quality programs."²³

In assessing the dispute-resolution mandate of section 164(e), it is instructive to compare it with the process by which FLMs participate in PSD permitting decisions. The FLM has an affirmative duty to protect air quality in Class I areas.²⁴ An FLM charged with managing a Class I area (e.g., national park, wilderness area, etc.) must be notified of major facilities proposed near

²⁰ H.R. Res. 733, 95th Cong. (1977), *reprinted in* 3 LEGISLATIVE HISTORY OF 1977, *supra* note 4, at 326.

²¹ Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. at 56,454 n.2.

²² TIMOTHY J. SULLIVAN, *The Difficulties of Mandatory Negotiation (the Colstrip Power Plant Case)*, in RESOLVING ENVIRONMENTAL REGULATORY DISPUTES 56, 74 (Lawrence Susskind et al. eds., 1983).

²³ William H. Gelles, *Tribal Regulatory Authority Under the Clean Air Act*, 3 ENVTL. LAW. 373, 377 (1997).

²⁴ 42 U.S.C. § 7475(d)(2)(B) (2006).

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the area or potentially affecting the area.²⁵ The permitting authority must consider the FLM's evaluation of a source's impacts, and may not issue a permit if certain conditions are present unless the state's governor issues a variance.²⁶ There is no intergovernmental negotiation provision in this situation. If the state issues a permit using the variance provision and the FLM does not concur, the issue must be forwarded to the President for a final decision, which is not subject to judicial review.²⁷

FLMs play an advisory role in the case of PSD redesignations,²⁸ and there is no provision for negotiation among parties with differing perspectives. A state contemplating a PSD redesignation must notify the appropriate FLMs of areas that may be affected and provide sixty days for the FLMs to make comments and recommendations.²⁹ As with the state permitting process, there is no provision for intergovernmental negotiation: the EPA's administrator has the limited discretion to disapprove of a state's redesignation only if the state fails to meet the procedural requirements of the CAA, or if the area proposed for redesignation is not eligible for the proposed classification.³⁰

In 1997, the EPA announced proposed rules to (1) clarify PSD permit-review procedures for proposed PSD sources that may adversely affect the air quality of any state or tribal Class I area, and (2) set forth more specific procedures for the EPA's resolution of intergovernmental permit disputes.³¹ Among other purposes of the rule, the EPA intended to reduce the need for parties to seek dispute resolution by clarifying the PSD permit-review procedures.³² The EPA further announced its intention to examine its dispute-resolution methods and procedures for areas of possible improvement.³³

The EPA also sought public comment "on whether and to what extent EPA should prescribe the procedures to be followed in resolving intergovernmental permit disputes under section

²⁵ *Id.* § 7475(d)(2)(A).

²⁶ *Id.* § 7475(d)(2)(C)-(D)(i).

²⁷ *Id.* § 7475(d)(2)(D)(ii).

²⁸ *Id.* § 7474 (b)(1)(B).

²⁹ *Id.*

³⁰ *Id.* § 7474(b)(2).

³¹ Prevention of Significant Deterioration of Air Quality (PSD) Program: Permit Review Procedures for Sources That May Adversely Affect Air Quality in Non-Federal Class I Areas, 62 Fed. Reg. 27,158 (May 16, 1997).

³² *See id.*

³³ *Id.* at 27,162.

164(e),” and on “incentives EPA could create for governments to resolve their conflicts amicably.”³⁴ We did not find any additional information on this rulemaking process, as it apparently was never completed.

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

B. Applications of Section 164(e)

As mentioned above, six Indian tribes have requested redesignation of their lands from Class II to Class I. In three cases the affected states did not object to the redesignations, so section 164(e) was not invoked.³⁵ This section describes instances in which section 164(e) *has* been invoked for redesignation or PSD permit issuance.

*1. Northern Cheyenne-Colstrip PSD Permit (1979)*³⁶

The Northern Cheyenne Indian Reservation is located in southeastern Montana, about 150 miles east of Billings, and covers roughly 1200 square miles. Its western border abuts the Crow Indian Reservation, which is much larger and more heavily populated than the Northern Cheyenne Reservation. The company town of Colstrip, the center of a major coal-burning power complex is about twenty miles to the north. The Rosebud coal seam, a valuable source of low-sulfur coal, runs beneath the entire area, providing the energy source for power production in Colstrip.³⁷

In 1973 the Montana Power Company sought a state permit to construct two new electricity-generating plants (Units 3 and 4) to expand its electricity-generating potential at Colstrip.³⁸ The

³⁴ *Id.* at 27,165.

³⁵ The Flathead and Fort Peck Reservations in Montana and the Spokane Indian Reservation in Washington. For descriptions of their redesignation processes, see Kreye, *supra* note 8 at 93-99.

³⁶ See generally SULLIVAN, *supra* note 22 (providing a detailed account of the Northern Cheyenne-Colstrip negotiations that this case study summarizes).

³⁷ *Id.* at 56.

³⁸ *Id.*

Northern Cheyenne Tribal Council, with environmentalists and local ranchers, opposed the expansion. Some expressed concerns about rapid growth in Colstrip and the potential need for increased police, fire, and health services to deal with spillover effects on the Reservation.³⁹ Others focused on the air-quality impacts, asserting that the plant emissions would inevitably degrade the Reservation’s clean air.⁴⁰ Over the next several years, the Tribe, State, federal agencies, environmentalists, ranchers, and coal company battled in a number of settings: (1) preparation of several environmental impact statements, (2) state and federal permit reviews, and (3) state and federal courts.⁴¹

While the dispute over Units 3 and 4 was pending, the Tribal Council requested a redesignation of its lands to Class I status.⁴² The EPA granted the request on August 5, 1977, almost simultaneously with Congress’ enactment of the 1977 CAA amendments.⁴³ The new classification required the EPA to provide additional review and to require more restrictive permit conditions, aimed at protecting the Reservation’s air quality.⁴⁴

After a series of permit decisions and legal challenges, the EPA announced in April 1979 that it would issue a PSD permit for the Colstrip project.⁴⁵ But before the EPA reached a final decision, the Tribal Council invoked section 164(e), requesting that the EPA convene negotiations to resolve the dispute over the proposed plant expansion.⁴⁶ The EPA requested that the Tribal Council make a threshold showing that the Reservation’s air quality would be adversely affected by operation of Units 3 and 4.⁴⁷ The Tribe submitted its response on August 17, 1979.⁴⁸ On August 29, 1979, the EPA accepted the Tribe’s threshold showing

³⁹ *Id.* at 56-59. An early analysis predicted that the town’s population would double with the influx of new workers. *See SULLIVAN, supra* note 22, at 57.

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⁴⁰ *Id.* at 59.

⁴¹ *See id.* at 59-62.

⁴² *See id.* at 65.

⁴³ *See* Conditional Permit to Commence Construction and Operate, The Montana Power Company Colstrip Units #3 and #4, Env’tl. Prot. Agency Region VIII, 1 (Sept. 11, 1979) (on file with the authors) [hereinafter Conditional Permit].

⁴⁴ *See SULLIVAN, supra* note 22, at 65-66.

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⁴⁵ *Id.* at 66.

⁴⁶ *Id.*

⁴⁷ Conditional Permit, *supra* note 43, at 2.

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⁴⁸ *Id.*

of visibility impairment, justifying the application of section 164(e).⁴⁹

The negotiation process commenced in Denver, Colorado, on September 5, 1979, involving three parties: EPA's Region 8, the Northern Cheyenne Tribal Council, and the Montana Power Company.⁵⁰ EPA attorney Wilkes McClave directed the negotiation sessions.⁵¹

The section 164(e) process lasted for three consecutive days and concluded with no agreement among the parties.⁵² The EPA's approach to the process did not appear to aid the parties in working toward a mutually acceptable resolution;⁵³ the Agency likely saw the section 164(e) process only as a procedural step toward permit approval. The tight timeline and limited representation in the process reduced the opportunity for meaningful discussion and exploration of the issues. Timothy J. Sullivan, who interviewed participants in this process and reviewed the negotiation transcripts, concluded, "Although the EPA managed the negotiations and fulfilled its legal requirements, the rigidity of the format and the narrowness of the agenda prevented the disputing parties from reaching a settlement."⁵⁴

At the start of the session, the EPA's representative asserted the Agency's intention to issue a PSD permit for the plant and reminded participants that the EPA had the power to impose a binding settlement if negotiations failed.⁵⁵ According to a representative of the Tribal Council, this preliminary statement "left opponents of the plant in despair."⁵⁶ The Tribal Council had expected the negotiations to last over several meetings, and the representative was not immediately prepared to negotiate substantive permit provisions.⁵⁷ The EPA denied the Tribe's request for a delay and proceeded with a process that closely resembled a

⁴⁹ *Id.*

⁵⁰ SULLIVAN, *supra* note 22, at 67.

⁵¹ The EPA was represented by Regional Administrator Roger Williams; the Northern Cheyenne Tribal Council was represented by Phil Sunderland, a lawyer from Washington, D.C.; and Montana Power was represented by Jack Peterson, a lawyer from Butte, Montana. *Id.* at 67.

⁵² *Id.* at 66-72.

⁵³ *Id.* at 74.

⁵⁴ *Id.* at 68.

⁵⁵ *Id.* at 67.

⁵⁶ *Id.*

⁵⁷ *Id.* at 67-68.

formal hearing, including full transcription and lawyers presenting statements on behalf of their clients.⁵⁸

Moreover, when critical questions arose about tribal religious and cultural values that might be affected by air-quality degradation, the non-Indian tribal representatives struggled to provide meaningful answers.⁵⁹ Apparently believing that the section 164(e) process was just another technical meeting, members of the Tribal Council did not attend and could not, therefore, be consulted about these issues during the negotiation.⁶⁰

The difference in the parties' representation became even more important on the second day when the discussion moved to technical aspects of the PSD permit, and the EPA proposed four permit conditions for the group's consideration.⁶¹ The Montana Power Company's board chairman was present and agreed to three of the four conditions.⁶² By contrast, the Tribal Council charged its representative with pursuing a set of highly restrictive permit conditions, which likely would have precluded the proposed construction altogether, and gave him no authority to compromise this position.⁶³ As Sullivan observed, "[H]is lack of power to make concessions prevented him from matching Montana Power's concessions. This brought negotiations to an impasse."⁶⁴ The section 164(e) process concluded on September 7, 1979, after just three days.⁶⁵

The EPA issued a PSD permit for Units 3 and 4 of the Colstrip plant on September 11, 1979, almost immediately upon conclusion of the 164(e) process.⁶⁶ The Northern Cheyenne Tribal Council then recognized that its initial position was untenable, and the parties embarked on a new—and ultimately more successful—round of negotiations under the provisions of the Montana State Siting Act.⁶⁷ This law gives its implementing body, the Montana Siting Board, broad authority to require a permittee to provide compensation for the socioeconomic impacts of develop-

⁵⁸ *Id.* at 68.

⁵⁹ *See id.* at 68-69.

⁶⁰ *Id.* at 69.

⁶¹ *Id.* at 71.

⁶² *Id.*

⁶³ *Id.* at 72.

⁶⁴ *Id.*

⁶⁵ *See id.* at 67, 71-72.

⁶⁶ *Id.*

⁶⁷ *Id.* at 73.

ment, opening new topics for discussion among negotiators in sitting disputes.⁶⁸ The parties met in small negotiating sessions in October and November of 1979 and again in April 1980. When the parties finally reached a settlement, the Northern Cheyenne agreed to drop their legal challenges, and Montana Power agreed to a number of conditions aimed at helping tribal members participate in the development of, benefit from, and monitor the impacts of the new power plants.⁶⁹ Sullivan concluded that the section 164(e) process failed in the Northern Cheyenne-Colstrip case for a number of reasons:

- There was scant opportunity for the disputing parties to understand one another's interests. The process began with formal position statements and moved immediately to technical issues, rather than exploring the factors underlying each party's position.
- The parties had unrealistic expectations of the purpose or possible outcome of negotiations. The Northern Cheyenne Tribal Council, for example, was not prepared to move from its initial position opposing any construction and hoped to convince the EPA to include such strict permit requirements that construction would be impossible.
- The negotiation process was unclear to the participants, so some came unprepared for substantive negotiations.
- The formal, legalistic proceeding discouraged direct interaction between the principal disputants, focusing instead on the lawyers advocating their positions. Thus, "the 164(e) negotiations became a permit hearing rather than true bargaining sessions." The EPA officials believed that the PSD section mandate of the CAA limited their consideration of issues and required a constrained approach.⁷⁰

In the end, "the section 164(e) negotiations, although mandated by law, were negotiations in name only."⁷¹ Nonetheless, the issues raised and the interests shared during the section 164(e) process provided the starting point for the successful negotiations completed shortly thereafter as part of Montana's sitting-permit process.

Air-quality impacts from the Colstrip facility were again the subject of a section 164(e) negotiation process in 2003, as is described in the fourth case study below.⁷² The Northern Chey-

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 74-77.

⁷¹ *Id.* at 77.

⁷² See discussion *infra* Part I.B.4.

enne Tribal Council is the only Indian-reservation governing body to invoke section 164(e) in relation to a PSD permit.⁷³

2. *Yavapai-Apache Redesignation (1996)*

The Yavapai-Apache Reservation is located in the Verde Valley, about ninety miles north of Phoenix, Arizona. It includes five land parcels, ranging from almost 4 to 458 acres over a range of thirty miles, for a total area of about 635 acres. The Verde Valley is in the heart of Arizona's redrock country and encompasses landmarks such as Sedona, Oak Creek Canyon, and the Sycamore Canyon Wilderness Area, which is a mandatory Class I area under the CAA's PSD program.⁷⁴ The Reservation abuts several national monuments of historic and archaeological significance.⁷⁵

In December 1993, the Yavapai-Apache Tribal Council submitted a request to the EPA to redesignate the Yavapai-Apache Reservation from Class II to Class I.⁷⁶ According to the plan's supporting documents, "[t]he Yavapai-Apache Tribe desires to maintain high quality air standards for its citizens,"⁷⁷ and one of the motivations for this additional protection was the Phoenix Cement Plant's plan to incinerate used tires near the Reservation.⁷⁸ The EPA reviewed the request and preliminarily determined that it met the applicable procedural requirements.⁷⁹ On April 18, 1994, the EPA published a notice in the Federal Register proposing to approve the request and announcing a thirty-day period for public comment.⁸⁰

The town of Clarkdale, located near one of the Reservation parcels, requested a public hearing on the proposal, which the EPA held on June 22, 1994.⁸¹ Subsequently, the EPA extended the public-comment deadline to August 22, 1994.⁸² In a one-page letter dated the final day of the comment period, the Governor

⁷³ See case studies in this article.

⁷⁴ Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. 56,450, 56,452 (Nov. 1, 1996).

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *Arizona v. EPA*, 151 F.3d 1205, 1209 (9th Cir. 1998).

⁷⁹ Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. at 56,452.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

of Arizona requested dispute resolution pursuant to CAA section 164(e), expressing concern that “[t]he effects of the proposed redesignation are not apparent to all of the stakeholders, and confusion exists about the potential impacts of the Agency’s proposed action.”⁸³ In response, the EPA asked the State to elaborate on its concerns and offered to meet with state officials to address the need for better public understanding of the implications of redesignation.⁸⁴

Governor Symington then wrote to the EPA on December 5, 1994, “The purpose of invoking the dispute resolution is to raise the issues of whether the Yavapai-Apache Reservation is of sufficient size to allow effective air quality management or have air quality-related values.”⁸⁵ The Reservation’s small, scattered parcels, he argued, meant that “it would be neither realistic nor practicable” to apply those requirements to all Reservation lands while distinguishing those lands from surrounding Class II areas, which would be subject to different air-quality limitations.⁸⁶

The section 164(e) process ran from October 1994 through January 1995.⁸⁷ Initially, the EPA met separately with state and tribal representatives to allow each to express its concerns in a non-adversarial setting; then the two parties met without EPA officials.⁸⁸ Subsequently, the parties met jointly with the EPA.⁸⁹ The parties’ positions, as expressed in the meeting transcripts, are summarized below from the EPA’s record of the dispute-resolution process:

- The State of Arizona argued that the extra-territorial effects of the redesignation would be unfair to non-reservation communities because it would “have significant impacts on future growth and growth trends, business trends, job opportunities in the Verde Valley, and in a way which may or may not impact the ability to manage the area for air quality values or to effectively manage the area for air quality purposes.”⁹⁰
- Arizona further argued that managing the scattered reservation lands under a higher air-quality standard than sur-

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 56,452-53.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

rounding lands would “be a very untenable and unworkable arrangement.”⁹¹

- The Yavapai-Apache Indian Tribe argued that the redesignation was an appropriate means to protect the health and welfare of its members.⁹²
- Moreover, the Yavapai-Apache Indian Tribe expressed frustration at the State’s late entry into the process, its delay in providing a full statement of its opposition, and its further delay in agreeing to attend the dispute resolution proceedings.⁹³

After hearing the parties’ concerns, the EPA attempted to explore common ground for a resolution, but the EPA adjourned the meeting when neither party expressed an interest in further discussion.⁹⁴ The EPA subsequently encouraged the parties to meet again to resolve the dispute, but they declined.⁹⁵ Therefore, on November 1, 1996, the EPA issued a final rule approving the Yavapai-Apache redesignation to Class I.⁹⁶

The EPA issued a lengthy analysis of the scope of its discretion under section 164(e) as part of the record of the dispute-resolution process.⁹⁷ The Agency claimed its decision was consistent with the legislative and administrative histories of section 164(e), which “indicate that so long as the prescribed procedures for public input and involvement are followed, EPA is to give States and Tribes broad latitude in deciding what PSD classification is appropriate for lands within their respective jurisdictions.”⁹⁸ The EPA stated that major off-reservation effects of redesignation appeared unlikely since the Verde Valley already has several mandatory Class I areas receiving enhanced air-quality protection. Regardless,

if there are any actual permit controversies that result from Class I redesignation, at that juncture there will be concrete facts and particularized, focused issues that are better fit for resolution than more general allegations and objections. EPA is committed to working with the State and Tribe to resolve

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 56,453-54.

⁹⁴ *Id.* at 56,454.

⁹⁵ *Id.*

⁹⁶ 40 C.F.R. § 52.150 (2006).

⁹⁷ Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. at 56,454-55.

⁹⁸ *Id.* at 56,454.

any intergovernmental permit disputes that actually arise as a result of the Class I redesignation.⁹⁹

As in the Northern Cheyenne decision described above, the EPA “noted that its review role was confined to determining whether the tribe complied with the CAA’s procedural requirements, and declined to reweigh or second-guess the tribe’s impact analysis.”¹⁰⁰ Arizona’s subsequent challenge in federal court upheld the EPA’s redesignation ruling, although the Ninth Circuit Court of Appeals reversed the Agency on its use of a federal implementation plan rather than a tribal implementation plan.¹⁰¹ The court remanded the decision to the EPA for new rulemaking,¹⁰² which has not yet been completed. Doug McDaniel of EPA’s Region 9 identified two reasons why the case remains unresolved: (1) both EPA and tribal staff have changed, so no one originally involved in the redesignation is pushing it; and (2) the cement plant adjacent to the Reservation cancelled its plans to burn tires, so there is no immediate threat to Reservation air quality.¹⁰³

In the Yavapai-Apache case, it appears the EPA made serious efforts to encourage a fruitful negotiation process by meeting individually with the parties beforehand, asking for help understanding their positions, and encouraging follow-up meetings after the formal negotiation hearing.¹⁰⁴ Nonetheless, the section 164(e) process failed to resolve the significant differences between the parties, and the EPA again had to make a final determination to resolve the dispute.¹⁰⁵ The EPA seems to have viewed the State’s objections with skepticism and possibly saw the Governor’s decision to invoke section 164(e) as little more than a delay tactic to prevent redesignation from going forward.¹⁰⁶ Certainly the Yavapai-Apache Tribal Council believed as much, as evidenced by their comments during the negotia-

⁹⁹ *Id.* at 56,455.

¹⁰⁰ James M. Grijalva, *Where Are the Tribal Water Quality Standards and TMDLs?* 18 NAT. RESOURCES & ENV’T 63, 64 (Fall, 2003).

¹⁰¹ *Arizona v. EPA*, 151 F.3d 1205, 1212 (9th Cir. 1998).

¹⁰² *Id.*

¹⁰³ Telephone interview with Doug McDaniel, Tribal Air Program Coordinator, EPA Region 9 (April 28, 2004).

¹⁰⁴ See Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. 56,450, 56,453 (Nov. 1, 1996).

¹⁰⁵ See *id.* at 56,450.

¹⁰⁶ See *id.* at 56,453.

tion.¹⁰⁷ Given this background, it is not clear that the EPA was prepared to act as a neutral mediator between the parties or that the parties viewed the EPA as impartial.

3. *Forest County Potawatomi Community Redesignation (1999)*

The Forest County Potawatomi (FCP) Community is located in northeastern Wisconsin, not far from Michigan’s Upper Peninsula. The Reservation covers about 12,000 acres, many of which are forested and managed for timber harvest and recreation.¹⁰⁸ Recently opened tribal enterprises such as casinos and resorts have sharply increased employment opportunities, bringing both rapid population growth and heightened concern for environmental protection.¹⁰⁹ In recent years, the Tribe protested a proposed zinc mine five miles from the Reservation boundary near Crandon, Wisconsin.¹¹⁰

To protect Reservation lands from such external threats, the FCP Tribal Council submitted a proposal on February 14, 1995, to the EPA to redesignate certain FCP lands from Class II to Class I.¹¹¹ The proposal included reservation lands that were more than eighty acres in size, located in Forest County, and held in trust for the FCP Tribe by the federal government.¹¹² It also included required technical reports and maps, as well as documentation of a public notification and a public hearing held the previous September.¹¹³ As the EPA concluded in its notice of proposed rulemaking on June 29, 1995, “the documentation submitted by the Tribal Council shows that all statutory and regulatory procedural requirements for redesignation have been met.”¹¹⁴

The EPA proposed a public hearing for August 1995, but postponed the meeting after the governors of Michigan and Wisconsin objected to the redesignation and requested formal dispute resolution pursuant to section 164(e).¹¹⁵ Neither request letter

¹⁰⁷ See *id.*

¹⁰⁸ Kreye, *supra* note 8, at 100.

¹⁰⁹ Notice of Class III Gaming Compact Taking Effect, 71 Fed. Reg. 5068 (Jan. 31, 2006).

¹¹⁰ Kreye, *supra* note 8, at 105.

¹¹¹ Redesignation of the Forest County Potawatomi Community to a PSD Class I Area, 60 Fed. Reg. 33,779-02, 33,780 (June 29, 1995).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Kreye, *supra* note 8, at 103.

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contained specific objections to the redesignation, but the governors spoke publicly about their concerns over the potential reach of tribal air-quality regulation beyond Reservation boundaries.¹¹⁶ Wisconsin Governor Tommy Thompson’s spokesman claimed that the FCP Tribe’s proposal would “devastate the economy of northern Wisconsin”; similarly, Michigan Governor John Engler argued that the redesignation would hinder economic development in the Upper Peninsula.¹¹⁷ Further, both states signed on as amici curiae in Arizona’s lawsuit challenging the Yavapai-Apache redesignation, supporting Arizona’s position that small, scattered reservation lands are inappropriate for redesignation to Class I status.¹¹⁸

In 1995, the EPA contracted with a professional mediation firm to conduct the section 164(e) negotiations.¹¹⁹ According to a representative of the State of Wisconsin, hiring a third-party mediator was essential: “[Wisconsin’s] main concern has always been with EPA and not directly with the Tribe. The State does not agree with the Class I procedural requirements and disagrees with EPA’s ‘rubber stamping’ approval process.”¹²⁰ Michigan chose to not participate in the section 164(e) negotiation, although state representatives observed the initial session.¹²¹

After initial meetings with the mediator in 1997, the three parties (the EPA, the FCP Tribe, and the State) met from September 1998 until reaching an agreement on February 2, 1999.¹²² Rather than proceeding as a formal hearing, the negotiations encouraged face-to-face dialogue and used small breakout sessions and regular information exchanges to help the parties better understand each other’s concerns.¹²³

The discussions were successful, and the parties signed a Negotiations Concept and Agreement in Principle on February 3,

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 87.

¹¹⁸ *Arizona v. EPA*, 151 F.3d 1205, 1207 (9th Cir. 1998).

¹¹⁹ Kreye, *supra* note 8, at 103. See also Ryan Tracey-Mooney, Tribal Environmental Regulation: Assertions of Sovereignty and Political Responses: A Case Study of the Forest County Potawatomi Airshed Redesignation Proposal 25 (May 2000) (unpublished Honors B.A. thesis, University of Chicago), available at <http://environment.uchicago.edu/studies/thesis/papers/ryan.pdf>.

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¹²⁰ Telephone Interview by Maureen Hartmann with Martin Burkholder, Tribal Specialist, Wisc. Dep’t of Natural Res., Div. of Air & Water (July 14, 2003).

¹²¹ Tracey-Mooney, *supra* note 119, at 25.

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¹²² *Id.*

¹²³ Martin Burkholder, *supra* note 120.

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1999.¹²⁴ In the resulting agreement, Wisconsin agreed to not challenge the EPA’s approval of the FCP reservation’s redesignation to Class I.¹²⁵ In exchange, the Tribe made certain concessions, including an agreement to limit enforcement of Class I air-quality increments to major sources within ten miles of the Reservation.¹²⁶ The parties’ agreement incorporates an ongoing dispute-resolution process using a Scientific Review Panel with representatives from the State and Tribe.¹²⁷ In addition, the parties agreed to discuss disputed legal and policy issues and to try, in good faith, to resolve them on a government-to-government basis prior to requesting a section 164(e) review.¹²⁸

Since Michigan did not participate in the dispute-resolution process, it could still oppose the FCP redesignation. The case remains in “pre-decisional” status.¹²⁹

4. *Northern Cheyenne-Roundup PSD Permit (2003)*¹³⁰

As described above, the Northern Cheyenne Tribal Council successfully sought redesignation of reservation lands to Class I in 1977.¹³¹ In 1979, the EPA issued a conditional permit to Montana Power for the construction and operation of two coal-fired, electricity-generating plants at Colstrip, Montana (Units 3 and 4), about fifteen miles north of the Northern Cheyenne Indian Reservation.¹³² In 1999, PPL Montana succeeded Montana Power as the owner and operator of Colstrip Units 3 and 4.¹³³ The earlier EPA permit remained in force, but the State of Montana exercised PSD permitting authority for all air-contaminant

¹²⁴ Tracey-Mooney, *supra* note 119, at 49 (providing a reference list which indicates the date this agreement was signed). For a detailed summary of the agreement provisions, see *id.* at 26-30.

¹²⁵ *Id.* at 29.

¹²⁶ *Id.* at 26, 29.

¹²⁷ *Id.* at 28.

¹²⁸ *Id.* at 28-29.

¹²⁹ *Id.* at 29-30.

¹³⁰ Agreement Concerning Northern Cheyenne-Roundup PSD Permit, Northern Cheyenne Indian Tribe, Mont. Dep’t of Env’tl. Quality & Env’tl. Prot. Agency (Feb. 13, 2004 (State of Montana), Feb. 27, 2004 (EPA), Apr. 22, 2004 (Northern Cheyenne Tribal Council)) (on file with the authors) [hereinafter Final Agreement].

¹³¹ See *supra* text accompanying notes 36-43.

¹³² Final Agreement, *supra* note 130, at 1.

¹³³ PPL Corporation, *PP&L Global and Montana Power Company Finalize PP&L’s Acquisition of Generation Assets in Montana*, Dec. 17, 1999, http://www.pplweb.com/newsroom/newsroom+quick+links/archived-ews/1999/December/12_17_1999_1.htm.

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sources in the state outside of Indian reservations.¹³⁴ Subsequent to the issuance of the EPA permit, the State of Montana issued several preconstruction permits and also the operating permit for the Colstrip facility.¹³⁵

On January 14, 2002, Bull Mountain Development Company No. 1 submitted an application to the Montana Department of Environmental Quality (DEQ) for an air-quality permit for two 390-megawatt pulverized-coal-fired, electricity-generating plants to be constructed near Roundup, Montana, about eighty miles northwest of the Northern Cheyenne Reservation.¹³⁶ The DEQ issued a draft environmental-impact statement for the project in November 2002, and a final environmental-impact statement in January 2003.¹³⁷

The Northern Cheyenne Tribal Council wrote to the EPA on January 24, 2003, requesting that the Agency invoke its authority under section 164(e) to resolve the Tribe's concerns about the project's air-quality impacts.¹³⁸ Specifically, the Tribal Council expressed three concerns: (1) projected violations of Class I increments, including existing violations at the Colstrip facility; (2) visibility impacts; and (3) the cumulative effect of reasonably foreseeable future development.¹³⁹

On January 31, 2003, the DEQ issued an air-quality permit for the Roundup Project, contending that PPL Montana had demonstrated the project would comply with applicable air-quality requirements.¹⁴⁰ The Tribal Council disputed the DEQ's conclusion and argued that the project would contribute to violations of the Reservation's air quality and visibility.¹⁴¹ The Montana Board of Environmental Review upheld the state air-quality permit on June 6, 2003, prompting two environmental organizations to file a lawsuit on June 9, 2003.¹⁴²

Meanwhile, in response to the request for a section 164(e) process, the EPA retained the University of Montana's Public Policy

¹³⁴ Final Agreement, *supra* note 130, at 1.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1-2.

¹³⁷ *Id.* at 2-3.

¹³⁸ *Id.* at 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Jennifer McKee, *Suit Targets Permits for Power Plant*, BILLINGS GAZETTE, June 12, 2003, available at <http://www.billingsgazette.net/articles/2003/06/12/local/export109906.txt> at B1.

Research Institute to facilitate discussions between the government parties.¹⁴³ The permit applicant (PPL Montana) and the two environmental groups that filed the permit challenge inquired about participating in the process, but the EPA responded that they “envision[ed] the process as involving government-to-government negotiations only, which is what section 164(e) of the Act appears to contemplate.”¹⁴⁴

The Public Policy Research Institute conducted a conflict assessment in June 2003, and summarized the parties’ interests, possible outcomes, and proposed next steps in a memo shared with the Northern Cheyenne Tribe, the EPA, and the Montana DEQ.¹⁴⁵ Representatives of these government bodies first met in Billings, Montana, on July 23, 2003.¹⁴⁶ They subsequently agreed to a work plan and ground rules for negotiations which proposed that the section 164(e) negotiations would seek agreement on the following two specific issues: (1) standing violators of increments for sulfur dioxide and nitrogen dioxide in the Class I airshed over the Reservation, and (2) the degree to which increments for sulfur dioxide and nitrogen dioxide would be further violated by the proposed Roundup Power Plant in the Class I

¹⁴³ Direct observation by the mediator, Matthew McKinney.

¹⁴⁴ Letter from Richard R. Long, Director, EPA Air and Radiation Program, to Steven T. Wade, Attorney, Browning, Kaleczyc, Berry & Hoven (May 29, 2003) (on file with the authors).

¹⁴⁵ The objective of a conflict assessment, sometimes referred to as “situation assessment,” is to develop a common understanding of the problem’s substance, the needs and interests of the parties, and the risks associated with different procedures for resolving the issues. See Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, in THE CONSENSUS BUILDING HANDBOOK 101, 104 (Lawrence Susskind et al. eds., 1999); see also MCKINNEY & HARMON, *supra* note 1, at 261. A situation assessment does not limit other dispute-resolution or agreement-building processes from moving forward. See *id.* at 261. In this case, the Public Policy Research Institute reviewed appropriate documents and interviewed people representing different viewpoints. Matthew McKinney, Summary of Conflict Assessment on Regional Air Quality, Northern Cheyenne Indian Reservation 1 (July 2, 2003) (on file with the authors). Based on this information, the Public Policy Research Institute prepared a short report summarizing the various parties’ interests and concerns and their options for a negotiation process. *Id.* The report was distributed to all of the interviewees for review and comment, and served as a “convening” report for the first meeting. Based on the convening report and the first meeting, the participants jointly designed a negotiation process—consistent with their joint understanding of section 164(e)—to meet their specific needs and interests. *Id.*

¹⁴⁶ Final Agreement, *supra* note 130, at 3.

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airshed over the Reservation.¹⁴⁷ The parties agreed to meet at least monthly and to seek resolution of the issues by December 2003.¹⁴⁸

During the next five months the participants engaged in numerous conference calls rather than face-to-face meetings for two reasons. First, given that participants were geographically dispersed from Denver (EPA regional office) to Seattle (Northern Cheyenne Tribe's attorney), Helena (Montana offices of the DEQ and the EPA) to Lame Deer, Montana (Northern Cheyenne Tribe), it was very expensive to meet in person.¹⁴⁹ Second, like many complex multiparty negotiations, the participants needed to move slowly, building a common understanding of the nature of the problems, exploring alternative solutions, and discussing the feasibility of alternative solutions with their constituents.¹⁵⁰ Negotiations of this type are often best conducted in a series of two to four sessions, rather than full-day or multi-day sessions.

In addition to the conference calls, the participants did meet face-to-face two more times, once in Billings and once in Denver.¹⁵¹ The mediator also stayed in frequent contact with the parties, helping to clarify issues, interests, options, and potential packages.¹⁵²

As the discussions progressed, it became clear that the Tribe wanted new permit conditions placed on the operations of Colstrip Units 3 and 4, the subject of the 1979 section 164(e) negotiation, raising issues about the scope of the present section 164(e) process.¹⁵³ An EPA attorney notified the parties that the EPA's authority extended only to the Roundup permit and did not allow the Agency to compel PPL Montana to make changes in its Colstrip operations.¹⁵⁴ The EPA's limited authority would have restricted its options to resolve the dispute if the section 164(e)

¹⁴⁷ Clean Air Act 164(e) Negotiation, Northern Cheyenne Indian Reservation, Suggested Work Plan and Ground Rules (Draft of July 10, 2003) (on file with the authors) [hereinafter Negotiation Work Plan].

¹⁴⁸ *Id.* at 1.

¹⁴⁹ Direct observation by the mediator, Matthew McKinney.

¹⁵⁰ For illustrations of the various ways in which these processes unfold, see the case studies of multiparty negotiations in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 145, at 685-1050.

¹⁵¹ Direct observation by the mediator, Matthew McKinney.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

process did not result in an agreement between the parties, but it did not prevent the State and the Tribe from exploring conditions to which they could agree beyond the scope of the EPA's decision-making authority.¹⁵⁵ In the end, the opportunity for broader discussions opened the door to successful negotiations.

The section 164(e) negotiation concluded with an agreement signed by the State on February 13, 2004, by the EPA on February 27, 2004, and by the Tribal Council on April 22, 2004.¹⁵⁶ The EPA's regional administrator signed the agreement as a "non-party," noting that the EPA recognized the agreement and intended to participate in certain activities under it.¹⁵⁷

The parties agreed to a number of conditions aimed at ensuring compliance with Class I increments on the Reservation, including permit conditions imposed on the existing Colstrip Units 3 and 4, as well as monitoring and evaluation of actions needed to deal with visibility impacts.¹⁵⁸ The agreement further committed the parties to resolve disputes cooperatively before resorting to legal challenges:

Any dispute which arises under this Agreement shall in the first instance be the subject of informal negotiations between the Parties. The period for informal negotiations shall not exceed twenty (20) working days from the time the dispute arises, unless such period is modified by written agreement of the Parties. The dispute shall be considered to have arisen when one Party sends the other Party a written Notice of Dispute. The dispute notice shall set forth the specific points of the dispute, the basis for objection of the disputing Party, and any matters or other information which the disputing Party considers necessary or appropriate. Either Party may request the assistance of an impartial mediator to help resolve the dispute, and the selection of a mediator will be made jointly by the Parties.¹⁵⁹

Five participants responded to a "participant satisfaction scorecard" distributed by the Public Policy Research Institute at the conclusion of the section 164(e) negotiation.¹⁶⁰ Most concluded that the negotiation was more costly and time-consuming than alternative options, which they defined as either negotiating

¹⁵⁵ *Id.*

¹⁵⁶ Based on personal knowledge of the mediator, Matthew McKinney.

¹⁵⁷ Final Agreement, *supra* note 130, at 17.

¹⁵⁸ *Id.* at 7-9.

¹⁵⁹ *Id.* at 10-11.

¹⁶⁰ Confidential information on file with the mediator, Matthew McKinney.

outside of the 164(e) process or doing nothing.¹⁶¹ All agreed that, generally speaking, a collaborative approach was appropriate to the situation, and they would recommend such an approach in the future.¹⁶² A recurring observation was that intergovernmental conflicts persisting beyond the end of the negotiation threatened the agreement's integrity.¹⁶³ Apparently, not all parties felt the EPA was fully committed to the negotiation process or supported the agreement reached by the State and the Tribe at the conclusion of the process.¹⁶⁴

II

LESSONS LEARNED FROM SECTION 164(E) NEGOTIATIONS

Although each application of section 164(e) is based on a unique factual situation, some points of comparison provide insight into the reasons why some negotiations have proved more fruitful than others. Based on the limited experience to date, we propose the following elements for successful section 164(e) negotiations.

A. Use the Process to Supplement Other Legal Proceedings

Negotiation and collaboration are often viewed as replacements for the legal process or requirements for public participation. To the contrary, negotiation and collaboration are intended to increase the effectiveness of public participation and the legal process. They are designed to supplement and complement the formal decision-making process.

As demonstrated in the four cases above, section 164(e) negotiations do not require any party to surrender legal rights as a condition of participation. Negotiation creates a better forum for disputants to explore and understand each other's interests than more formal, rigid, legal proceedings (and most public participation processes as well). Negotiation and collaboration are very flexible procedures and are most effective when adapted—consistently with existing laws, policies, and regulations—to meet the unique needs and interests of people in particular situations. Mandatory negotiation simply requires a good-faith effort at

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

resolving differences before resorting to unilateral decisions by an administrative agency, to litigation, or to other means of making decisions and resolving disputes.¹⁶⁵

B. Clarify the EPA's Roles

Section 164(e) places the EPA in an awkward position, as the Agency is both a government agency with final decision-making authority and the convener of disputing parties.¹⁶⁶ As a regulatory authority, the EPA is concerned with implementing the CAA and will necessarily bring enforcement concerns to the negotiating table. In addition, the federal government has a special relationship as a trustee for Indian tribes.¹⁶⁷ As such, a federal agency attempting to act as a neutral facilitator between states and tribes likely faces questions about its impartiality or conflicting loyalties.

In both the original Colstrip permit case and the Yavapai-Apache redesignation case, the EPA ran the negotiations itself. In the Colstrip case, the EPA convened a formal hearing and presided over the parties, one of which was the EPA itself.¹⁶⁸ At the outset, the EPA set the parameters of the discussion, most importantly by stating that the permit issuance to which the Tribe objected was not in question.¹⁶⁹ There was no mediation, but merely an opportunity to provide input into an essentially completed decision.

In the Yavapai-Apache case, the EPA worked more diligently to assess the parties' interests, meeting separately with the State and the Tribe.¹⁷⁰ In the end, however, the Agency held a formal meeting at which all comments were transcribed.¹⁷¹ When the parties were unable to resolve their disputes, the EPA exercised its authority under section 164(e) to make a final decision.¹⁷² This approach resembles a model of dispute resolution known as "med-arb," in which the mediator serves as arbitrator if media-

¹⁶⁵ For a recent review of the degree to which negotiation and collaboration are being integrated into natural-resource decision-making, see generally MCKINNEY & HARMON, *supra* note 1.

¹⁶⁶ 42 U.S.C. § 7474(e) (2006).

¹⁶⁷ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pct.) 1, 17-18 (1831).

¹⁶⁸ SULLIVAN, *supra* note 22, at 66-67.

¹⁶⁹ *Id.* at 67.

¹⁷⁰ See *Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution*, 61 Fed. Reg. 56,450, 56,453 (Nov. 1, 1996).

¹⁷¹ *Id.*

¹⁷² *Id.*

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tion fails.¹⁷³ The authors of a leading book on the subject, *Getting Disputes Resolved*, conclude that this model has both advantages and disadvantages, including the possibility that “[w]hat appears to be a negotiated resolution may be perceived by the parties as an imposed one. . . . Moreover, because the parties know that the neutral may decide the dispute, they may withhold information that would be useful in reaching a mediated settlement.”¹⁷⁴ Some parties in the Yavapai-Apache case indicated distrust of the EPA’s ability to act as a neutral third party and, therefore, likely did not fully share information during the advance meetings.¹⁷⁵

By contrast, in the more recent applications of section 164(e)—the FCP redesignation case and the Roundup permit case—the EPA chose to hire a professional mediator to provide neutral third-party facilitation.¹⁷⁶ The mediator met or spoke with the parties separately to assess their interests and concerns, while the EPA’s role in the group discussions might be described as that of “interested observer,” providing technical input, perspective on regulatory options, and clarifications of legal questions.¹⁷⁷ Both cases resulted in satisfactory agreements, so the EPA did not have to resort to making a final “resolution” decision, and the parties appeared to have been satisfied with the service provided by the mediators.¹⁷⁸

Perhaps the EPA should view its role as a catalyst for dispute resolution rather than as an agent for resolving the dispute—acknowledging, of course, that the Agency is charged to act as arbiter if negotiations fail. Thus, when section 164(e) requires the EPA to step into a PSD dispute, the Agency should initiate the best possible dispute-resolution process with a professional mediator, identify the appropriate parties and encourage their full participation, participate with meaningful communications and information sharing, and contribute technical and legal expertise as needed throughout the process. Of course, the EPA should

¹⁷³ W.L. URY et al., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 66-57 (1988).

¹⁷⁴ *Id.* See also ANN L. MACNAUGHTON & JAY G. MARTIN, *ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS* 49-51 (2002) (discussing the application of “med-arb” to environmental disputes).

¹⁷⁵ *Arizona Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area*, 61 Fed. Reg. 56,461, 56,468-69 (Nov. 1, 1996) (codified at 40 C.F.R. § 52.150).

¹⁷⁶ See *supra* text accompanying notes 119 and 143.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

also play the role of final decision-maker, particularly when the negotiation process fails to provide a mutually satisfying result.

C. Provide an Efficient, Structured Process

Congress provided the EPA with no guidance for the process it should use to “enter into negotiations with the parties involved to resolve . . . dispute[s].”¹⁷⁹ Thus, each case has demonstrated a different approach, from the short and formal to (in the latter cases) longer, more complex processes involving informal conversations.

For example, the 1979 Colstrip case lasted just three days and involved no informal dialogue or discussion.¹⁸⁰ Parties communicating through their lawyers in a formal hearing such as that one will emphasize their positions rather than share their interests and work toward mutually satisfactory solutions. The Yavapai-Apache case extended over a longer period and included informal meetings to explore the parties’ concerns but ended with a short, formal meeting.¹⁸¹ The long time-frame was not the result of ongoing negotiations, but instead appears to have been caused by the parties’ reluctance to communicate with one another.

The FCP-redesignation and Roundup-permit cases demonstrate that a section 164(e) negotiation need not extend over a long period to be successful. Neither lasted more than six months.¹⁸² In the Roundup case, the parties acknowledged at the outset the need for a timely resolution to ensure influence over the state permitting process, and they set a target settlement date of December 2003.¹⁸³ This goal required tightly scheduled meetings and many telephone-conference calls, but the parties responded favorably to the deadline and accomplished their negotiations within the agreed-upon period.¹⁸⁴

A clearly structured process is a necessary condition for any successful multiparty negotiation. While each process must be tailored to the particular parties’ unique needs and interests, scholars, through study and experience, have articulated a set of

¹⁷⁹ 42 U.S.C. § 7474(e) (2006).

¹⁸⁰ SULLIVAN, *supra* note 22, at 66-72.

¹⁸¹ Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. at 56,454.

¹⁸² See *supra* text accompanying notes 122, 146-156.

¹⁸³ See Negotiation Work Plan, *supra* note 147, at 1.

¹⁸⁴ Direct observation of the mediator, Matthew McKinney.

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“best practices” to design effective processes.¹⁸⁵ Two key elements in designing an effective process are (1) getting the right people to the table, and (2) creating an interest-based agenda.

1. *Get the Right People to the Table*

Just who should participate in a section 164(e) negotiation process is an unresolved question. In the 1979 Colstrip case, one of the negotiating parties was the permit applicant, which was represented for at least part of the hearing by its board chairman.¹⁸⁶ However, the EPA has restricted participation in the other cases to government entities, despite the acknowledged impacts that decisions have on regulated industries and other interests. In the 2003 Roundup case, for example, several affected parties inquired about participating in the section 164(e) process but were denied the opportunity.¹⁸⁷ Their participation might have contributed valuable technical information or helped shape the terms of the agreement. Interested parties excluded from a negotiation process also will have no stake in the success of a negotiated agreement and may seek to discredit it or challenge it in another forum. In such a situation, the parties to the agreement will ultimately find their progress toward a long-term solution to their dispute obstructed.

Additionally, failure to participate in negotiations may compromise the interested parties' ability to challenge the final agreement or the EPA resolution in court. For example, the Ninth Circuit Court of Appeals ruled that the Arizona Chamber of Commerce had no standing to challenge the Yavapai-Apache redesignation because “the Chamber did not participate in either the EPA redesignation proceedings or the dispute-resolution proceedings.”¹⁸⁸

Acknowledging the potential difficulty of exclusion, the parties to the 2003 Roundup negotiation agreed at the beginning of the process “to keep other potentially affected parties, including power plant owners and operators and environmental groups, informed of the direction of the negotiation and to seek their input

¹⁸⁵ Lawrence Susskind, *An Alternative to Robert's Rules of Order for Groups, Organization, and Ad Hoc Assemblies that Want to Operate By Consensus*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 145, at 3-57.

¹⁸⁶ SULLIVAN, *supra* note 22, at 67.

¹⁸⁷ Based on personal knowledge of the mediator, Matthew McKinney.

¹⁸⁸ *Arizona v. EPA*, 151 F.3d 1205, 1210 (9th Cir. 1998).

and advice as appropriate.”¹⁸⁹ The participants did this in a very informal, sporadic way, and it remains to be seen if any other “stakeholders” will challenge the process and its outcomes.

Finally, it clearly matters which representatives from the negotiating parties participate in the process. The 1979 Colstrip case demonstrated the importance of communicating early with participants to ensure they are informed, prepared, and appropriately represented. The process should also be sufficiently flexible to permit recesses when representatives need to confer with their constituencies for information and support.

Unlike the earlier Colstrip negotiations, the parties to the 2003 Roundup negotiation drafted an early work plan that not only included a list of stakeholder groups,¹⁹⁰ but also stated that each stakeholder group would include individuals with decision-making authority, legal expertise, and technical expertise.¹⁹¹ By ensuring that all stakeholders are adequately represented, such procedures reflect the best practice.¹⁹²

2. *Create an Interest-Based Agenda*

Section 164(e) provides both an opportunity for broad discussion and a narrow scope of resolution. The statute does not prescribe the topics that parties may address in their negotiations, nor the range of solutions that might be included in their agreement, but it does limit the EPA’s discretion if the negotiations fail and the Agency must resolve the dispute.¹⁹³ Acknowledging the uncertainty, in 1997 the EPA sought public input “on whether EPA should address . . . some of the potential measures and tools that may be employed to resolve intergovernmental disputes and, if so, what approaches may be appropriate.”¹⁹⁴

In the two cases in which negotiating parties failed to reach agreement, the 1979 Colstrip case and the Yavapai-Apache case,

¹⁸⁹ Negotiation Work Plan, *supra* note 147, at 3.

¹⁹⁰ We define a “stakeholder” as any person or organization interested in or affected by an issue, any decision-making body or institution needed to implement the outcome of a dispute-resolution process, or any person or organization that may challenge the process and/or its outcomes.

¹⁹¹ Negotiation Work Plan, *supra* note 147, at 1-2.

¹⁹² For specific strategies on getting the right people to the table, see SUSSKIND, *supra* note 185, at 38-39.

¹⁹³ 42 U.S.C. § 7474(e) (2006).

¹⁹⁴ Prevention of Significant Deterioration of Air Quality (PSD) Program: Permit Review Procedures for Sources that May Adversely Affect Air Quality in Non-Federal Class I Areas, 62 Fed. Reg. 27,158, 27,165 (May 16, 1997).

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the EPA limited the parties' discussions to the scope of the Agency's narrow, carefully constrained, ultimate decisions.¹⁹⁵ This was unfortunate, because the objectors in both instances had broader concerns than technical violations of PSD increments. The Northern Cheyenne, for example, wanted to address socio-economic impacts of the expanded Colstrip facilities, but these were not on the table for discussion until the parties subsequently met to negotiate the state siting permit.¹⁹⁶ Similarly, Arizona's invocation of section 164(e) likely was an attempt to draw attention to the confusion and concerns of non-Indians in the Verde Valley, some of whom believed the Tribe's policies would unfairly constrain economic development in their communities.¹⁹⁷ The EPA was unable to address these concerns, except by assuring the State they were speculative and would be addressed more appropriately in the context of a PSD permit application.¹⁹⁸

By contrast, the parties to the FCP-redesignation settlement included provisions clarifying the procedures for reviewing PSD permits in the future, offering more certainty than would otherwise be available to potentially affected parties—although they apparently had to convince the EPA that a broader scope of discussion was appropriate in section 164(e) negotiations.¹⁹⁹ Further, by agreeing to a dispute-resolution procedure, they reduced the possibility that section 164(e) will be necessary to resolve future permit disputes.²⁰⁰ Similarly, the successfully negotiated resolution of the Roundup-permit dispute went beyond the scope of the EPA's authority and examined the Reservation's air quality as a regional rather than a site-specific issue.²⁰¹

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

¹⁹⁵ See discussion accompanying notes 51-52, 93.

¹⁹⁶ SULLIVAN, *supra* note 22, at 68-73.

¹⁹⁷ Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. 56,450, 56,456 (Nov. 1, 1996).

¹⁹⁸ *Id.* at 56,457.

¹⁹⁹ Interview with Marty Burkholder, *supra* note 120, on May 5, 2004.

²⁰⁰ Tracey-Mooney, *supra* note 119, at 28-29.

²⁰¹ Direct observation by the mediator, Matthew McKinney.

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III

THE PLACE OF MANDATORY DISPUTE RESOLUTION

Mandatory use of negotiation, mediation, arbitration, or some other form of dispute resolution is not the only way to resolve disputes that emerge in the context of federal natural-resources and environmental law. The variety of statutory models outlined in such laws (summarized in Appendix 1) suggests the possibility of a more comprehensive, robust system to prevent and resolve disputes. The models also clarify the place of mandatory dispute resolution in such a system.²⁰²

In recent years, the field of dispute resolution has moved beyond the sporadic application of dispute-resolution procedures in isolated cases.²⁰³ Those engaged in what is referred to as “dispute resolution systems design” seek to create comprehensive systems for dealing not with just a single dispute, but with the stream of disputes that arises in nearly all relationships, communities, and institutions.²⁰⁴

In one of the leading texts in the field, *Getting Disputes Resolved*, authors William Ury, Jeanne Brett, and Stephen Goldberg identify three basic ways to resolve disputes: (1) reconcile the disputants’ underlying interests, (2) determine who is right, and (3) determine who is more powerful.²⁰⁵ The “best” approach to resolving a particular dispute can be determined by considering the following four criteria:

1. How satisfied are the stakeholders likely to be with the outcomes of a particular process?
2. What is the chance that the issue will be resolved—and not recur—through one process or another? That is, how sustainable is the outcome likely to be?
3. What are the likely costs—time, money, and emotional energy—of relying on one process rather than another?
4. How will the use of one process over another impact the relationships among stakeholders?²⁰⁶

These four criteria are related. Dissatisfaction with outcomes may lead to the recurrence of disputes, straining relationships,

²⁰² See Appendix 1 for a review of alternative statutory models to prevent and resolve disputes.

²⁰³ See URY et al., *supra* note 173, at 171.

²⁰⁴ See *id.*

²⁰⁵ *Id.* at 4-8.

²⁰⁶ *Id.* at 11-19.

and increasing transaction costs.²⁰⁷ Because these four different costs typically increase or decrease together, it is useful to refer to them collectively as “the costs of disputing.”

Based on these criteria, the core proposition of the theory of dispute-systems design is that integrating interests through negotiation, mediation, and consensus building is less costly than determining who is right, which in turn is less costly than determining who is more powerful.²⁰⁸ This does not mean that focusing on interests is always better than resorting to rights or power, but simply that such a focus tends to result in greater satisfaction with outcomes, fewer dispute recurrences, lower transaction costs, and less strain on relationships.²⁰⁹

In light of this analytical framework, *Getting Disputes Resolved* presents six principles of dispute-systems design: (1) put the focus on interests; (2) build in “loop-back” procedures that encourage disputants to return to negotiation; (3) provide low-cost rights and power backup procedures; (4) build in consultation before, and feedback after; (5) arrange procedures in a low-to-high cost sequence; and (6) provide the motivation, skills, and resources necessary to make the procedures work.²¹⁰

Using this theoretical framework, the existing statutory models together provide the beginning of a more comprehensive “system” to prevent and resolve disputes. By combining the various public-participation and dispute-resolution mechanisms into one system embracing everything from consultation, consistency, and unassisted negotiation to voluntary mediation, mandatory dispute resolution, and agency recommendation, a more robust system is possible. The system would seek prevention of unnecessary disputes by engaging people early and often throughout the decision-making process.²¹¹ Many studies demonstrate that a common understanding and broad-based agreement are made possible by preventing needless disputes

²⁰⁷ *Id.* at 12-13.

²⁰⁸ *Id.* at 15.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 42.

²¹¹ For good examples of how to do this, see International Association for Public Participation, Core Values for the Practice of Public Participation, <http://www.iap2.org/displaycommon.cfm?an=4> (last visited August 21, 2006), and USFS COMMITTEE OF SCIENTISTS, SUSTAINING THE PEOPLE'S LANDS: RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY, 83-144 (1999), available at <http://www.fs.fed.us/emc/nfma/includes/cosreport/Committee%20of%20Scientists%20Report.htm>.

with meaningful opportunities for public participation early and often throughout the process.²¹²

However, the proposed dispute-resolution system would also recognize that it may not be possible in some cases to resolve all disputes; thus, it would be important to provide low-cost procedures for dispute resolution as preludes to litigation and other rights- and power-based procedures. It is important to emphasize that not all disputes related to federal natural-resources and environmental law can, or should, be resolved by reconciling interests. But rights and power procedures often become the forums of first resort and are frequently used where they are not necessary. The goal in designing a more effective dispute-resolution system is to resolve most disputes by integrating interests, some by determining who is right, and the fewest by determining who is more powerful.

Such a system of dispute resolution would be mandatory in two senses: (1) in requiring a certain step-by-step progression of the process, and (2) in mandating the type of process. First, parties would be required to move through the system one step at a time. For example, the states of Montana and Wyoming incorporated a dispute-resolution system into the Yellowstone River Compact in 1996.²¹³ The dispute-resolution system addresses disagreements over management of the interstate river by moving from unassisted negotiation to facilitation before allowing the states to employ voting and litigation.²¹⁴

Second, in some cases mandating a certain type of dispute-resolution process might also be valuable, as in the CAA and the Clean Water Act (CWA). Given the growing use of courts to strongly encourage, if not require, mediation and other forms of dispute resolution short of litigation, we believe it is time to expand the use of mandated dispute resolution beyond its currently limited sphere of application. If the courts will insist that disputants engage in these alternative forms of dispute resolution, perhaps now is the time to structure the processes in such a way that

²¹² For detailed insight into the role and value of public participation, see MCKINNEY & HARMON, *supra* note 1; THOMAS C. BEIERLE & JERRY CAYFORD, *DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS* (2002); and JULIA WONDOLLECK & STEVEN L. YAFFEE, *MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT* (2000).

²¹³ The Compact provides an institutional framework for managing the interstate river. See MCKINNEY & HARMON, *supra* note 1, at 243-44.

²¹⁴ *Id.* at 244.

not only empowers people to resolve their own differences, but also addresses the concerns they may have with mandatory dispute resolution.²¹⁵

To illustrate how this system might be integrated into federal natural-resources and environmental law, consider the possibility of resource-management planning by the U.S. Bureau of Land Management (BLM). Table 1 describes how interest-based approaches hypothetically could be integrated into each step of the planning process governed by the National Environmental Policy Act of 1969 (NEPA).²¹⁶

The voluntary-mediation option integrated into the decision-making and dispute-resolution process of the Alberta Environmental Appeals Board provides an apparently successful, real-life example.²¹⁷ The Board has conducted mediations on about half of all appeals on file with a success rate of eighty-three percent, although it notes that some cases are not appropriate for mediation.²¹⁸ The take-home lesson of the Alberta study is that mediation can be offered as a voluntary, rather than a mandatory, option; if it meets certain tests and is well run, mediation will be chosen most of the time.

Our approach to designing more effective dispute-resolution systems for federal natural-resources and environmental law is experimental. While some work has been done on the merits of institutionalizing alternative forms of dispute resolution in natural-resources and environmental policy,²¹⁹ we believe there is a

²¹⁵ For example, who will be allowed to initiate the process and under what circumstances? Who will participate in the process? Should negotiation sessions be open to the public? What is the status of information and proposals exchanged during the dispute-resolution process? What are the fallback procedures if the dispute-resolution process fails? How might mandatory dispute-resolution procedures influence the relative distribution of power?

²¹⁶ National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006).

²¹⁷ MCKINNEY & HARMON, *supra* note 1, at 241-42; *See also* Matthew Taylor, Patrick Field, Lawrence Susskind, & William Tilleman, *Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices*, 22 DALHOUSIE L.J., 51, 61-62 (1999).

²¹⁸ ENVTL. APPEALS BOARD, ALTA. (CAN.) DEP'T OF ENV'T & MINISTRY OF ENV'T, 2003-04 ENVTL. APPEALS BOARD. ANN. REP. 21; *See also* MCKINNEY & HARMON, *supra* note 1, at 242.

²¹⁹ *See, e.g.*, GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 149-50 (1986); *see also* Jonathan Brock, *Mandated Mediation: A Contradiction in Terms*, 14 VILL. ENVTL L.J. 57 (1991) (discussing the features of successful institutionalized dispute-resolution systems); Matthew McKinney, *Designing a Dispute Resolution System for Water Policy and Management*, NEGOT. J. 153, 160-61 (April 1992).

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tremendous need and value to promoting thinking and experiments along these lines. Noting the difficulty of specifying in advance which parties belong at a negotiation table and which ground rules will foster productive work among various combinations of parties, mediation expert Gail Bingham cautions that “much remains to be learned about how to draft statutes that specify general procedures for negotiation, mediation, or arbitration of environmental disputes.”²²⁰ Moreover, she notes, “It is also not clear what effect establishing specific rules has on parties’ incentives to negotiate in good faith or at all.”²²¹ Jonathan Brock concludes that “the design complexity, political controversy, and intersection with existing regulatory and administrative practices makes institutionalizing alternative dispute-resolution mechanisms more difficult than using ADR to resolve individual site-specific disputes.”²²² We also suspect that there is much to learn from international environmental law about the place of mandatory dispute resolution in federal natural-resources and environmental law.²²³

TABLE 1
INTEGRATING INTEREST-BASED STRATEGIES INTO BLM
ENVIRONMENTAL IMPACT STATEMENT-LEVEL
PLANNING EFFORTS

Key Steps	Collaborative Strategies
Prepare to Plan	<ul style="list-style-type: none"> • Consult an facilitator or mediator for coaching, training, and/or team-building • Conduct a situation or conflict assessment • Design the right process, or a public-participation plan, in consultation with citizens • Include resources (time, money, and staff) in the project plan and budgets to support the selected level of participation
Analyze the Management Situation	<ul style="list-style-type: none"> • Jointly name the problem with citizens and stakeholders via one-on-one interviews, groups of like-minded interests, and/or a multi-party group • Foster mutual education by exchanging information • Engage in joint fact-finding

²²⁰ BINGHAM, *supra* note 219, at 53.

²²¹ *Id.*

²²² Brock, *supra* note 219, at 84.

²²³ For a good start on this body of knowledge, see Alfred Rest, *Enhanced Implementation of International Environmental Treaties by Judiciary—Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration*, 1 MACQUARIE J. INT’L & COMPAR. ENVTL. L. 1 (2004).

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Conduct Scoping	<ul style="list-style-type: none"> • Publish a Notice of Intent and provide opportunity for comment • Gather public input and advice via public meetings, open houses, web-based surveys, stakeholder meetings, and existing social networks • Convene a 21st century town meeting • Validate public input and advice via newsletters, web sites, letter to the editor
Develop Planning Criteria	<ul style="list-style-type: none"> • Develop planning criteria in consultation with citizens and stakeholders • Use a single-negotiating text to facilitate the process
Formulate Alternatives	<ul style="list-style-type: none"> • Jointly frame options or choices—either one-on-one, in groups of like-minded interests, and/or a multi-party group • Encourage citizens and other stakeholders to develop and submit their own alternatives • Use stakeholders as a sounding board to ensure that the range of alternatives responds to NEPA issues and unresolved issues
Analyze Effects of Alternatives	<ul style="list-style-type: none"> • Use an independent fact-finder • Convene a technical advisory panel • Engage in joint fact-finding
Select a Preferred Alternative	<ul style="list-style-type: none"> • Use agreed-upon criteria to evaluate alternatives • Negotiate—either unassisted or assisted (with facilitator or mediator) • Conduct a deliberative poll • Convene a citizen jury or study circle • The responsible official may consult stakeholders to confirm the decision and rationale before announcing the selected alternative
Prepare a Draft Resource Management Plan/ Environmental Impact Statement (EIS)	<ul style="list-style-type: none"> • Make sure the process is open and transparent • Adopt a principle of “no surprises”
Publish Draft Resource Management Plan/EIS and Provide 90-day Public Comment Period	<ul style="list-style-type: none"> • Use multiple means to inform and educate people, and to seek their input and advice
Prepare a Proposed Resource Management Plan/Final EIS 30-day Protest Period and 60-day Governor's Consistency Review	<ul style="list-style-type: none"> • Convene a working group of diverse stakeholders to review public comments, clarify dominant themes, validate or revise NEPA issues, and explain the rationale for the final decision • Resolve outstanding issues through negotiation, then mediation, then arbitration
Prepare Record of Decision and Approved Resource Management Plan	<ul style="list-style-type: none"> • Engage in a settlement conference, summary jury trial, or mini-trial during appeals (before litigating)
Implement, Monitor, and Evaluate	<ul style="list-style-type: none"> • Convene a working group to monitor and evaluate implementation, and to suggest appropriate changes to the plan of action • Create partnerships to implement on-the-ground projects

**APPENDIX 1:
ALTERNATIVE STATUTORY MODELS TO PREVENT AND
RESOLVE DISPUTES**

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

A. Consultation

Some federal statutes require federal agencies to enter into “consultation” with one another, and sometimes with states, prior to making final decisions. While the consultation is generally mandatory, the lead agency need not defer to the other agencies or the states, and there is no mechanism to resolve identified differences. Nonetheless, this procedural requirement may serve as an important opportunity for publicizing criticism and concerns and often influences the lead agency’s final decision. According to one commentator, “Consultation is designed to slow down headlong rushes to complete ill-considered projects and to provide an outside opinion on possible consequences for biological resources.”²²⁴ The examples below illustrate the variety of procedural formalities expressed in such consultation requirements.

The Fish and Wildlife Coordination Act of 1934 requires that any federal agency proposing a water impoundment or diversion project (or any private party in need of a federal permit for such a project) must, “with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development,” consult with the U.S. Fish and Wildlife Service, the Department of the Interior, and the appropriate state wildlife official.²²⁵ The lead agency must “give full consideration” to reports and recommendations received through this process, and must incorporate “such justifiable means and measures for wildlife purposes” as the agency determines are necessary “to obtain maximum overall project benefits.”²²⁶

NEPA requires federal agencies to prepare an EIS prior to approving major federal actions that may significantly affect the en-

²²⁴ Robert L. Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 ENVTL. L. 451, 456 (2004).

²²⁵ 16 U.S.C. § 662(a) (2006).

²²⁶ *Id.* § 662(b).

vironment.²²⁷ The statute directs responsible federal officials, prior to preparing the EIS, to “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved,” and further requires that all comments received be made available for public review and be included in all agency review processes.²²⁸ According to one commentator, while the EIS requirement “opened the floodgates for public participation in all aspects of environmental policy,” the consultation mandate is just beginning to be realized as more collaborative approaches to policy development and implementation emerge from “the total policy gridlocks of the 1990s.”²²⁹ A recent report by the National Environmental Conflict Resolution Advisory Committee offers detailed recommendations for incorporating conflict-resolution mechanisms into NEPA implementation.²³⁰

Despite compelling arguments as to contrary congressional intent, courts have interpreted NEPA as essentially a procedural statute, mandating consultation and public disclosure, but not environmentally benign decisions.²³¹ Section 7 of the Endangered Species Act of 1973 is the closest to such a mandate, requiring agencies undertaking actions that may affect a listed or proposed species to consult with Fish and Wildlife or the National Marine Fisheries Service to determine how best to protect the affected populations and their habitat.²³² The consulting agency’s determination must be given substantial weight; the law prevents the action from going forward if the agency determines that there will be “jeopardy” to the listed species and that no reasonable or prudent alternatives to the proposed actions are available.²³³

²²⁷ 42 U.S.C. § 4332(C) (2006).

²²⁸ *Id.* § 4332(C)(v).

²²⁹ Margaret A. Shannon, *Will NEPA be ‘An Agenda for the Future’ or will it Become ‘A Requiem for the Past’?: A Book Review of the National Environmental Policy Act: An Agenda for the Future*, 8 BUFF. ENVTL. L.J. 143, 151 (2000). See *infra* Table 1, for suggestions on more collaborative approaches to implementing NEPA.

²³⁰ U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, ENVIRONMENTAL CONFLICT RESOLUTION ADVISORY COMMITTEE REPORT 46 (2005), available at www.ecr.gov/necrac/reports.htm.

²³¹ *Id.* at 9, 26-27.

²³² 16 U.S.C. § 1536 (2006).

²³³ *Id.* § 1536(b)(3)(A). Such determinations are exceedingly rare: a 1995 study found that only 0.005% of a total of 100,000 consultations yielded jeopardy opinions that halted federal actions. Jeffrey A. Lockwood, *The Intent and Implementation of the Endangered Species Act: A Matter of Scale*, in PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT: SAVING HABITATS, PROTECTING HOMES 73, 73 (Jason

This standard, argued one observer, “added a powerful, substantive bite to the old resource management consultation procedure.”²³⁴ Yet the time, expense, and conflicts engendered in this process have prompted some to call for more cooperative alternatives, such as conservation agreements between private parties and government agencies.²³⁵

B. Consistency

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

For example, the Federal Land Policy and Management Act of 1976 governs the public lands managed by the BLM.²³⁶ The statute directs the agency to ensure that resource-management plans are as consistent as possible with existing officially adopted and approved resource-related plans, policies, or programs of other federal agencies, state agencies, Indian tribes and local governments,²³⁷ and to assist in resolving identified inconsistencies.²³⁸ A state governor who objects to a proposed resource-management plan with such identified inconsistencies may appeal its approval within the BLM, but the agency has no obligation to change its plans to address such issues.²³⁹ There also is no process specified to resolve such disputes other than judicial review of the administrative action in federal court.²⁴⁰ In a legal challenge, the standard of review is “arbitrary and capricious,” so that “the BLM is provided with the ability to ignore state and

F. Shogren ed., 1998) (citing U.S. FISH & WILDLIFE SERV., FACTS ABOUT THE ENDANGERED SPECIES ACT (1995)).

²³⁴ Fischman, *supra* note 224, at 456.

²³⁵ See, e.g., John F. Turner & Jason C. Rylander, *The Private Lands Challenge: Integrating Biodiversity Conservation and Private Property*, in PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT: SAVING HABITATS, PROTECTING HOMES, *supra* note 233, at 92-137 (describing, among other examples, a conservation agreement between Plum Creek Timber, and federal and state officials to allow timber harvest in Montana’s Swan Valley while enhancing grizzly bear habitat, thus preventing the need for a section 7 consultation).

²³⁶ 43 U.S.C. §§ 1701-1782 (2006).

²³⁷ 43 U.S.C. § 1712(c)(9).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See *id.*

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local plans if it can provide a rational basis for doing so.”²⁴¹ As one observer concluded, Congress enacted provisions such as these to encourage federal agencies to be informed by state and local concerns, but it did not intend to compromise the authority of the federal government over these resources.²⁴² As such, the Federal Land Policy and Management Act did not provide any substantive guidance for intergovernmental conflict resolution.

A different model of consistency appears in the Coastal Zone Management Act of 1972 (CZMA), which authorizes states to develop and administer federally funded coastal resource-management plans that meet federal standards.²⁴³ Federal activities in zones covered by approved plans must be conducted in a manner that is, “to the maximum extent practicable” consistent with state-approved plans.²⁴⁴ Private actions requiring federal permits or licenses in these zones require even stricter compliance with state-adopted standards.²⁴⁵ In private cases the state must certify that such actions will be consistent with the coastal-management plan, and essentially have veto power over federally licensed or permitted activities in lands within the zone.²⁴⁶ The federal government, however, retains substantial authority over the scope of state authority,²⁴⁷ and the veto power does not extend to actions on federal lands.²⁴⁸ The CZMA does offer a significant opportunity for state governments to work cooperatively with federal officials in land-use decisions along their coastlines.

C. Intergovernmental Dispute-Resolution Processes

1. The Coastal Zone Management Act

In addition to a process for determining the consistency of state and federal coastal-management plans, the CZMA contains a provision requiring the Secretary of Commerce, with the cooperation of the Executive Office of the President, to “seek to me-

²⁴¹ Jeffrey L. Beyle, *A Comparison of the Federal Consistency Doctrine Under FLPMA and the CZMA*, 9 VA. ENVTL. L.J. 207, 222 (1989).

²⁴² Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands?* 3 HASTINGS W.-NW.J. ENVTL. L. & POL’Y 193, 206 (1996).

²⁴³ 16 U.S.C. §§ 1451-66 (2006).

²⁴⁴ 16 U.S.C. § 1456(c)(1)(A).

²⁴⁵ *See id.* § 1456(c)(3)(A).

²⁴⁶ *See id.*

²⁴⁷ *See, e.g.*, Beyle, *supra* note 241, at 212.

²⁴⁸ *See id.*

diate the differences” between federal agencies and states over development, initial implementation, and administration of coastal-management plans.²⁴⁹ The CZMA does not prescribe the manner of mediation but does require that it include public hearings in affected local areas.²⁵⁰

The CZMA’s implementing regulations provide some additional guidance for this process, although its emphasis is on the voluntary nature of the mediation, stating that “[i]n certain cases, mediation by the Secretary . . . may be an appropriate forum for conflict resolution.”²⁵¹ The parties must first attempt to resolve their own differences, but either party may request “informal assistance” from the Assistant Administrator in the case of serious disagreement.²⁵² If the problem still is not resolved, either party may submit a written request for the Secretary to engage in mediation.²⁵³ This mediation process “shall last only so long as the parties agree to participate,”²⁵⁴ and shall terminate if either party withdraws, or if the process extends beyond fifteen days and the parties do not agree to an extension.²⁵⁵ Perhaps most significantly, the regulations make clear that state or federal agency parties may choose whether to participate in this process, providing that “judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process” provided by law.²⁵⁶ In other words, the only mandatory aspect of the mediation process provided in the CZMA is the obligation of the Secretary of Commerce to make it available to state and federal governmental bodies experiencing a serious disagreement.

2. *The Clean Water Act*

The closest parallel to CAA section 164(e) appears in the CWA’s provision for recognizing the sovereign authority of Indian tribes.²⁵⁷ In addition to requiring the EPA to promulgate regulations specifying how the Agency will treat tribes as the

²⁴⁹ 16 U.S.C. § 1456(h).

²⁵⁰ *Id.*

²⁵¹ 15 C.F.R. § 923.54(a) (2006).

²⁵² *Id.* § 923.54(b).

²⁵³ *Id.* § 923.54(c).

²⁵⁴ *Id.* § 923.54(d).

²⁵⁵ *Id.* § 923.54(e).

²⁵⁶ *Id.* § 923.54(f).

²⁵⁷ 33 U.S.C. § 1377(e)(2006).

equivalent of states for implementation of the CWA, section 518(e) provides that:

The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.²⁵⁸

In regulations adopted pursuant to this statute, the EPA outlined a detailed process for invoking a dispute-resolution mechanism.²⁵⁹ Either the state or a tribe may request that the EPA resolve such a dispute, but the parties must explain the steps they have taken to resolve it before involving the Agency.²⁶⁰ The EPA's regional administrator then must notify interested individuals and groups²⁶¹ and has the discretion to "include an NPDES permittee, citizen, citizen group, or other affected entity."²⁶² The regulations authorize the EPA to use (in descending order of preference) mediation, arbitration, and a "default procedure" in which the EPA makes a recommendation to resolve the dispute.²⁶³

Most importantly, although the statute appears to give the EPA broad authority to resolve disputes if mediation or arbitration fails, the Agency declined this role, explaining in its rulemaking comments, "the default procedure is simply the Agency reviewing available information and issuing a recommendation for resolving the dispute. The EPA's recommendation in this situation would have no enforceable impact."²⁶⁴ The legislative history does not demonstrate conclusively that Congress intended the EPA to resolve disputes under the CWA in the same fashion as under the CAA, but one commentator who studied

²⁵⁸ *Id.* § 1377(e)(3). This is sometimes referred to as the "Tribes as States" provision. See Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area; Dispute Resolution, 61 Fed. Reg. 56,450, 56,455 (Nov. 1, 1996).

²⁵⁹ See 40 C.F.R. § 131.7 (2006). These are far more detailed provisions than have been adopted to guide implementation of CAA section 164(e).

²⁶⁰ *Id.* § 131.7(e)(2).

²⁶¹ *Id.* § 131.7(d).

²⁶² *Id.* § 131.7(g)(2).

²⁶³ *Id.* § 131.7(f). For a similar dispute-resolution system, see the Yellowstone River Compact Commission, described in MCKINNEY & HARMON, *supra* note 1, at 243-44.

²⁶⁴ Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,888 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

the record concluded that the CWA “can also support a reading that Congress intended to authorize a stronger role” than that provided by section 164(e) of the CAA.²⁶⁵ Regardless, “the Agency has consistently taken the position that it cannot resolve disputes over the objections of parties.”²⁶⁶ Another commentator suggested that the EPA’s reluctance to make binding decisions in such cases argues in favor of state-tribal compacts to resolve water-quality disputes.²⁶⁷

Despite these differing interpretations of statutory authority, the Agency’s experience implementing the CWA section 518(e) dispute-resolution mechanism is instructive for our analysis of CAA section 164(e). For example, we discussed earlier unresolved questions concerning which parties should participate in a 164(e) negotiation process.²⁶⁸ In a 1996 decision, the Tenth Circuit Court of Appeals upheld the EPA’s interpretation of CWA section 518(e) when the City of Albuquerque objected to the Agency’s requirement that only states or tribes could initiate the process.²⁶⁹ The Tenth Circuit Court of Appeals reasoned:

The need for a dispute resolution mechanism to resolve unreasonable consequences stems from the possibility that two sovereigns—a state and a tribe—may impose different water quality standards on a common body of water. It is reasonable, therefore, to allow only those two sovereigns to initiate the dispute resolution process to resolve their differences rather than to include affected permittees such as Albuquerque. As successfully occurred through the negotiated settlement in this case, the dispute resolution mechanism allows the state and tribe to invite third parties to participate.²⁷⁰

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

²⁶⁵ Denise D. Fort, *State and Tribal Water Quality Standards Under the Clean Water Act: A Case Study*, 35 NAT. RESOURCES. J. 771, 792 (1995).

²⁶⁶ *Id.* at 792 n.109.

²⁶⁷ Robin Kundis Craig, *Borders and Discharges: Regulation of Tribal Activities Under the Clean Water Act in States with NPDES Program Authority*, 16 UCLA J. ENVTL. L. & POL’Y 1, 2 (1997-98).

²⁶⁸ See *infra* Part II.B.

²⁶⁹ *Albuquerque v. Browner*, 97 F.3d 415, 429 (10th Cir. 1996).

²⁷⁰ *Id.* at 427.

3. *The Healthy Forests Restoration Act of 2003*

The Healthy Forests Restoration Act of 2003 included several sections aimed at encouraging federal agencies to engage in collaborative processes in planning, prioritizing, and implementing hazardous-fuel-reduction projects.²⁷¹ For example, the Act requires the U.S. Forest Service and the BLM to give priority to recommendations contained in “community wildfire protection plans,” which must be developed through collaborative processes involving local governments, local fire agencies, and state forestry agencies, and in consultation with stakeholders and FLMs.²⁷²

In a separate section concerning environmental analysis, Congress directed federal agencies to encourage meaningful public participation by facilitating “collaboration among State and local governments and Indian tribes, and participation of interested persons, during the preparation of each authorized fuel-reduction project.”²⁷³

Similar language in previously enacted public-land-management legislation mandates collaborative processes.²⁷⁴ Accordingly, the federal resource-management agencies have incorporated statements encouraging collaboration into their implementing regulations and operational manuals.²⁷⁵ It is clear that a shift in agency practice is underway, with an attempt to

²⁷¹ See Pub. L. No. 108-148, 117 Stat. 1887 (2003) (codified at 16 U.S.C. §§ 6511-6591 (2006)).

²⁷² 16 U.S.C. § 6511(3)(A).

²⁷³ 16 U.S.C. § 6514(f).

²⁷⁴ See, e.g., Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. 106-393, § 205 114 Stat. 1607 (2000). The Act established Resource Advisory Committees as the primary means of funding special projects through federal payments to support counties, and required the provision of “early and continuous coordination with appropriate land management agency officials.” *Id.* § 205(b)(3). The Act also required the provision of “frequent opportunities for citizens, organizations, tribes, land management agencies, and other interested parties to participate openly and meaningfully, beginning at the early stages of the project development process.” *Id.* § 205(b)(4).

²⁷⁵ See, e.g., U.S. FOREST SERVICE, FOREST SERVICE HANDBOOK 2409.19, RENEWABLE RESOURCES HANDBOOK, CHAPTER 60, STEWARDSHIP CONTRACTING § 61.12(a) at 21 (2005), available at <http://www.fs.fed.us/forestmanagement/projects/stewardship/direction/index.shtml>. This chapter includes a list of “Principles of Collaboration,” which include: (1) identify and involve relevant stakeholders, (2) design a strategy to conduct an open, inclusive, and transparent process, and (3) plan for implementation and evaluation as part of the collaborative effort.” *Id.*

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engage affected parties earlier in the process and thus forestall the need for conflict resolution later.²⁷⁶

²⁷⁶ For an excellent analysis of both the benefits and limitations of collaboration in addressing public-land conflicts, see Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 469-76 (2006).

