

Alternative Dispute Resolution Committee Newsletter

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INTRODUCTION TO THE NEWSLETTER

In this issue of the Alternative Dispute Resolution (ADR) Committee Newsletter, we feature five articles on a number of cutting-edge issues in the ADR field. Three of the articles address collaborative decision making. The first article, "A Collaborative Governance Approach to Developing Wind Policies and Siting Turbines," by Sean Nolon, discusses participatory planning, negotiated rulemaking, and siting negotiations in the context of wind development, and suggests that more collaborative processes can produce more effective decisions and fewer adverse impacts. In "Managing Climate Change Through Land Use: Creating the Human Infrastructure for Collaborative Decision Making at the Local Level," Jessica Bacher and Tiffany Zezula discuss the importance of increasing capacity for consensus building in local government decision making. The authors consider the benefits of consensus building in the context of local land use planning related to climate change. In "Case Study of a Public-Private Collaboration: The Missouri River Recovery Implementation Committee," John E. Thorson, retired administrative law judge and immediate past chair of the MRRIC, addresses the urgent and daunting environmental management problem of balancing the many competing uses of the Missouri River, including navigation, recreation, irrigation, habitat preservation, and flood prevention. His article describes the promising efforts of a congressionally authorized seventy-member public-private collaborative committee to devise a process for deliberation and achieve consensus on substantive recommendations for river management.

The two remaining articles address issues of discovery, confidentiality, and communications during ADR processes. "Preventing Discovery from Frustrating the Time and Cost Advantages of Arbitration," by Michael C. Dotten, addresses the problem of excessive discovery in arbitration proceedings. The author suggests a number of options for arbitrators and parties to consider in drafting the arbitration agreement that can reduce the burden of excessive discovery. The last article, "Recent Circuit Court Decision Reaffirms Confidentiality of ADR," by David Batson, discusses a recent Ninth Circuit decision, *Facebook v. ConnectU, Inc.*, which addressed the confidentiality of communications in mediation.

Carl H. Helmstetter and Joseph A. Siegel
Newsletter Vice Chairs
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Carl H. Helmstetter and
Joseph A. Siegel, Co-Editors**

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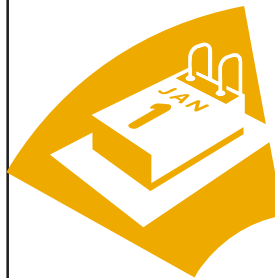
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A COLLABORATIVE GOVERNANCE APPROACH TO DEVELOPING WIND POLICIES AND SITING TURBINES

Sean F. Nolon

Wind farm projects are increasingly facing robust citizen opposition. This resistance has many in government and the wind industry scrambling to find new ways to handle approval processes. While there is little empirical data on the impact of citizen opposition on the siting process, several high-profile cases have captured the media's attention and heightened the desire for improved siting procedures. Collaborative processes have long been suggested to accomplish this improvement. However, years of experience suggest that these processes must be used further upstream to help set state and regional policies about how and where wind turbines can be built in order to improve downstream siting processes. What we need is a federal structure of incentives that will kick-start statewide wind policies created with citizens' input and that support negotiation at the siting stage. By involving citizens effectively at the policy and siting level, the hope is that wind turbine siting decisions will make more sense and produce fewer adverse impacts.

The three collaborative practices that can be used on this upstream-to-downstream continuum to create an implementable wind energy policy are *participatory planning*, *negotiated rulemaking*, and *siting negotiations*. Participatory planning can be used at the state level to poll a large representative group of citizens to identify their priorities on appropriate locations for wind turbines, the amount of wind power desired, and the rate at which fossil fuel use should be phased out. Negotiated rulemaking, also at the state level, can be used to reach agreement among discrete stakeholders on model ordinances, recommended lease provisions, compensation mechanisms, appropriate mitigation measures, and decommissioning provisions. Finally, siting negotiations can be used to ensure that the siting process for approving individual turbines is tailored to local conditions.

1. Participatory Planning

Participatory planning refers to practices that engage citizens to serve a central advisory role in making important and often complicated policy decisions that do not require specified technical experience or

knowledge. These practices have been used to provide valuable information about how to manage financial resources, set energy priorities, manage natural resources, and enable disadvantaged populations to assess their current circumstances. Some of the labels for these techniques include participatory planning, citizen juries, deliberative polling, participatory budgeting, citizen boards, and advisory committees.

As compared to negotiated rulemaking, participatory planning approaches are not used to reach agreement among a discrete group of stakeholders, but to identify priorities among broad swaths of the community. These approaches can be used to identify appropriate areas for wind turbines, the amount of wind energy desired, and if desired, the amount of fossil fuels to be reduced. In fact, deliberative polling—a popular form of participatory planning—has already been used in Texas to gauge the public's interest in building out the renewable energy infrastructure.

2. Negotiated Rulemaking

Negotiated rulemaking, also known as “reg-neg,” is generally defined as a supplemental process in which representatives from agencies and affected interest groups negotiate the terms of a proposed administrative rule. Historically, it has been used at the federal and state levels of government, but it has applicability at the local level as well. The Negotiated Rulemaking Act of 1990 provides the basic structure for agencies to design and implement appropriate processes. Negotiated rulemaking was seen as a way to deal with what seemed like a never-ending cycle of regulations being adopted and then being overturned after years of legal appeals. Instead of being limited to the minimal process required for promulgating rules with notice, public comment, and publication of a rule that would then be subject to a lawsuit, many agencies supplemented this required process to get input earlier. In developing wind policies, reg-neg can be used to develop model ordinances, required lease provisions, compensation mechanisms, and decommissioning of turbines.

Reg-neg aims to bring interested parties to the table before the rule has been drafted and before the required regulatory approval process, to see if the affected parties can reach agreement. By setting up a negotiating forum before drafting the rule, the agency

can engage those who are most likely to be affected by (and most likely to challenge) a rule. The nature of this negotiation is drastically different than the nature of the formal rulemaking process because the parties have an opportunity to talk to each other instead of directing all comments through the agency. They can share information about what is important to them and what is not. They are free to collectively explore and evaluate different regulatory possibilities. If all the parties can reach agreement, then the text of their rule becomes the proposed rule that is then subject to the required regulatory process.

The benefits of reg-neg include greater access to key information, ability to rank and trade off interests to maximize value, and opportunities to interact with and educate other stakeholders and bureaucrats. The regulatory negotiation process also facilitates more informed, workable, and pragmatic rules than traditional rulemaking provides. Studies have identified the following benefits: more interaction builds relationships and increases commitment to a successful result; reg-neg is a powerful vehicle for learning; and a majority of participants consider their contributions to have major or moderate impact on the outcome.

3. Facility Siting Negotiations

In addition to citizen engagement in policy development, a successful turbine siting policy must include opportunities for citizens to participate in siting decisions. This level of involvement is necessary so that mitigations are tailored to meet local conditions and should take the form of pre-application negotiation. To be successful, such negotiations should create a cooperative environment that is designed to build relationships, enhance communication, share information, and generate solutions.

Creative solutions are needed to successfully mitigate the adverse impacts of turbines. The adversarial climate created by the typical approval process creates a structural barrier to identifying creative solutions. Processes that demand adversarial interactions, like the required decision making process, create barriers to creative solutions.

The types of issues that are appropriate to negotiate in the siting context include mitigation of adverse impacts on biodiversity, water quality, noise and aesthetics, compensation for lost property value and nuisance, monitoring, and decommissioning of facilities once out of use. Monitoring (of construction, operation, and decommissioning) and compensation are held out as the most influential issues from the perspective of the community. Surveys of local communities reveal that provisions to include citizens in the design and monitoring of industrial facilities are highly persuasive at changing perspectives from neutral to favorable.

These negotiations should follow a basic structure that starts with gathering information, identifying interests, generating options, evaluating those options, and then implementing any agreement that is reached. Ideally, one party should be designated as a process manager to shepherd the negotiation through this structure. In substantively complex negotiations where relationships are strained, the parties should strongly consider using a process manager who is a neutral party with skills in mediation and facilitation. These negotiations should not be seen as a substitute for the required decision making process. They should be used before the required process begins, or early on, as a way to negotiate a concept that will meet as many interests as possible. That concept can then be converted into an application and submitted to the appropriate decision making body. In this way, the siting negotiations are intended to supplement the required decision making process.

Sean F. Nolon is the director of dispute resolution and associate professor of law at Vermont Law School. For more information on this framework, please see “Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines,” in the Spring 2011 edition of the *Cardozo Journal of Dispute Resolution*, available at <http://papers.ssrn.com/abstract=1272653>

MANAGING CLIMATE CHANGE THROUGH LAND USE: CREATING THE HUMAN INFRASTRUCTURE FOR COLLABORATIVE DECISION MAKING AT THE LOCAL LEVEL

Jessica A. Bacher and Tiffany B. Zezula

According to the U.S. Census Bureau, the nation's population will increase by 100 million people, or 40 million households, by the year 2039. This growth, when combined with the need to replace deteriorated residential, commercial, and industrial buildings, will lead to the construction of 93 million new homes and 137 billion square feet of nonresidential space by midcentury. Nearly two-thirds of buildings on the ground by 2050 will be built between now and 2039.

With this expected development comes the potential to contribute significantly to or mitigate climate change. Since local governments have been given the legal authority to determine where and how buildings will be built, local land use planning and legal reform are central to managing the growing problem of climate change. Those charged with making these decisions—local elected officials, land use board members, and citizen leaders—must be equipped with the necessary legal and collaborative decision making skills to manage land development over the next few critical decades. The need for decision makers to be knowledgeable about consensus-building techniques will be necessary to implement many of the land use techniques central to managing climate change.

Mitigation Through Land Use Control

Although Americans have preferred single-family homes for the past several decades, market projections indicate that the new 40 million households will orient toward more dynamic, walkable neighborhoods in cities and urban suburbs. This anticipated preference enables the implementation of a land use strategy in which local governments can use their existing authority to regulate land use and building in order to shift toward more compact, dense, and mixed-use development.

Through zoning and planning, local governments can create the blueprint for transportation-efficient

communities that allow for mixed uses, a variety of housing types, smaller, more energy-efficient homes, sidewalks, trails, bike paths, and future transit services. In more urban areas, local governments can zone and plan for higher urban density around transit stops, a density that would create transit-oriented green development that both limits parking and drive-through uses and promotes bicycle and pedestrian traffic through sidewalk and bikeway connections. With their power to plan and regulate, local governments have been crucibles of change to alleviate and adapt to serious social problems. Fortunately, local governments have the authority to create new land use patterns that mitigate global warming. What local leaders may need assistance with, however, is building the capacity to react collaboratively. As more complex and innovative land use strategies are needed, it becomes even more important for decision makers to be equipped with the necessary legal and consensus-building skills to build this capacity.

Capacity Building and Training for Land Use Decision Makers

Without the proper support and groundwork of understanding and knowledge regarding the issues previously discussed, local governments are not able to accomplish their land use goals. In many communities, land use decisions have become a battleground that polarizes neighbors, frustrates developers, and paralyzes local officials. Land use issues are becoming increasingly complicated, and it is often difficult for public officials to balance the contending forces of environmental protection, economic and sustainable development, and preservation of community character. Lawyers understand that the decision making process can be critical when trying to gain public support for such decisions and when done collaboratively, this process can help increase public support for decisions that are necessary to the community's future. To manage climate change through land use strategies, the decision makers and stakeholders involved must have not only the substantive knowledge and understanding of effective land use strategies but also the capacity to build consensus around these strategies. Decision makers must create collaborative forums to ensure that all stakeholders are convened and engaged in the

process. Therefore, equipping and training local decision makers on the land use and collaborative decision making tools and techniques is necessary to implement effective reform toward climate change management.

In 1995, Pace Law School's Land Use Law Center created a forum for both education and conversation on land use law techniques and collaborative decision making in a program called the Land Use Leadership Alliance Training Program (LULA). The LULA program began in New York's Hudson River Valley, but has since been transferred to Connecticut, New Jersey, Pennsylvania, and Utah. Since 1995, the center has trained and assisted thousands of local land use leaders with land use and collaborative decision making skills and techniques. The center has closely examined the challenges, influences and processes of local land use reform and innovation and, by interacting with these leaders, has discovered how climate change management can occur through the utilization of positive land use techniques and collaborative leadership skills.

The LULA program was created to build capacity for change among local land use leaders. Each training session brings together 40 local leaders for a four-day training experience. The individuals come from varying backgrounds, hold diverse positions in communities, and reflect many differing perspectives on how the land should be used. Developers, real estate agents, mayors, supervisors, planning and zoning officials, citizen advocates, business leaders, environmentalists, housing advocates, and the lawyers and professionals that serve them, all take part in the program.

The LULA program explicitly relies on peer-to-peer interaction as the most effective approach to innovation in land use. The LULA program's design is based on well-known sociologist Everett Rogers' "diffusion of innovation" theory. New patterns of development, building and site design, and local environmental laws offer alternatives to sprawl; these alternatives are "innovations" that improve on the land use system. New laws and practices that accomplish sustainable development demonstrate remarkable adaptation to contemporary needs and the challenges faced by climate change. Moreover, when innovations are

adopted and a community improves on the pattern of land development, other communities only benefit if they learn about, and act on the new approach themselves.

Under Rogers' approach, the local process of change is led by individuals called "early adopters" or "champions of change" who are broadly respected, practical, and innovative. These leaders have the power, charisma, and interpersonal skills needed to overcome inevitable indifference and resistance and are the ones able to make change occur. These leaders, more importantly, understand the interests and concerns of others, and they are effective negotiators and facilitators of the community decision making process. "Early adopters" and "champions of change" are the types of leaders who are invited to participate in the LULA program through its intense and deliberate recruitment process. Arming these individuals with legal and procedural tools catalyzes effective change in land use and climate change mitigation.

The primary objective of the LULA program is to foster the understanding that solutions to complex, persistent problems can be reached through authentically collaborative initiatives. The program asserts that collaborative decision making frequently results in better outcomes than those reached by the typical adversarial process used in the land use system. The curriculum begins with an exploration of the traditional land use decision making process, which tends to involve the public only at the end. The effect of this approach is that the public feels excluded from important stages and is likely to take adversarial positions as a result. The traditional process does not effectively solicit opinions and limits information exchange, so conflict becomes a natural result. The LULA program participants explore how to anticipate and manage this conflict and work in ways that keep relationships intact and achieve viable land use decisions.

The program also explores the idea that leaders should think collaboratively during planning and legal reform. The curriculum includes strategies to increase public participation, input, and interaction during the traditional legal process. If members of the public have ownership of a problem and are involved in its

resolution, then they are more likely to find themselves responsible for the ultimate decision. The key to the LULA program's success is teaching participants the language, skills, and tools that mediators and facilitators use in order to engage in a more collaborative process.

The LULA program creates an environment that is conducive to creative thinking, problem solving, and conversation. Every session is designed to model this behavior so that leaders can create forums in their own communities to substitute for the fragmented and somewhat adversarial conversations that normally occur. As one of the LULA graduates concluded, "When I came into this program, I was exhausted from fighting brush fires over land use controversies and ready to resign. Now, because of what I have learned here, I am excited to return to my community and reinvent democracy there."

As the need for managing climate change develops, and the role of the land use system emerges, there will be an ever-increasing need for decision makers to be knowledgeable about consensus-building techniques.


The LULA program is just an example of how to create the human infrastructure to better utilize the land use system for managing climate change.

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CASE STUDY OF A PUBLIC-PRIVATE COLLABORATION: THE MISSOURI RIVER RECOVERY IMPLEMENTATION COMMITTEE

John E. Thorson

The Missouri River is synonymous with western history. From its mouth near Saint Louis to its headwaters west of Bozeman, Montana, America's longest river evokes the legends of Lewis and Clark, Sacagawea, steamboats, epic floods, and monumental dams. Congressional passage of the 1944 Pick-Sloan Plan initiated decades of dam construction, flood control, and navigation improvements on the river. The flood control features have been especially tested during spring 2011. June was the highest month of runoff in the basin since 1898, resulting in the inundation of land and communities along the river and its tributaries.

The Missouri has also been the venue for waves of litigation and conflict—somewhat ironic given the generally plentiful river. For example, the U.S. Army Corps of Engineer's (USACE's) revision of the Master Water Control Manual for operating main-stem reservoirs on the river, commenced in 1989, took 15 years to complete in the face of controversy and extensive litigation over how the many users of the river would be affected.

In the aftermath of this conflict, a committee oddly known as the MRRIC, is pioneering new approaches for resolving conflicts involving large river systems. The Missouri River Recovery Implementation Committee—MRRIC—is a 70-member assembly of sovereign and stakeholder representatives who are working collaboratively on pressing river issues.

River of Controversy

For all its force and bounty, the Missouri faces a suite of problems challenging decision makers. The USACE is increasingly challenged in managing six main-stem dams, constructed in the 1930s and following decades, in our contemporary era of environmental consciousness and changed economics. Water levels can rapidly fluctuate both in the upper basin reservoirs

and the lower river, complicating water intakes and other commercial uses as well as bird nesting patterns. Scientists and others are concerned about how dams and navigation channels have changed the sedimentation patterns in the river. The list goes on and on.

During the master manual revision (1989–2004), all sides criticized the USACE. The requirements of biological opinions issued in 2000 and 2003 by the U.S. Fish and Wildlife Service (FWS) to protect the listed species limited the USACE's range of options, and the agency was challenged to find the right mix of flows and storage to satisfy all interests. During summer 2003, the USACE was defendant in six lawsuits filed in different federal courts. When the agency was able to issue its master manual in 2004, it committed to a different approach to future decision making. In signing the record of decision, Brigadier General William T. Grisoli pledged that river restoration actions “will be identified, reviewed, modified, and implemented through coordination with a Missouri River Recovery Implementation Committee, which will include stakeholder representation. . . .”

Advent of MRRIC

To advance the MRRIC concept, the U.S. Institute for Environmental Conflict Resolution (an impartial federal entity located in Tucson, Ariz., providing conflict resolution services; <http://www.ecr.gov/>) worked with the USACE and other federal agencies (which continue to work together as a federal working group) and stakeholders to commission a situation assessment performed by CDR Associates of Boulder, Colorado. In its 2006 report, CDR provided a detailed concept of how the MRRIC might be created and what it might accomplish (<http://projects.ecr.gov/moriver/pdf/FINAL-SARTR.pdf>).

The USACE and other federal agencies active in the Missouri River basin asked the institute to convene a planning group of sovereign and stakeholder representatives to draft a proposed charter for the MRRIC. The planning group consisted of a drafting team that met ten times during 2007–2008 to develop charter language and a review team that critiqued the drafts. During this period, Congress passed the Water

Resources Development Act of 2007 (WRDA 2007); section 5018 of the legislation authorized the establishment of the MRRIC. On July 1, 2008, the drafting team presented John P. Woodley Jr., assistant secretary of the army (civil works), with a proposed charter (<http://projects.ecr.gov/moriver/pdf/MRRICCharterFINAL1Jul2008.pdf>), which he approved that day.

The MRRIC does not make management decisions for the Missouri River. The charter specifies that the MRRIC's purposes are primarily to provide *guidance and recommendations* to the USACE and other federal agencies on (1) the ongoing Missouri River mitigation and recovery plan (with annual expenditures of between \$50 and \$85 million), and (2) the long-term (50-year) Missouri River Ecosystem Restoration Plan (MRERP). MRRIC members are encouraged to articulate their perspectives and flag when policies might negatively impact their interests.

The MRRIC charter establishes a committee with state, tribal, federal, and stakeholder representation. The eight main-stem states may appoint members and all have done so. All 28 basin tribes are authorized to appoint representatives and 18 have done so. The USACE and FWS are standing lead federal agencies and 13 other federal agencies are represented as participating federal agencies. Federal agencies are not counted for quorums or consensus determinations.

Sixteen stakeholder categories (e.g., navigation, irrigation, environmental/conservation) are identified in the charter and a total of 28 MRRIC members are selected from these categories. State, tribal, and federal agencies appoint their own representatives and alternates. Stakeholder representatives are appointed by the commander, USACE Northwestern Division, based on applications and demonstrated support from stakeholder organizations. The MRRIC selects its chair and vice chair (Michael Mac, retired U.S. Geological Survey official, was selected in May as the MRRIC's second chair). A talented team from RESOLVE, a nonprofit firm dedicated to the use of consensus building in public decision making, facilitates meetings and conference calls. The U.S. Institute continues to provide overall assistance.

The MRRIC's most distinctive feature is the consensus requirement. For a substantive recommendation to be adopted, state, tribal, and stakeholder representatives must support or "be able to live with" the recommendation.

While MRRIC decision making can be tedious, the committee was able to reach consensus on many important subjects in its first three years. They include:

- adopting internal operating procedures and ground rules and establishing a series of specialized work groups allowing the MRRIC to work efficiently;
- selecting committee leadership and a facilitation team;
- developing multifaceted ways to engage with federal agencies on a wide range of concerns including a partnered independent science program, the ongoing recovery program, and the USACE's long-term restoration plan (MRERP);
- developing a comprehensive set of social, economic, cultural, and tribal values associated with the river, articulated by individual members, that should be considered by the USACE in its long-term planning;
- approving recommendations to federal agencies addressing the endangered pallid sturgeon, bird habitat, annual recovery program expenditures, and the purpose and need for the MRERP study; and
- commissioning a newly formed independent science advisory panel to study the scientific efficacy of the controversial "spring rise," the release of water (under certain conditions) to mimic spring natural flows with anticipated benefits for the listed species. Other issues will be referred to the panel in future years.

Recent Work and Challenges

The MRRIC met six times during 2009, its first full year of operations, and four times during 2010. Two meetings have been held in 2011 (plus a video telephone conference) but the MRRIC's July meeting was cancelled due to flooding conditions. The committee met again in Denver October 18–20.

A typical MRRIC meeting is preceded with optional field trips or other educational activities on the Monday preceding the meeting. Official MRRIC meetings usually run from Tuesday morning to Thursday noon and the agenda consists of information sessions, business sessions, and work group meetings. Work groups, whose members also participate in two or three conference calls (each call usually lasting 90 minutes) between each MRRIC meeting, conduct much of the committee's work. Work groups have been formed on the ongoing recovery program, the MRERP, integrated science, communications, procedures, and agenda development. A special subcommittee on tribal participation has been established to emphasize tribal issues and explore ways to increase tribal involvement in the MRRIC.

Insights for Multiparty Facilitation

With its large and diverse membership and complex mission, the MRRIC provides an important ongoing opportunity to assess what works or does not work in multiparty facilitation. The following are some preliminary insights:

Consensus is a difficult decision rule—The MRRIC's charter requires that members in attendance reach consensus at two consecutive meetings on substantive recommendations to the USACE and other federal agencies. The consensus requirement provides opportunities for members to vet pending recommendations with constituents, prevents a tyranny of the majority, and ensures broad support for approved measures.

To achieve consensus among all stakeholders and state-tribal representatives (federal representatives do not vote) is, to say the least, tough. The possibility of impasse always looms. The MRRIC members are increasingly proficient in communicating their interests, listening, brainstorming alternatives, and agreeing on practical solutions. The MRRIC's work group processes help anticipate problems and allow time to achieve accommodations. When impasse has developed in plenary sessions, we've delayed final consideration to allow sidebars and further negotiations. Also, peer pressure is persuasive; it is

very uncomfortable to be the only person saying "no" in a 70-member group.

Good facilitators are priceless—The MRRIC has been fortunate to have some of the best, both from the institute and RESOLVE. Bringing vast experience in multiparty facilitation, they have helped to give form to this new enterprise. They help to carefully plan, moderate, and document every meeting and call. Still, they struggle to continually assure members, in an evenhanded manner, that their concerns and views are important.

Technology is indispensable—We have employed an array of technology to expedite our work, e.g., e-mail, conference calls, webinars, web conferencing (Adobe Connect), members-only Web site, and video telephone conferences. Prior to their MRRIC service, many members had little experience with these technologies, and we have provided necessary training. Generally, members have become comfortable with this new way of doing business.

Collaborators must often invent intermediate procedures—The MRRIC's charter is a well-crafted document but, like a constitution, does not answer all the procedural issues that arise as the MRRIC goes about its work. Because the committee is new and different, no precedent exists to answer questions like "What is the role of federal agency staff in the work groups?" or "Do we need unanimity or majority vote to move a proposal from a work group to MRRIC?" This "brave new world" of collaboration lacks the authoritative answers to such process questions as provided in the past by *Robert's Rules of Order*.

Collaboration, on this scale, is an expensive undertaking—Federal agencies annually spend about \$1.7 million in direct support of the MRRIC plus a considerable amount more in staff time and travel.

The federal legislation establishing the MRRIC (WRDA 2007) bars any compensation for nonfederal members' service—or even reimbursement of their travel expenses. This legislation, particularly the travel reimbursement ban, makes the MRRIC participation costly for all members and is particularly burdensome

during the recession. A 2009 survey estimated that nonfederal members collectively spent more than 10,000 hours on committee activities (conservatively valued at \$253,000) during the first year of operations and incurred more than \$180,000 in travel expenses to meetings—a total of \$433,000.

If productive, the MRRIC will continue at least during the preparation of the long-term MRERP—a planning exercise now scheduled for 2020–2021 completion. By that time, American taxpayers and MRRIC members will have spent a vast amount on this new approach to problem solving in the Missouri River basin. MRRIC proponents believe the investment will be justified by improved decision making and the avoidance of even more expensive litigation.

Corps of Recovery

A MRRIC member, Randy Asbury, has noted, we are a “Corps of Recovery,” restoring both our personal relationships with one another and our relationship to the river. Yet, the MRRIC’s crucial challenges are ahead—especially in meeting the needs of the pallid sturgeon, least tern, and piping plover while minimizing disruptions to the multitude of economic and cultural uses now also dependent on the river. As the result of the 2011 floods, many basin residents will call for a fundamental reexamination of how the river is managed, and these efforts will make it more difficult for the MRRIC to focus only on species recovery and ecosystem restoration.

The MRRIC remains the foremost gathering of stakeholder and governmental representatives from all parts of the basin. The members are well informed on the issues and, as a result of meetings throughout the basin, have a better understanding of the range of interests and complexity of issues than do most governors or members of Congress. MRRIC members also have the experience of working through problems together and have developed more trust for one another. If the recent floods force the need to more fundamentally reexamine Missouri River management, the MRRIC, which has already demonstrated its utility as a productive collaborative forum, may be the right approach.

The MRRIC’s Web site is www.mrric.org and the committee’s charter and annual report may be found under the “MRRIC Documents” tab. More information on the MRERP may be found at www.mrerp.org. Judge Thorson’s original article is at http://apps.americanbar.org/enviro/committees/waterresources/newsletter/sept10/WaterRes_Sept10.pdf.

John Thorson, a retired judge and former chair of the ABA Water Resources Committee, was co-chair of the MRRIC charter drafting process (2007–2008) and chair of the MRRIC (2009–2011). The opinions expressed in this article are his and do not represent the view of the MRRIC or necessarily of any member. © 2011. Permission granted by John E. Thorson.



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PREVENTING DISCOVERY FROM FRUSTRATING THE TIME AND COST ADVANTAGES OF ARBITRATION

Michael C. Dotten

As arbitration proceedings come more and more to resemble litigation in both time and expense, many lawyers and clients are starting to ask the obvious question, why arbitrate? Of course arbitration can be useful to achieve confidentiality and to assure knowledgeable triers of fact and law better than a trial in a court of general jurisdiction can. This article focuses on the increasing amount of discovery taking place in arbitration proceedings. It suggests some techniques for arbitrators (and the parties) to achieve the benefits of confidentiality and knowledgeable deciders while reducing the adverse impacts of excessive discovery in arbitrations.

Arbitration agreements are simply contracts that both the arbitrators and the courts will enforce. The Supreme Court recently expressed its views on the obligation of courts to honor the parties' arbitration agreements as contract provisions:

We have described this provision [9 U.S.C. §2] as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone, supra*, at 24, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. ____ , ____ (2010) (slip op., at 3). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440, 443 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989).

AT&T Mobility LLC v. Concepcion, slip op. (April 27, 2011) 4-5, 563 U. S. ____ (2011).

Accordingly, in the first instance, the parties have control over the amount of discovery that will take place through the selection of their arbitration clauses in the underlying agreements. Parties are increasingly adding clauses to the dispute resolution provisions of

contracts that call for the application of the Federal Rules of Civil Procedure (FRCP) (or sometimes state rules) to govern discovery in arbitrations. This is increasingly taking place even in energy and environmental agreements that may have been preceded by administrative proceedings where large records have already been developed incorporating the relevant facts that ultimately may be involved in the arbitration. The provisions are also often used in contracts even where the most likely disputes will be confined to questions of contract interpretation. Such disputes could, absent the requirement for broad discovery, be resolved by something akin to cross-motions for summary judgment.

One provision I recently encountered incorporated the usual clause "any dispute under this Agreement shall be subject to binding arbitration conducted under the commercial arbitration rules of the American Arbitration Association" (AAA Commercial Rules). But then the agreement also provided as follows:

During any arbitration conducted pursuant to this Article, the Parties shall have the discovery rights provided in the FRCP.

Incorporating FRCP discovery rules into the arbitration clause poses a real problem for any arbitrator. In the absence of such a provision, the AAA Commercial Rules would limit discovery:

Exchange of Information

- (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
 - i) the production of documents and other information, and
 - ii) the identification of any witnesses to be called.
- (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

AAA Commercial Rules at R-21.

The “exchange of information” under the AAA rules only takes place “at the request of any party or at the discretion of the arbitrator.” In large complex commercial disputes under the AAA rules, the preliminary hearing must include discussion of “the extent to which discovery shall be conducted.” On the other hand, saying that “the Parties shall have the discovery rights provided in the FRCP” means that, absent the agreement of the parties, either party may insist on the whole panoply of FRCP discovery rights including interrogatories (FRCP 33), requests for production (FRCP 34), depositions (FRCP 30 and 31), and requests for admission (FRCP 34). The advent of broad electronic discovery techniques has only complicated discovery and resulted in dramatic increases in the number of documents that are available to parties to support their cases, further complicating the objective of arbitration to achieve focused and less costly resolution of disputes.

Regardless of the discovery rights that the parties reserve to themselves in arbitrations, a skilled arbitrator will always try to customize the discovery used to fit the nature of the dispute. Most arbitration proceedings begin with a conference of some sort between the arbitrator and the parties. In cases where discovery is provided for, but I sense that it would not be very useful in resolving the dispute, I start my *first conference* with the parties by:

1. Asking that the principals for the parties be present in the conference.
2. Explaining that well over half of the cost of arbitration and the associated time delay can be from discovery.
3. Explaining that, in my experience, in most cases, discovery has added very little in the way of critical/dispositive facts in resolving the contract disputes that I have arbitrated.
4. Telling the parties that although they may have incorporated a provision for discovery in their arbitration clause, they can agree among themselves not to use broad discovery, particularly if the contract issues seem to be primarily questions of law. I then tell the parties

if, at first glance, I believe the case is likely to be resolved on a question of law (not disputed fact). I explain that facts, of course, are important in applying the law—but, in appropriate cases, I tell the parties if the pleadings reveal to me that the undisputed (or even disputed) facts necessary to resolution of the case seem to be well understood by the parties in a way sufficient to present their cases.

5. If parties believe that their understanding of the contract is critical, and if the parol evidence rule applies, I tell the parties that they should *confine discovery to the time surrounding formation of the contract*. Under the law to be applied in most jurisdictions (but not all), subsequent understandings are likely immaterial to resolution of the dispute.
6. If it appears that the attorneys still want broad discovery, I *ask the attorneys to consult with their clients about the cost of discovery and to propose a narrow plan of discovery* to me, in writing, after consultation with their clients. I then schedule another conference to discuss the scope of discovery, again with the principal on the call.
7. If the parties insist on having depositions, I will *stage the depositions*, giving each side one deposition to start. I ask the parties to come back to me and to reveal a material fact that they discovered in the deposition that could have a significant bearing on resolution of the dispute. If the initial deposition doesn’t really reveal any facts material to the disposition of the case, then I tell the parties that and state that I don’t intend to permit further depositions. This technique was taught to me many years ago by Judge Edward Leavy (now a senior judge on the U.S. Court of Appeals for the Ninth Circuit), when he was a federal magistrate designated by the presiding district judge to handle discovery in a high-stakes case in which I was counsel for a federal agency.

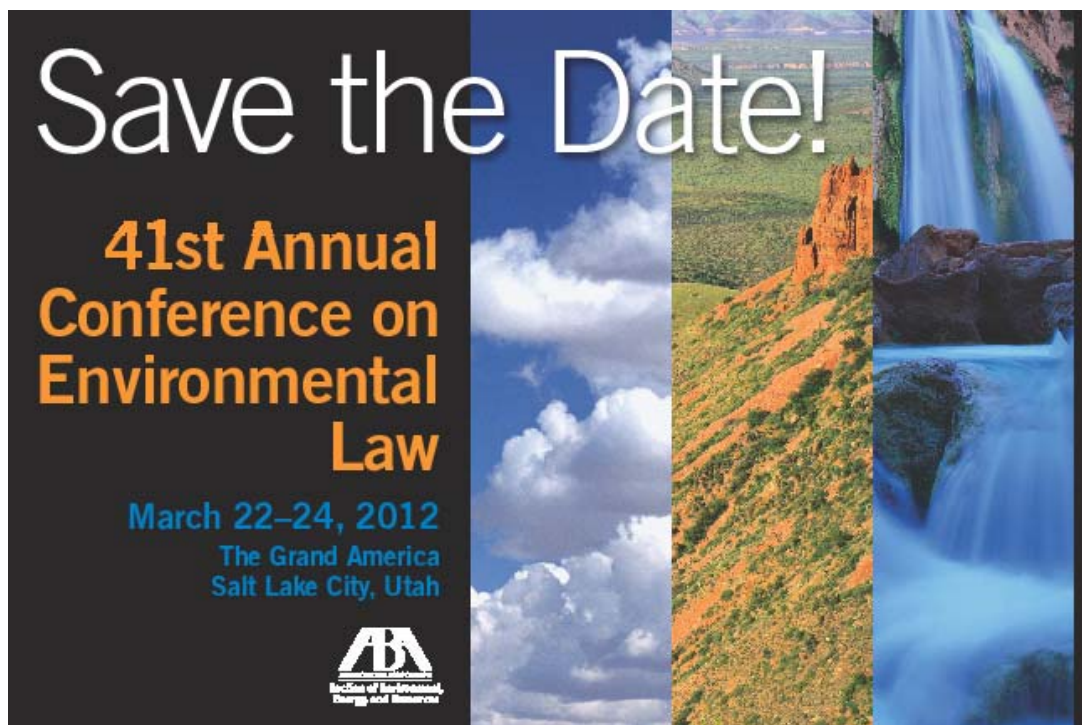
8. If both sides want *interrogatories and requests for admission*, I similarly limit the use of those discovery vehicles, as well, by asking the parties to stipulate to a limited number of such discovery tools and deciding on a limit if the parties can't agree.

In one case in which I presided, the arbitrators and parties agreed to a site visit, in lieu of discovery and arranged for the site visit immediately after opening argument so that the parties could describe to the arbitrators the features of the site that they believed were significant to resolution of the case. This reduced the need for a lot of discovery to elicit facts that were obvious from the site visit. The same thing could, in many environmental and energy disputes, be accomplished by *photographs or videos*.

Like many overworked trial judges, arbitrators have needlessly surrendered their role in favor of "letting the lawyers try their case" in the same way that litigation takes place in the courts. Many times lawyers for both sides could agree to limit discovery, but don't want to appear weak or less confident in the facts of their case and won't agree to discovery limits if it appears the other side of the dispute won't agree to such limits. On the other hand, if supported by arbitrators who seek to manage the case for the benefit of their clients, the lawyers would readily agree to discovery limits. The

result of failure to seek to limit discovery in arbitrations is loss of faith in the arbitration system as a speedy and less costly way of resolving disputes by both the parties and counsel. Most of us who have been lawyers for 30 years or more know of a time when even complex cases (including those that went to trial) were tried much more expeditiously. Due process can be afforded by an experienced arbitrator without excessive discovery, prehearing motions, and time delays. But preserving the objectives of speed and economy in the arbitration process must start when the parties draft the arbitration clause in their agreement. In most cases, incorporation of civil discovery rules defeats or complicates achievement of those objectives.

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RECENT CIRCUIT COURT DECISION REAFFIRMS CONFIDENTIALITY OF ADR

David C. Batson

The recent decision of the Ninth Circuit in *Facebook v. ConnectU, Inc.* (Consolidated cases 08-16745, 08-16873, and 09-15021; Decision filed April 11, 2011), reaffirms and clarifies the confidentiality of communications during an ADR process. In brief, the case dealt with a disputed settlement of alleged damages related to the creation of the social networking site Facebook (see the movie *The Social Network* for the interesting back story). The parties reached a settlement through the use of mediation, which was conducted pursuant to a written confidentiality agreement stipulating that all statements made during the mediation were privileged, nondiscoverable, and inadmissible in any arbitral, judicial, or other proceeding. A one and one-third page-long settlement agreement was signed by all parties during the mediation specifying the terms of settlement, however, negotiations broke down over the form of the 130 pages of documents needed to implement the settlement and Facebook filed a motion with the district court to enforce the original settlement agreement. The opposing parties argued that the original settlement agreement should be ruled unenforceable because it lacked material terms and was procured through fraud which occurred during the mediation. The district court found the settlement agreement enforceable and the matter was appealed.

The issues on appeal, among others that are beyond the scope of this article, included a challenge to the district court's exclusion from evidence of communications made during the mediation sought to prove the alleged fraud. The district court's ruling was based on its finding of a "mediation privilege" inherent in confidentiality protections created by local court rules. Though supporting the lower court's ruling, the Ninth Circuit differed with the lower court on its rationale for exclusion of the mediation communications and, in doing so, provides useful insights into ADR confidentiality.

The Ninth Circuit disagreed with the establishment of a mediation privilege, ruling that a privilege is created by common law and not through administrative rules of a

court. It noted as well that, given the use of a private mediator, the mediation in question was conducted outside the scope of the local court rules, therefore negating any confidentiality protections afforded by the rules. However, the Ninth Circuit ruled that communications during the mediation must be excluded nevertheless based on the language of the confidentiality agreement entered by the parties. This conclusion was reached despite arguments of the appellants that if the confidentiality agreement excludes use of the evidence then it is void as a violation of federal law applicable to securities transactions.

The Ninth Circuit ruling provides several useful lessons for counsel involved in the mediation of a dispute in the federal courts. First, assume that proactive steps are required to ensure the confidentiality of mediation-related communications. Second, carefully review the scope of local court rules to determine the scope of any ADR programs and afforded confidentiality protections. Third, and most important, always enter a written confidentiality agreement with all parties clearly evidencing understandings and intentions regarding the confidentiality of communications and documents shared during the mediation process.

David C. Batson is senior collaboration and ADR specialist of the U.S. Environmental Protection Agency. As subject matter expert on confidentiality for the U.S. Interagency ADR Work Group, David drafts guidance for federal agencies on mediation practice and confidentiality in the use of ADR. With over 30 years of conflict resolution experience, David has convened and mediated over 400 matters, from settlements of federal litigation and employment disputes to hazardous waste cases involving over 1200 parties.



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THE SECTION INVITES NOMINATIONS FOR THE FOLLOWING AWARDS:

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The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student-organized educational program or public service project of the year addressing on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2011 calendar year [consideration may be given to allowing projects that occurred in the 2010-2011 or 2011-2012 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

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The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2011 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: May 14, 2012.

These awards will be presented at the ABA Annual Meeting in Chicago in August 2012.

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