

# Case Studies

Over the past few decades, Kitchen Table Democracy (formerly the Policy Consensus Initiative) and partners from across the country (particularly the National Policy Consensus Center at Portland State University and other members of the University Network for Collaborative Governance) collected and composed case studies of projects at the state, local, and regional levels that used some type of collaborative process to achieve agreements and collective impact. This collection of case studies includes a wide variety of types of processes as well as issues addressed. They are arranged in alphabetical order by state and can be accessed by the bookmarks on the left menu of the PDF.



*\*Please note that some of the case study contacts or links may no longer be current. Please contact Kitchen Table Democracy or the National Policy Consensus Center at PSU for more information.*

# Case Study

## Arkansas' Low Income Energy Forum Delivers Affordable, Efficient Energy

### The Problem

Arkansas has a high rate of poverty and many residents cannot afford to pay their utility bills or to conserve energy in order to lower their bills. Federal funds only allow the State to assist one-third of the population that is income eligible for relief. Unlike most states, Arkansas does not supplement those federal funds. Until recently, the only source of funds to assist the poor was private donations – either through churches or utility companies' Good Neighbor Funds.



In order to address the problem, the Arkansas Community Action Agencies Association (ACAAA) convened a public forum to educate and engage the public. The forum was followed by a stakeholder process to develop action steps.

### The Product

Through these processes, three proposed actions were developed: formation of a statewide fuel fund;

proposed legislation for a sales tax exemption for utility services; and creation of the state's first utility-funded energy efficiency program.

### The Process

In 2005, the ACAAAA formed a Steering Committee of stakeholders to find a way to address this problem. The stakeholders included utility providers (electric and natural gas), social service organizations, and ACAAAA staff. In 2006, the Steering Committee convened the Low Income Energy Forum.

### Involving the Public

The Low Income Energy Forum was a one-day event held at Altell Arena, in North Little Rock. Over 100 people attended the forum, including leaders from diverse sectors and groups within the state.

Nationally known speakers made presentations to the group. These speakers included representatives of the American Gas Association, the electric industry, low-income consumers, Economic Opportunity Studies, and Michigan's Heat and Warmth Fund.

The Forum was held in conjunction a meeting of the State legislature's Joint

Energy Commission, where some of the Forum participants gave testimony.

## How Stakeholders Responded to the Public

In August 2006, the original Steering Committee of stakeholders, was expanded to include some faith-based groups. They formed three workgroups to develop plans to address the three priorities identified through the public forum: formation of a statewide fuel fund; proposed legislation for a sales tax exemption for utility services; and creation of the state's first utility-funded energy efficiency program.

The workgroup to develop the statewide fuel fund formed an organization, which has applied for tax-exempt status from the IRS, and should soon be able to receive funds.

## Next Steps

The statewide fuel fund group introduced a bill in the Arkansas legislature, seeking a quarter of a million dollars to carry the fuel fund through until it has fundraising capability and more stakeholders can be involved. So far, two utilities have

provided fuel funds and a third utility has express interest.

The other work groups have developed proposed legislation for the sales tax exemption; and continue to work toward creating a utility-funded energy efficiency program.

For more information about this case, contact Rose Adams, Executive Director of ACAAA at [radams@acaaa.org](mailto:radams@acaaa.org).



★ National  
★ Policy  
★ Consensus  
★ Center

This case study is published jointly by the Policy Consensus Initiative (PCI) and its applied research and development arm, the National Policy Consensus Center (NPCC). PCI is a national nonprofit organization that promotes consensus building and effective problem solving in states. NPCC is a center of expertise on consensus building for public leaders.

For other case studies and information about collaboration, consensus and conflict resolution, visit the website: [www.policyconsensus.org](http://www.policyconsensus.org).

# Partnering Program Saves ADOT Millions

Arizona's Department of Transportation, like others around the country, spent much of the last several decades buried in litigation. At the start of the 1990s, ADOT had 60 unresolved claims totaling nearly \$40 million.

In addition, major construction projects were consistently running behind schedule, with no incentives for change. Administering construction contracts—about \$1 billion worth—was proving more and more difficult both for ADOT and the Corps of Engineers.

In frustration, the Corps of Engineers and ADOT asked a state university for help in developing a model for administering construction contracts more effectively. They were put in touch with Charles Cowan, a colonel in the Corps of Engineers known as a champion of the partnering model, and invited him to speak at a two-day conference.

At that conference, 750 participants from Arizona's transportation, engineering, and construction sectors learned about the strategy and benefits of partnering, said Ginger Murdough, who now heads ADOT's partnering section. "They decided then that this is the way we're going to do business in Arizona."

Partnering, as defined by ADOT and the American Association of State Highway Transportation Organizations (AASHTO) is a process of collaborative



## CASE STUDY

teamwork to achieve measurable results through agreements and productive working relationships. It is seen by many as a form of risk management in which participants jointly develop a vision of a project, then use that vision to identify and manage the risks and general direction of a construction project.

At the conference in Arizona, participants' initial hope was that partnering would enable ADOT projects, most of which were ending at least 8 percent behind schedule, to finish on time. "We hadn't done a lot of measurement or benchmarking at that stage," Murdough said. "We had the knowledge that we weren't finishing on time, but that was it. So that issue alone was reason enough to try it."

As partnering got underway, ADOT began tracking those projects and how many days were being saved. "The results were amazing," Murdough said. Projects started finishing not just on time, but ahead of schedule, and the number of claims began to dwindle. In addition, ADOT no longer needed a "claims group." Instead, the focus shifted to building partnerships, and a "Partnering

Team" emerged.

Today, says Murdough, after more than 1,100 partnered projects, ADOT has stayed out of litigation on construction claims, and projects are finishing 8 to 10 percent ahead of schedule. Overall, partnering initiatives have saved ADOT up to \$35 million.

The success is due in large part to resolving the issues throughout the project, Murdough said.

"A collaborative environment allows people to be creative," she said. "In Arizona, ADOT and the contractors worked out incentives that boost productivity and quality. Contractors have the opportunity to earn incentive payments based on their performance. They can earn the incentive and the public benefits because the project is delivered more quickly and with the same quality."

ADOT's "issue resolution" process provides a method of working through issues jointly as they arise, while also documenting the issues so parties have records, in the event a case goes to arbitration. "People do file claims," Murdough explained, "but they go through the issue resolution process, so most issues get resolved without arbitration."

Issue resolution at ADOT involves a ladder approach with four "levels of empowerment." At the first level are project stakeholders (including key stakeholder groups, field-level partners, ADOT foremen, inspectors, etc.), who work to resolve issues among themselves. If they are not successful, the issue goes to resident engineers and contract managers. If unresolved at that level, it escalates to the district engineer or the contractor's regional manager. From there it moves to the final level—the state engineer's office and the contractor's CEO or president.

Cases still unresolved go to arbitration, then litigation. Since 1996, three cases have had formal arbitration. None have been litigated.

Murdough said resident engineers have up to \$50,000 to spend on resolving issues. District engineers are empowered to resolve issues up to

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ADOT PARTNERING CONSTRUCTION CONTRACTS SINCE JULY 1991	
Completed contracts	1,140
Contract days saved	15,405
Average time saved	8.2 percent
Construction engineering savings	\$27.6 million
Construction value engineering savings	\$7.9 million
Over-project bid amount (including contingencies, incentives/bonuses, revisions, omissions and additional work paid by others)	9.8 percent
Arbitrated construction claims reported since 1996	3
Total Construction Dollars	3.2 billion

# ADOT Partnering Saves Millions . . .

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\$250,000. Ground rules, established at the beginning of each partnership, set a specific length of time the parties may spend at each level. ADOT provides printed material to every stakeholder describing the “resolution steps,” and outlines the process for people entering it for the first time.

“An important piece of information,” says Murdough, “is that there’s no shame in NOT resolving an issue.” The escalating

process is set up to handle any outcome.

Critics of ADOT’s partnering plan, and construction partnering in general, worry that such programs are expensive and bureaucratic. But Murdough says the data in Arizona don’t support those claims.

“It actually saves money, because it provides opportunities for value engineering, early completion, and zero or low legal costs” she said. “Because ADOT splits value

engineering savings with the contractor, there’s an incentive for the contractor to come up with ways to save money.”

After a decade of work on a successful partnering program, and in following the experiences of other states, Murdough is unwavering in her support for the process. “Partnering works,” she says. “But you have to have a major commitment to this. It takes a lot of effort.”

## *Caltrans Offers Partnering Resources*

The Partnering Steering Committee of the California Department of Transportation has produced a video to use in training field personnel and crews on the approaches and benefits of partnering.

Caltrans, which has a successful con-

struction partnering program, also offers a comprehensive “Partnering Field Guide” that walks users through every aspect of carrying out a Caltrans partnership. Find the guide at [www.dot.ca.gov/hq/construc/partnering.html](http://www.dot.ca.gov/hq/construc/partnering.html).

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# SACRAMENTO TRANSPORTATION AND AIR QUALITY COLLABORATIVE

## OVERVIEW

Sacramento County is a rapidly growing metropolitan area, with the six-county region expected to grow by a million people over the next 20 years. This anticipated growth raises important questions about how the community can maintain mobility, enhance air quality, sustain economic prosperity, and preserve the Sacramento region as an attractive place to live and work.

To address concerns about transportation and air quality associated with this expected growth, county officials initiated the “Sacramento Transportation & Air Quality Collaborative.”

## THE COLLABORATION

### The Players

Forty-eight organizations (104 participants and alternates) are participating in the Collaborative. They were recruited from five categories that meet as interest groups:

- Business Interest Group
- Environment Interest Group
- Government Interest Group
- Local Community Participants
- Community Interest Group (Disability, Youth, Seniors, Ethnic etc.)

Two other groups participate separately—the Agriculture Interest and Tax Payers League, whose interests differ significantly from the other five interest groups. There also are ex-officio members who are invited as official observers and inform negotiations as needed, but don’t participate in formal decision-making. Ex Officio participants also have been identified and are on the distribution list for collaborative material.

The Local Community Participants bring a rich diversity of local perspectives (geographic and demographic) rather than the views of any one organization to which the participants may belong. Each of the four cities and the unincorporated areas of Sacramento County have participants who represent individual perspectives and not particular constituencies.

The various community interest groups selected participants for their interests. For example, the senior

organizations within the County of Sacramento were briefed on the Collaborative and invited to a luncheon to select a member and alternate to sit at the negotiating table. Some meeting attendees self-nominated and others were nominated during the meeting. The participant and alternate were selected by vote. The participant has the responsibility to inform the greater group of Collaborative progress, and to obtain input on negotiation points throughout the process.

Several of the groups have formed advisory groups to assist in the negotiation process. One example is the African American Advisory Group, whose collaborative participant has called upon leaders in the African American community to meet routinely to become educated on transportation, air quality, relevant land use and economic vitality, and to advise her on issues importance to that community during the negotiation phase.

The Collaborative has three full-time and one half-time staff, on loan from different participating government agencies. In addition, private professionals provide expertise in mediation and transportation through contracts.

### The Process

The purpose of the Collaborative is to develop a long-range and comprehensive strategy for the Sacramento countywide area to improve transportation and air quality within a regional context, including relevant land use and economic development strategies. It is to be accomplished through an interest-based negotiation process consisting of five steps: 1) Assess, 2) Organize, 3) Educate, 4) Negotiate, 5) Implement.

The assessment step was initiated in 1999. Twenty participants from the five interests listed above were asked by eight public agencies to explore the potential for interest-based negotiations to address the transportation and air quality issues in the projected growth area. After an 18-month deliberation, the group recommended to the sponsoring agencies that they proceed with the collaborative process.

The cities of Citrus Heights, Elk Grove, Folsom, and Sacramento; the County of Sacramento; Regional Transit; Sacramento Transportation Authority; Sacramento Metropolitan Air Quality Management District; and Sacramento Area Council of Governments provide



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# SACRAMENTO TRANSPORTATION AND AIR QUALITY, CONTINUED

funding for the effort and participate in the Government Interest Group. Caltrans provides a half-time staff member and participates as a member of the Government Interest Group. The newly incorporated City of Rancho Cordova, which has been briefed on the Collaborative, selected a local community participant and anticipates that a government representative will be selected as the city acquires staff.

During the organization phase, staff and stakeholders were recruited and oriented, then an overall approach was charted. The participants discussed and adopted the purpose; identified the challenges and opportunities associated with transportation, air quality, land use and economic vitality; identified what their group wants from the negotiation and why; and became acquainted with work from other communities addressing similar issues.

The structure of the Collaborative requires that participants volunteer 10 to 15 hours per month. They attend:

- A monthly plenary meeting for education purposes
- A monthly interest group meeting to develop issues and interest statements, to develop negotiation strategies, and to consider other Collaborative issues
- One or more working groups
- An Education Working Group to assist in design of the plenary sessions
- A Visioning Working Group to design land use and transportation scenarios to test via models
- A Coordinating Work Group to develop the negotiation framework.

In February 2001, an 18-month formal Education and Visioning Phase was initiated. Four tools were used for this phase:

1. Brief technical papers on the core topics to use as a reference in acquiring a basic understanding of complex issues.
2. A panel of experts addressing key questions related to an issue that cuts through several of the core topics.
3. A visioning process using indicators. A working group selects indicators for measuring changes when land use and infrastructure scenarios are changed. Then they select scenarios and measure the change to indicators. For example, if denser development occurs around light rail stations, what happens to vehicle miles traveled?

4. Issues and Interest Statements—organizations or interest groups prepare a statement of what they need from the negotiation and why. A rigorous uncovering of the interests allows participants to move beyond their positions to understanding their underlying interests. Well-defined interests can be turned into objective criteria for testing the robustness of agreements-in-principle, trial balloons, and then draft agreements.

The July plenary was a transition from the Education and Visioning phase to the Negotiation phase. The current work is harvesting “common understandings” and remaining data gaps from the 18-month Education and Visioning Phase Collaborative. Further education/research will be proposed to close the data gaps. The “Common Understandings” will provide a foundation for an agreement.

## The Agreement

An agreement among the participants is not anticipated until late 2004.

The initial step is development of agreements-in-principle, a series of negotiated statements that, taken as a whole, represent the beginning of a conceptual outline for the agreement. For the Transportation Collaborative, agreements-in-principle could be organized around such major topics as transportation infrastructure and systems, transportation funding, and community and neighborhood design. Agreements-in-principle do not go into specific detail, but rather capture the broader landscape of a potential overall agreement.

Using the agreements-in-principle as a starting point, the negotiation teams flesh out the full details of the agreement. Agreements-in-detail consume the most time in any negotiated agreement, and lead over time to a draft agreement and then to the final agreement.

Assurances are mechanisms that ensure the details of an agreement will be honored. Assurances can be more or less certain. For example, a handshake is less of an assurance than a legal contract. Typically, different levels of assurances are developed for different portions of a final agreement. An assurance itself is also considered as a type of agreement.

A series of planned actions will provide for implementation of the final agreement. Along with action steps, implementation plans for agreements typically include provisions for monitoring the agreement as well as for modifying the agreement in the face of significant changed conditions.

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# SACRAMENTO TRANSPORTATION AND AIR QUALITY, CONTINUED

A straw proposal, or trial balloon, will be developed to allow a group to review and revise an idea or potential agreement with the understanding that discussing the proposal does not imply any kind of support or commitment. Trial balloons are usually revised or significantly altered multiple times until an agreement emerges.

## OUTCOMES

The major outcomes at this early stage of the Collaborative include: development of common understandings of complex interrelated issues of transportation, air quality, relevant land use and economic vitality; building community capacity; and relationship building between interests within the community.

The Education & Visioning phase of the Collaborative provided a common technical basis from which the interest groups can launch their negotiations. The level and breadth of understanding of the group has increased significantly. Participants have been exposed to a broader view of community transportation needs of other jurisdictions, of people who provide or use a different transportation mode, people who are impacted by transportation projects, and people with different underlying interests.

Capacity building is another important outcome of the process. The participants are charged with sharing Collaborative information with their constituency and to elicit their input for issues and interests and in negotiations. The participants have done so in a number of creative ways. One city's local community participants developed a survey to obtain local input. The local Community Services District distributed and collected the survey.

The Community Interest Groups have established advisory boards. The African American Board—the most developed of these boards—has invited speakers to provide additional education on transportation and air quality topics of particular interest to the African American community, in preparation for the negotiations.

Relationship building among the different interest groups has also been a visible outcome of the process. Members of the Environmental and Business Interest Group jointly held a seminar for local builders and developers focusing on successful higher density housing. Architects from areas where denser housing is more commonplace spoke about the marketability of such products.

## LESSONS LEARNED

- ✓ Many of the members/interest groups are engaged in other civic areas. **Trust and relationships that developed during the Collaborative** have had a positive impact in the other areas, and vice versa. The converse is also true. Trust broken or relationships frayed at the Collaborative can have negative consequences that reverberate outside the Collaborative.
- ✓ **Significant resources (funding and time) are necessary for interest-based negotiation** around the complex issues of transportation, air quality, land use and economic vitality among the large broad based group of participants.
- ✓ **Support from the elected officials and from the executive officers** of the sponsoring government jurisdictions is critical to the success of the Collaborative. Funding depends on their support, and their approval of the final agreement will be required.
- ✓ The Collaborative staff is comprised of people with differing areas of expertise matched to the needs of the broad issues under consideration, as well as the diverse group of participants. **A mediator or facilitator skilled in interest-based negotiation** is essential to ensure all have a voice during the negotiations.
- ✓ The Collaborative is a six-year process addressing complex issues. **Participants must agree upon their purpose**, establish a common factual base to address issues of common concern, develop a thorough understanding not only of their own interests but also the interests of the other parties at the table, and negotiate satisfactory agreements that take into account the varied interests represented in the process.
- ✓ **Life outside the collaborative process does not stand still.** People will continue to do what they need to do on behalf of their interests outside and independent of the collaborative process. This sometimes includes pursuing options or activities that could have an impact on other interests at the table. It can be a challenge to reconcile activities taking place simultaneously in these two spheres.

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*This case was adapted from a report prepared by Cheryl Creson, with Sacramento County.*



## Allotting Resources for HIV Prevention

### The Problem

When the Centers for Disease Control (CDC) announced it would distribute money to the states for HIV prevention programs, it included a pivotal condition: To a considerable degree, the amount of money a state received would depend on how well the state engaged all concerned parties in agreeing on the state's HIV prevention plan.



For the Colorado Department of Public Health and Environment, CDC's condition raised two questions. The first was straightforward: how to comply with CDC's demands, thus securing for the state as much funding as possible for HIV prevention?

The second question was more complicated, raising issues of centralization versus decentralization in allocating resources for HIV prevention. Who should be guiding HIV prevention? The state health department? Community-based organizations? Or those who are infected or affected by it?

State health department personnel were inclined to believe that they were the best ones to ensure that HIV prevention programs were effective. A range of opinion existed in the department about how much control it should retain. Local health departments, which get much of their funding from the state, also tended to believe that public agencies should hold prevention funds fairly close, again in the name of effectiveness.

But organizations of gay men, advocacy groups for the poor and people of color, and support organizations wanted the state health department "to let go, to stop controlling how HIV prevention would be done," in the words of one observer.

### The Process

In January, 1994, the state department of health received the CDC directive and assembled a coordinating committee of interested parties. Its purpose was to design a community planning process and to convene a group to develop a statewide plan for preventing the spread of HIV.

To mediate the community planning process, the coordinating committee hired the National Civic League, an organization fostering community-based problem solving, and CDR Associates, a Colorado-based conflict resolution organization.

The statewide planning group was called Coloradans Working Together: Preventing HIV/AIDS. The acronym became CWT. Its first meeting was held on July 10, 1994, and the process design phase had done its job. A total of 110 participants showed up, including

- persons with HIV, some who also had AIDS
- gay men
- representatives of the African-American, Latino, and Native-American communities
- HIV prevention specialists from community-based organizations, local health departments, and the state health department
- doctors, nurses, and other health care specialists
- public health educators, case managers, and social workers
- members of various religious organizations



*It is important for citizens and government to know how to resolve disputes without litigation or resorting to violence. Ohio is most fortunate to have a commission which helps us learn how to utilize dispute resolution techniques. As a public official, I believe these programs are vital to making Ohio a safer and better place in which to live.*

*Senator Merle Grace Kearns of Ohio*

Mediator Michael Hughes chronicled the progress of the meetings. The July meeting focused on process. An August meeting concentrated on data. Three presentations provided a sense of the degree of HIV infection in Colorado, an evaluation of HIV prevention organizations, and a review of strategies in use to stop HIV transmission.

A first meeting in September brought hard questions about the process, data, the mediators, and the true intentions of the state health department and the CDC. The meeting focused useful discussion on ground rules for the process so that by a second meeting in September the CWT group was ready for substance in a serious way. In that meeting and in subsequent meetings in October, November, and December, the group worked to articulate 14 core needs that a statewide HIV prevention should address. In Hughes' words, "through painstaking negotiation ...the group not only wrote and revised the core element of the plan—word by word—but came to understand, listen to, and respect one another. On December 3, Coloradans Working Together came to consensus in the State of Colorado's 1995 HIV prevention plan."

There are several reasons why a group of this diverse makeup could find common ground on matters such as needle exchange, comprehensive health education, condom availability, and abstinence education.

One reason is that the group forged a shared vision and purpose. Another is that the process was open. No one was excluded. A third reason was that CWT designed a flexible process in which facilitators interrupted only to summarize, bring a discussion to a close, and check for consensus.

The group's ground rules fostered an atmosphere of respect and honesty. Finally, Hughes writes, there was "time to heal wounds. It is difficult to do justice to the depth of grief and fear that permeated CWT's work. CWT members struggled to ensure that their work would do justice to those whose lives have been irreversibly changed by the virus."

### The Result

The process resulted in a three-year plan for statewide HIV prevention. The three-year plan was successfully completed. In years two and three, the plan became increasingly decentralized and successfully brought to Colorado more than \$3 million annually in CDC funds for statewide prevention programs, according to Robert Bongiovanni who runs the HIV Prevention project for the state health department.

A new plan, now in effect, guides \$3.7 million a year in CDC funds for HIV prevention in Colorado. The CWT group that charts and approves the plan now has representatives of 28 coalitions and, more than ever, "matches the face of Colorado's HIV epidemic," in Bongiovanni's words.



*During my eight years as governor of Wyoming, working with state policy issues and with other Governors, I became a true believer in the necessity of governors, their staffs, and other public officials operating as consensus builders. Given the complexity of the issues, the speed of change, and the diversity of the many constituencies, new tools and skills are required to forge lasting agreements on public policy. What PCI is about, therefore, is essential to enhancing government effectiveness and efficiency.*

*Former Governor Mike Sullivan of Wyoming  
Chair, Board of Directors  
Policy Consensus Initiative*



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# COLORADO'S SHORTGRASS PRAIRIE INITIATIVE

## OVERVIEW

Colorado's shortgrass prairie—covering more than 27 million acres, or nearly one third of the state—is one of the most imperiled ecosystems in North America. Factors contributing to its deteriorating condition include agricultural plowing, water and wind erosion, development of dams and irrigation systems, decreasing water availability, development, and the loss or decline of important herbivores such as bison, elk, and prairie dog. Of more than 100 declining species on the prairie, 54 are globally imperiled, ten are listed under the Endangered Species Act (ESA), one is proposed, and six are candidates.

With continued development, diminishing habitat, and the number of federally listed species increasing, the Colorado Department of Transportation (CDOT) has been spending more and more time on clearing projects. Clearance often involves multiple seasons of species surveys and additional time for mitigation or conservation planning. As a result, individual projects can sometimes consume state resources for years before anything happens on the ground. In addition, the project-by-project clearance and mitigation process can yield scattered and fragmented habitat conservation, which contributes little to the viability of individual species and ecosystems on which they depend.

These two sets of concerns set the stage for a unique and successful collaboration. A desire emerged several years ago among state agencies like the Division of Wildlife and non-profit organizations like The Nature Conservancy to alleviate the need to list species under the ESA by conserving large portions of shortgrass prairie habitat. At the same time, CDOT (which counts nearly 90,000 acres of shortgrass prairie within its statewide right-of-way) along with the Federal Highway Administration (FHWA) and U.S. Fish and Wildlife Service were exploring regulatory streamlining practices that would focus resources on results.

## THE COLLABORATION

### The Players

The Collaboration was initiated by Edrie Vinson, of the Colorado Division of FHWA, and Vinson's colleague at CDOT, Marie Venner, who shared an interest in bringing environmental values into agency practices. In spring 2000, Vinson and Venner arranged to meet with

Chris Pague of The Nature Conservancy (TNC) to discuss a collaborative initiative.

One topic of conversation was TNC's 1998 study, *Ecoregion-Based Conservation in the Central Shortgrass Prairie*. The study, centered on Colorado's Eastern Plains, identified imperiled species and top priority habitats for protection. The two transportation officials acknowledged their own agencies' interests in large-scale habitat protection; if shortgrass prairie species continued to get federally listed at the current rate, it could bring highway construction to a halt. Shortly after their meeting, representatives of CDOT, FHWA, and TNC contacted the U.S. Fish and Wildlife Service (FWS) about collaborating on a habitat preservation / mitigation banking project.

From the beginning, the parties to the agreement focused on their desire to combine a mitigation banking approach to streamlining transportation projects with a large-scale habitat conservation approach to protecting declining species. The parties crafted an assessment of future impacts from CDOT transportation projects and came up with a conceptual conservation strategy to offset those impacts.

The parties partnered with public interest and research organizations, including the Colorado National Heritage Program and the Rocky Mountain Bird Observatory, to complete the assessment and flesh out the conservation concept. The Farm Bureau, the Colorado Cattleman's Association, and local governments skeptical of conservation initiatives were consulted at various points. Environmental organizations such as the National Wildlife Federation, Audubon, and the Sierra Club were consulted at meetings of Colorado's Environmental Roundtable.

### The Process

Once all the primary partners agreed to collaborate, they began meeting about once a month, planning and negotiating without the help of an outside facilitator. One participant believes this was possible because the parties had very compatible interests and each had a lot to gain from collaborating.

In April 2001, after meeting for nearly a year, the parties formalized their collaboration in a Memorandum of Agreement (MOA). The signatories to the MOA were CDOT, FHWA, FWS, the Colorado Department of Natural Resources, the Colorado Division of Wildlife, and The Nature Conservancy.

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# COLORADO'S SHORTGRASS PRAIRIE INITIATIVE, CONTINUED

## The Agreement

The Memorandum of Agreement (MOA) committed the parties to working together to effect regional conservation of declining species on Colorado's Eastern Plains. This will be done by providing proactive, advance conservation of priority habitats for multiple species that will allow CDOT and FHWA to address compliance under the ESA for listed species and for declining species that may become listed.

In preparation for the agreement The Nature Conservancy and the Colorado National Heritage Program identified declining animal and plant species that 1) were likely to be listed under the ESA in the next 20 years, 2) were within a zone of impact from CDOT highways, and 3) were likely to benefit from a conservation/mitigation banking approach. Thirty-six species became the focus of the MOA.

In lieu of project-by-project species inventory, analysis, and review, the parties estimated the collective impacts of proposed transportation projects on declining-species habitats over the next 20 years. They based this estimate on CDOT's 20-year plan, which anticipates safety, reconstruction, capacity, and other transportation improvements for 22% of the highway network in Colorado's central shortgrass prairie (over and above overlay projects, which are expected to have minimal impacts). The MOA covers those transportation improvement projects, in addition to CDOT maintenance work, resurfacing, and on- and off-system bridge repairs throughout the Eastern Plains.

Under the MOA, a panel headed by technical experts from The Nature Conservancy and Colorado Division of Wildlife will identify priority habitat conservation sites that can serve as large-scale conservation/mitigation areas for the 36 species identified in the preliminary survey.

CDOT will then issue a request for proposals from outside parties who would contract with CDOT to acquire property interests in the selected sites and develop a conservation plan for the acreage. The party that enters into the contract with CDOT will manage the conservation acreage in accordance with the purpose for which they are acquired under the ESA. CDOT will fund the contract with the intent that Federal-aid projects will reimburse the state for mitigation credits as they are used. The contracting party will report to

CDOT regularly on the conservation activities over the 20 years the contract will be in effect. The lands will be held in perpetuity for habitat conservation.

This proactive conservation/mitigation measure will help satisfy CDOT and FHWA obligations under the ESA for identified listed species and declining species, should the latter become federally listed as threatened or endangered.

## OUTCOMES

The MOA sets up a unique long-term institutional collaboration among state and federal transportation and resource agencies and a national non-profit organization. It will eventually protect more than 50,000 acres of shortgrass prairie in Eastern Colorado. Much of that acreage will be leveraged with other conservation measures—like those of Ft. Carson, Great Outdoors Colorado, and the Pawnee National Grasslands—to preserve even larger sites that would otherwise be subject to development and species decline.

CDOT has not yet purchased any land. Their first attempt was unsuccessful in part because the division in charge of the purchase was accustomed to purchasing right-of-way, and negotiation around land conservation were somewhat outside the division's realm of experience. CDOT has since decided to contract for outside land brokerage service.

A secondary outcome of the project has been the continued use of collaborative practices by the participating parties. According to the MOA, "While shortgrass prairie issues can be challenging, long-term conservation success will require an open and honest dialog among public agencies, private landowners, and non-profit partners. The land management entities in this MOA will foster a collaborative approach to shortgrass prairie conservation and management and are committed to working with local communities."

The trust the agencies built through this project led to other joint activities. For example, FHWA and FWS have created the first endangered species "bank" in Colorado. Through ESA mitigation, FHWA discovered an innovative method of protecting the habitat of the Prebles Meadow Jumping Mouse. In cooperation with FWS, they tripled their effort beyond what was required to comply with the ESA and created 25 acres of habitat for the threatened mouse.

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## COLORADO'S SHORTGRASS PRAIRIE INITIATIVE, CONTINUED

Finally, the parties to the MOA are undertaking a public education campaign to build appreciation of the shortgrass prairie ecosystem and how it supports life in Eastern Colorado. The effort will include outreach to schools, libraries, and other organizations.

### LESSONS LEARNED

- ✓ Although personal relationships and informal discussions were important to the success of the collaborative process, **the MOA provided the formal glue** that will hold the project together, even in the event of personnel turnover.
- ✓ **Collaborative efforts can result in cost savings.** CDOT gets 20 years of mitigation at today's land prices. FWS stands to save money by avoiding costly project-by-project reviews under the ESA.

- ✓ **Trust built through one collaboration can lead to future cooperation on other issues.**
- ✓ **Exploring and uncovering shared interests was a crucial first step** to the success of this collaboration. Helping all parties accomplish their missions can ensure motivated and enthusiastic participation. As Edrie Vinson observed, "If you can accommodate people's interests up front, everyone will work hard to pull off the project. In our case there has been almost no dissention. We look for solutions together and we find them!"

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*This case was adapted from Colorado Memorandum of Agreement, available at < <http://www.fhwa.dot.gov/environment/streaming/comoa.htm>>. Other sources include Shortgrass Prairie – 2003 FHWA Environmental Excellence Awards Entry and Successes in Streamlining Newsletter, December 2001.*



# Balancing Environmental and Industrial Concerns in Delaware

## The Problem

To outsiders, Delaware's Coastal Zone Act may sound conventional enough, perhaps something to protect sand dunes along the state's Atlantic Coast. In fact, the 1971 act is sweeping legislation dealing with matters of air, water, and land management along almost the entire sloping sweep of the state's coastline, from the Delaware River in the north through the Delaware Bay to the Atlantic Ocean in the south. In the words of mediator-lawyer Gregory Sobel, it "is a powerful land use law prohibiting new heavy industry from being built in Delaware's coastal region, while allowing existing heavy industry to continue operating."



*Along the Delaware Coast*

## Principles of Consensus Building

- Arriving at a common information base about the source(s) of a problem
- Separating the people from the problem
- Focusing on interests instead of positions
- Brainstorming win-win options
- Reaching a solution that serves everyone's interests

One notable hitch existed, however, in applying the law. For more than 25 years after passage of the Coastal Zone Act, there were no formal regulations to implement it. Instead, the state's Department of Natural Resources and Environmental Control (DNREC) used an informal, undefined regulation system that pleased neither environmentalists nor industry representatives who disagreed frequently over the law's implementation. Several attempts along the way to adopt formal regulations were unavailing.

Strong differences existed between industry and environmentalists over the department's efforts to interpret and apply the law to individual permit applications. Industry said DNREC's case-by-case approach was working; environmentalists were not as pleased with the department's implementation of the law.

## The Process

In a new attempt to draft regulations, DNREC officials hired Sobel, director of the Massachusetts-based Environmental Mediation Services, and colleagues from the Consensus Building Institute to assess whether a new effort to draft regulations would be feasible. As defined by Sobel, conflict assessment is a tool for agencies

and others considering whether to initiate an intensive negotiation process to "determine who has a stake in a dispute, what their interests are, and whether the situation is appropriate for consensus building." Sobel emphasizes that "the time and financial costs of negotiations are so significant that the parties should attempt consensus processes only if they have carefully analyzed the situation in advance."

In Delaware's case, the initial assessment was that the situation was not then ripe for a successful consensus-seeking process because some industry representatives believed DNREC's case-by-case approach was preferable to what might result from a negotiated process. The conflict assessment team pointed out that if Governor Tom Carper announced he would establish new regulations that would be substantially different from the existing, informal rules and, at the same time, stressed his preference to create those regulations through a consensus process, all key parties likely would be willing to participate in negotiations.

Governor Carper and DNREC Secretary Christophe Tulou made such an announcement in 1996. All invited participants agreed to join the Delaware Coastal Zone Regulatory Advisory Committee. The 20

members of the group represented an array of interests, among them the Sierra Club, the Delaware Nature Society, Dupont Corporation, the Chemical Industry Council, unions, the farming community, and DNREC.

In the negotiations, industry's interest was in maintaining the economic viability of companies in a rapidly changing global marketplace. The environmentalists' main interest was the long-term environmental health of the coastal zone. Government representatives wanted to reconcile differences and finally be able to promulgate regulations.

The advisory committee held three two-day negotiating sessions between the fall of 1996 and December 1997. At first, the process involved representatives discussing each others' interests, then brainstorming options to meet those interests. Through a series of trade offs, an agreement was developed between industry and environmentalists that allows industry the flexibility to add and change products and processes while assuring environmentalists that continuous environmental improvements will be made to the coast. Industry is allowed to increase production capacity so long as it does so within its existing footprints in the coastal zone. This approach is accomplished through a procedure for allowing "offsets" in permits to industry.

An offset allows some projected environmental degradation that can be "offset" through other measures that are taken to improve the environment. As a means to ensure that this approach actually results in environmental improvement in the coastal zone, the group proposed that DNREC develop a set of environmental goals and indicators and establish a committee to monitor how the offset policy is carried out.

### **The Result**

In December 1997 negotiators crafted a final draft MOU and by March 1998 all committee members had signed it, and then presented it to Governor Carper who also signed the agreement. As is required in negotiated rulemakings, a full public comment process followed. The draft regulations were published and hearings were held around the state. Many members of

the advisory committee spoke in favor of the regulations; no members opposed them. For the first time in the long history of Delaware's Coastal Zone Act, government, industry, environmentalists, organized labor, and agricultural interests all supported the same set of rules. The regulations were formally adopted in April 1999 and are now in force.

In a case study, Sobel says the key to the Delaware settlement is that the new regulations "ensure continuous environmental improvement in the coastal zone while at the same time providing industry with the flexibility to remain competitive in the global marketplace."

### **Lessons Learned**

If the powers that be are willing at the onset to commit to implementing whatever agreements the groups develop, there is greater incentive for stakeholders to work together toward developing implementable solutions.

A conflict assessment is an essential step to take before proceeding with a consensus process.

(This case study is based on a chapter prepared by Gregory Sobel for publication in *Negotiating Environmental Agreements*, edited by Lawrence Susskind, Paul F. Levy and Jennifer Thomas-Lerner, forthcoming from Island Press.)

**"For the first time in the long history of Delaware's Coastal Zone Act, all interests supported the same set of rules."**

# Case Study

## Delaware's Cancer Consortium Develops Cancer Control Plan

### The Problem

Cancer incidence and mortality in Delaware was among the highest in the nation in 2002.

The task: to reduce cancer incidence and mortality. Governor Ruth Ann Minner, whose own family has been affected by cancer, formed the Delaware Cancer Consortium (DCC) in SB102<sup>1</sup>, originally formed as the Delaware Advisory Council on Cancer Incidence and Mortality, in March 2001 in response to Senate Joint Resolution 2.<sup>2</sup> The task force was established to advise the governor and legislature on the causes of cancer incidence and mortality and potential methods for reducing both.



### The Policy Makers and Other Players

The advisory council originally consisted of 15 members appointed by the governor and consisted of medical communities, practitioners, legislators, the division of public health and cancer patients to

develop an actionable, measurable four-year plan.<sup>3</sup> Membership in the Consortium is open to organizations and individuals whose missions are not in conflict with its priorities. Members must provide annual reports about progress and accomplishments and be willing to coordinate and collaborate within its own organization and with other organizations to implement strategies that address DCC priorities.<sup>4</sup>

### The Product

The Consortium has implemented programs and services, driven awareness and education campaigns and many other activities to lessen the cancer burden in Delaware. Delaware's rate of improvement for cancer mortality now leads the country.<sup>5</sup> By the Third-Year Progress Report, the Consortium had many highlights to report:

- Delaware's reduction in mortality was nearly double the rate of the nation.
- Colorectal cancer screening rates are up. In 2005 there was a 38% increase in the

<sup>1</sup> Delaware Cancer Control Budget, page 60: [http://cancercontrolplanet.cancer.gov/budget/budget\\_files/Delaware\\_Cancer\\_Control\\_Budget.pdf](http://cancercontrolplanet.cancer.gov/budget/budget_files/Delaware_Cancer_Control_Budget.pdf)

[www.delawarecancerconsortium.org/adx/adx/adxGetMedia.aspx?DocID=412,466,9,5,1,Documents&MediaID=1129&Filename=DCC\\_Year3\\_Progress\\_Report.pdf](http://www.delawarecancerconsortium.org/adx/adx/adxGetMedia.aspx?DocID=412,466,9,5,1,Documents&MediaID=1129&Filename=DCC_Year3_Progress_Report.pdf)

<sup>2</sup> Third-Year Cancer Report, page 71.

<sup>3</sup> Delaware Cancer Consortium Homepage: [www.delawarecancerconsortium.org/](http://www.delawarecancerconsortium.org/)

<sup>4</sup> DCC Membership Application Form: [http://www.delawarecancerconsortium.org/adx/adx/adxGetMedia.aspx?DocID=196,27,2,6,1,Documents&MediaID=754&Filename=DCC\\_Membership\\_Application.pdf](http://www.delawarecancerconsortium.org/adx/adx/adxGetMedia.aspx?DocID=196,27,2,6,1,Documents&MediaID=754&Filename=DCC_Membership_Application.pdf)

<sup>5</sup> Delaware Cancer Consortium Issues Third Progress Report: <http://www.dhss.delaware.gov/dph/dpc/consortium.html>

- number of African Americans who reported ever having a colorectal cancer screening.
- Funding continued for a comprehensive, statewide tobacco prevention program at levels recommended by the U.S. Centers for Disease Control and Prevention.
- The Tobacco Prevention and Control Program expanded tobacco cessation services to include the web-based QuitNet and more face-to-face counseling through the Quitline.
- The Delaware Cancer Treatment Program, the first of its kind in the country, served more than 221 patients.
- From 2002-2006, 1,317 colonoscopies were performed through Screening for Life.
- A promotional campaign for radon testing of Delaware homes generated a 300% increase in the number of public inquiries about radon.
- Screening for Life screened 1,412 uninsured or underinsured Delawareans, and removed polyps from 823 patients.
- An annual fund was established to train and place statewide cancer care coordinators who link patients with medical and support services.

- The Consortium continued to focus on closing gaps for disparity groups.<sup>6</sup>

### Developing a Plan for Action

The DCC began meeting in April 2001 with the shared understanding that their work would be focused on developing a clear and useable cancer control plan. Another shared priority was that extensive input would be needed from professionals in cancer control, as well as from Delaware citizens affected by cancer. With these priorities in mind, DCC worked on a system to create a shared awareness and agreement on the range of cancer control issues to be addressed now and in the future. They also wanted to create a structure and agenda for addressing these needs and enable Delaware to move forward with meaningful action for its citizens<sup>7</sup>.



To accomplish these goals, DCC heard from speakers on Delaware cancer statistics, including Dr. Jon Kerner from the National

Cancer Institute, and began monthly presentations featuring Delaware cancer survivors or family members who had lost a loved one

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<sup>6</sup> Task Force Report:  
<http://www.delawarecancerconsortium.org/Task-Force-Progress-Reports>

<sup>7</sup> Year Three Progress Report, page 64.

to cancer. They provided valuable insight into some of the concerns and barriers faced by people battling cancer, the stress this disease places on all aspects of their lives, and ideas for ways that Delaware can help ease these burdens on its citizens.<sup>8</sup>

### Involving the Public

A unique project, called Concept Mapping, was also initiated to get input on cancer issues from Delaware citizens and to help DCC establish priorities and its scope of work. DCC invited more than 195 Delaware citizens who are living with the disease or have experienced its devastation to participate in the project<sup>9,10</sup>.

Both DCC and those invited completed the brainstorming phase, during which they provided their ideas on completing the statement: "A specific issue that needs to be addressed in comprehensive cancer control in Delaware is...." Over 500 statements were submitted, and editing of these to avoid duplication resulted in 118 ideas about controlling cancer in Delaware. These ideas were then rated, relative to each other, on importance and feasibility<sup>11</sup>.

### Development of Subcommittees and Recommendations

From the results of the Concept Mapping activity and the numerous speakers, the DCC developed a clear set of priorities and established six subcommittees to address these issues. Each subcommittee, chaired by a member of DCC, was provided with a list of priorities in its focus area, from which specific recommendations were developed. The subcommittees meet regularly to address each specific goal and implement the work that is needed to succeed. For example, the Quality of Life Committee aims to implement a patient-driven treatment model that maximizes the opportunity for home-based care. To achieve this goal, the Committee will educate, empower and support patients and caregivers to receive home-based care when appropriate by tasking Cancer Care Coordinators to provide patient and caregiver education and facilitate access to home-based support; tasking itself with expanding the use of hospice services to situations other than those of crises, and redefine the ways and populations for whom hospice services can be presented; and tasking the Delaware General Assembly to provide funding for essential items that allow patient transfer to home care. The Committee is chaired by Delaware Representative Pamela Maier and includes representatives from community and non-profit groups and members of the health profession.

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<sup>8</sup> Year Three Progress Report, page 64.

<sup>9</sup> Recommendations of the Delaware Advisory Council on Cancer Incidence and Mortality APRIL 2002:

[www.delawarecancerconsortium.org/adx/adxGetMedia.aspx?DocID=409,466,9,5,1,Documents&MediaID=1120&Filename=DCC\\_Task\\_Force\\_Report\\_2002.pdf](http://www.delawarecancerconsortium.org/adx/adxGetMedia.aspx?DocID=409,466,9,5,1,Documents&MediaID=1120&Filename=DCC_Task_Force_Report_2002.pdf)

<sup>10</sup> Year Three Progress Report, page 64.

<sup>11</sup> Year Three Progress Report, page 64.





### Next Steps

Governor Minner says the next four-year plan, released in August 2007, strives toward new goals to further reduce cancer incidence and mortality rates in the First State. Already, the cancer incidence rate has decreased four times as much as the nation's rate, and the cancer death rate has declined twice as much as the national average. Borrowing on those successes, the Governor is expanding the outreach and identifying new preventive strategies.<sup>12</sup> William Bowser, Chairman of the DCC, says the task force will continue to work with health care professionals, legislators and the community to ensure that all Delawareans have access to the services they need to lower their cancer risks.<sup>13</sup>

*This case was developed by the University of Delaware's Conflict Resolution Program. Contact*

<sup>12</sup> Purple Book 12/26:  
[http://www.delawarecancerconsortium.org/adx/aspx/adxGetMedia.aspx?DocID=465,467,9,5,1,Documents&MediaID=1218&Filename=PurpleBook\\_12.26.pdf](http://www.delawarecancerconsortium.org/adx/aspx/adxGetMedia.aspx?DocID=465,467,9,5,1,Documents&MediaID=1218&Filename=PurpleBook_12.26.pdf)

<sup>13</sup> Delaware Cancer Consortium Issues Third Progress Report:  
<http://www.dhss.delaware.gov/dph/dpc/consortium.html>

*Kathy Wian, Director, or Shelley Cook for more information at [kwian@udel.edu](mailto:kwian@udel.edu).*



This case study is published jointly by the Policy Consensus Initiative (PCI) and its applied research and development arm, the National Policy Consensus Center (NPCC). PCI is a national nonprofit organization that promotes consensus building and effective problem solving in states. NPCC is a center of expertise on consensus building for public leaders.

For other case studies and information about collaboration, consensus and conflict resolution, visit the website: [www.policyconsensus.org](http://www.policyconsensus.org).



# Case Study

## Building Consensus in Florida on a Statewide Building Code

### The Problem

Following Hurricane Andrew in 1992, Florida experienced record-breaking insurance losses resulting in a crisis affecting every homeowner in the state. The Governor appointed a Building Code Study Commission, The Florida Conflict Resolution Consortium, located at Florida State University, designed and facilitated a two-year study and deliberation process with the 28 members representing a range of interests in the public and private sectors, through which the Commission evaluated the building code system.



The study revealed that building code adoption and enforcement was inconsistent throughout the state. Even local codes thought to be the strongest proved inadequate when tested by

major hurricane events. The consequences were devastation to lives and economies and a statewide property insurance crisis. The Commission recommended reform of the state building construction system that placed emphasis on uniformity and accountability.

The legislature enacted the consensus recommendations into law in 1998. In late 1998, the Consortium was asked by the Commission's chair to assist the newly created Florida Building Commission in its effort to build consensus for a uniform building code proposal. A complex consensus building process was put in place that included designing and facilitating meetings of 11 balanced technical advisory groups of 15 members each appointed by the Commission, as well as the Commission's meetings.

### The Process

The Consortium designed and led a series of facilitated public workshops around the state for the Commission to receive public input on its draft products. After public comment was obtained, the Commission refined the

Code and presented it to the 2000 Florida Legislature for review and approval.

### **The Product**

The Florida legislature enacted the new Florida Building Code and directed the Commission to continue to build consensus on key topics involved in its implementation, including product approvals and other controversial issues. The Consortium continues to assist the Commission at each of its meetings.

The Florida Building Commission is a 23 member Governor appointed stakeholder group who successfully created, implemented, and maintains the new statewide Florida Building Code. Commission Chair Rodriguez, praised the consensus process that has resulted in the code decisions thus far. “I am absolutely in awe of this process. The intent is not to compromise, because one does not compromise on issues of life safety, but to find and reach consensus on the best way to achieve results the people want.”

The Florida Building Commission (FBC) seeks to develop consensus decisions on its recommendations and policy decisions. The members strive for agreements which all of the members can accept, support, live with or agree not to oppose. In instances where, after vigorously exploring possible ways to enhance the members’ support for the final decision, the Commission finds 100% acceptance or support is not achievable, decisions require at least 75% favorable vote of all members present and voting. This super majority decision rule underscores the importance of actively developing consensus throughout the process on substantive issues with the participation of all members and which all can live with and support. The consensus process is conducted as an open public process with multiple opportunities for the public to provide input to the Commission on substantive issues.

### **Next Steps**

The Florida Building Commission continues to provide a forum for stakeholders representing different interests to participate in a consensus-building

process where issues affecting the construction industry are discussed and evaluated on their technical merits and cost-benefits to the citizens of the State of Florida.

For more information about this case, contact Robert Jones, FCRC Director, at [rmjones@mailers.fsu.edu](mailto:rmjones@mailers.fsu.edu).



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# Case Study

## Achieving Building Code Energy Efficiencies in Florida

### The Issue

Florida has long been one of the leading states for work in energy efficiency. It became the first state to adopt a statewide mandatory energy code in 1980 by establishing performance requirements for heating and cooling systems. The requirements that the state of Florida has maintained since then have been equal to or greater than those standards set by the US Department of Energy. These codes work to create energy efficiency levels that work with priorities regarding air quality in a climate overwhelmed with heat and humidity.

In his July 2007 executive order, Governor Charlie Crist directed the Florida Building Commission to increase the energy efficiency requirements described in the Florida Energy Efficiency Code for Building Construction. The increase in efficiency was to be by 15% for residential and commercial buildings. The Florida legislature passed the Energy Act of 2008 which created assignments and goals for the commission. Following this bill, a supplement to the 2007 Florida

Building Code took effect in March 2009.



### The Process

The Florida Building Commission was assisted by the FCRC Consensus Center at Florida State University in meeting proceedings. Jeff Blair of FCRC helped to facilitate consensus building with the Florida Energy Code Workgroup and the Florida Solar Energy Center where they worked to evaluate the options for achieving the building code energy efficiencies. The purpose of the workgroup is to develop recommendations that will increase energy conservation to 20% by the 2010 Florida Building Commission. These building efficiency increases will be based on the International Energy Conservation Code, while maintaining Florida energy efficiencies. The workgroup worked to analyze several options for efficiency improvement including energy efficiency for new additions to

code, examining improvements to equipment to make it more efficient in the humid climate and design criteria for new equipment.



### The Players

The Florida Building Commission is chaired by Raul Rodriguez of American Institute of Architects (AIA). A twenty-five member workgroup was tasked by the Governor to represent their stakeholders group's interests. The Florida Energy Code Workgroup is charged to work with stakeholders to develop consensus packages of recommendations for submittal to the Commission.

### The Product

The Florida Energy Code Workgroup unanimously voted on recommendations regarding cost effectiveness tests for evaluating the

proposed amendments to the building code in May of 2009. These recommendations were submitted to the Florida Building Commission, and the Commission voted unanimously at the June 2009 meeting to adopt the package of recommendations. The workgroup will continue to work in facilitated meetings to develop recommendations to increase energy efficiency for the Florida Building Code.

### Next Steps

Future work by the Florida Energy Workgroup will include the development of a model for energy code efficiencies in residential building, the evaluation of the current code for both residential and commercial energy effectiveness, a comparison of the Florida code to that of the International Energy Conservation Code and strategies for developing and implementing the public awareness on energy efficiencies and its benefits. These meetings will continue to be facilitated by the Florida Consensus Center and will develop recommendations to the Commission for consideration during

the 2010 Florida Building Code Update Process.

For more information about this case, contact Robert Jones, FCRC Consensus Center Director, at [rmjones@mailers.fsu.edu](mailto:rmjones@mailers.fsu.edu).



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# Transportation

*Transportation systems determine where people live and work and how communities evolve. Because of these impacts, great controversy often exists around transportation policies and their implementation. Public officials are finding themselves in need of better ways to identify citizens' priorities and preferred approaches to solving transportation problems. They are increasingly using collaborative processes, like those outlined below, to bring diverse groups to the table to work on transportation problems.*

*The following case is an example of how consensus building can be used to work out both transportation policies and their implementation.*

## Mediating a Highway Dispute in Florida\*

### Problem

During the 1990s, local transportation agencies tried to construct a limited access highway that would directly link the Greater Orlando Airport and the City of Orlando. This “Central Connector Project” was included in the Orlando Urban Area Metropolitan Planning Organization (MPO) Long Range Transportation Plan.

Key stakeholders held intense positions for and against the project. Proponents felt the proposed corridor was essential since tourists and businesses had no direct and speedy route to travel from the airport to the City of Orlando. Some local communities opposed it because they believed the proposed roadway would divide their main business districts and negatively impact their economy and quality of life. Many of the opponents also wanted a transportation alternative for the corridor that would include other roadway improvements and light rail options.

The dispute escalated into a “mega-impasse,” complete with litigation, administrative hearings, and efforts to seek legislation that would result in either building or eliminating the proposed highway. In response to lawsuits against the expressway, supporters converted the plan into a ‘proposed turnpike.’ Opponents responded with additional lawsuits and requests for administrative hearings.

### Process

By 1994, disputes surrounding the highway were at a critical stage. Amid some feelings of doubt, the MPO hired a mediator to assess whether parties on both sides of the issues were willing to work toward a consensus recommendation. The mediator conducted the assessment with help from the Florida Conflict Resolution Consortium. After interviewing the parties, the assessment team recommended that the MPO sponsor a voluntary mediation to generate transportation options for the Central Corridor.



Merle Kearns  
Ohio State Representative

*"It is important for citizens and government to know how to resolve disputes without litigation or resorting to confrontation. Ohio is most fortunate to have a commission which helps us learn how to utilize dispute resolution techniques. As a public official, I believe these programs are vital to making Ohio a safer and better place in which to live."*

The MPO contacted key stakeholders who had been identified in the assessment and invited them to select a representative to participate in the mediation. These included five cities, the county, the aviation authority, the chamber of commerce, the city's promotional council, a neighborhood council, the regional transportation authority, a property owners association, the expressway authority, a state senator and representative, and a community council.

Shortly before the first mediation session, a lawsuit was filed against the Florida Department of Transportation that resulted in the Department not being able to participate in the mediation. In spite of, or perhaps because of, this suit the Department supported the mediation. The parties knew about the lawsuit and were still willing to come to the table.

The mediation was completed in seven sessions. The sessions were held several months apart so that the independent transportation consultants could conduct a technical analysis of the alternatives generated by the mediation. After discussing and accepting mediation protocols, the parties identified optimal mediation outcomes, jointly framed the issues, and identified information needed for future sessions.

Next, participants jointly selected criteria to evaluate the transportation alternatives that would be developed at subsequent meetings. Criteria ranged from minimizing division of neighborhoods and government jurisdictions to net cost estimates to environmental impacts. The participants were pleased and surprised that by the second meeting they had unanimously endorsed the joint criteria.

During the next stage, participants identified eleven alternatives for the Central Corridor. Independent transportation consultants conducted computer modeling and analysis of the eleven options. After considering the technical analysis, the group drafted a transportation improvement package. The mediator then conducted a confidential survey of all the stakeholder constituencies to determine the level of agreement on the proposed recommendations. The representatives

shared the survey with their constituencies and submitted their responses to the mediator. Participants reviewed the survey results and reached final consensus.

## Results

The final consensus agreement consisted of two recommendations—1) to delete the Central Connector from adopted roadway plans and 2) to implement light rail options and five specific roadway improvements as a total package. The mediation participants wanted to ensure that the MPO understood a consensus agreement had been reached. They selected representatives who had been actively involved in the dispute to present their recommendations to the MPO.

After hearing the recommendations, the MPO unanimously adopted the alternatives and approved inclusion of the recommendations in the long range transportation plan.

## Lessons Learned

- Working with an impartial mediator can help provide the negotiating parties with confidence that the playing field will be level.
- Using group-generated criteria to evaluate options helps negotiators reach a consensus recommendation.
- When ground rules require designated representatives to communicate with their constituencies during the deliberations, it is easier to gain broad-based support for the process and its results.

\*Based on a case study conducted by Pat Bidol-Padva.

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### *For more information on this case contact:*

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## Funding Affordable Housing

### The Problem

Like many states, Florida needs large amounts of affordable housing for low and moderate-income residents. In 1991, state officials decided to energize lagging efforts to meet those needs. They convened the Governor's Ad Hoc Work Group on Affordable Housing. The goals for the group were to reach consensus on recommendations for creating a state housing policy and establish a Florida Housing Partnership.

For years, various elements making up the work group had been "fighting each other," in the words of one observer. "Here was an opportunity where they could come together and really come up with a coordinated strategy for affordable housing and, more important, a funding mechanism for that strategy."



The work group was made up of state and local government officials, representatives of the business and nonprofit sectors, lawyers, and academics. Public officials included state legislators and representatives of the Department of Community Affairs, the Housing Finance Agency, and regional planning councils. Business interests were represented by individual home builders and officials of the Florida Home Builders Association and the banking industry. Nonprofit interests included representatives of community development corporations and the Florida Low Income Housing Coalition.

### The Process

The work group held three day-long facilitated meetings about 30 days apart. Staff and sub-groups, or committees, met in between. The committees explored such subjects as regulatory reform, assessment of existing housing programs, and funding and legislation recommendations. The Florida Conflict Resolution Consortium helped to develop the agendas and facilitated the discussions.

The first meeting dealt with such matters as (1) clarifying the group's mission; (2) defining the rules and responsibilities of group members; (3) identifying matters to be examined by committees and the scope of their efforts; and (4) reviewing "who was responsible to produce what to be delivered to whom."

The second meeting focused on the reports of the sub-groups. For example, a regulatory reform committee reviewed regulations at all levels of government and identified ways to reduce the costs and increase the availability of affordable housing. A second example: A committee that assessed existing housing programs focused on identifying state programs that made best use of public monies in such areas as leveraging funds, number of persons served by the programs, and timely and cost-effective delivery of housing.

Each committee developed its recommendations in accord with the guidelines established by the full work group. For example, one guideline required that state money should be heavily leveraged, spent on housing, not program administration, and used whenever possible as loans, not grants.

At the second meeting, the full work group ranked committee recommendations, listed areas where there was disagreement, and pursued ways to resolve differences.



*Legislating has never been easy, and it's getting much more difficult as issues become more complex. These complex emerging issues require new skills to operate effectively in the legislative environment. Legislators need the Policy Consensus Initiative to help teach us the skills of consensus building so we can deal with these issues more effectively.*

*Senator Roger D. Moe  
Minnesota Senate Majority  
Leader*

The final meeting dealt with refining the recommendations of the committees, examining the reasons for making them, and building consensus on them within the full work group for its final report.

### **The Result**

The immediate result of the work group was a series of recommendations that became the framework for legislation. Among the accomplishments of the Affordable Housing Act was the institution of a real estate transfer document stamp that became a dedicated funding source for affordable housing.

With funding developed through the act, Florida now provides \$120 million a year in state funds for affordable housing. More important, that amount is leveraged on a four-to-one basis so that the state has about a half-billion dollars a year available for affordable housing, according to Mark Hendrickson, a national housing consultant who as a state official served on the work group in the early 1990s.

The Florida Housing Partnership that emerged from the work group was instrumental in encouraging passage of the housing act. The partnership incorporated the changed relationships that developed as profit and nonprofit interests and state and local government officials worked together and found consensus on affordable housing. “These people continue to work together—the relationships the work group created have sustained themselves over the years for the purposes of affordable housing,” according to Tom Taylor of the Florida Conflict Resolution Consortium.



*I use consensus process to resolve public policy problems simply because it works. The complex nature of issues today requires an integrated collaborative approach to ensure sound lasting solutions.*

*Governor John A. Kitzhaber,  
M.D., of Oregon*

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# FLORIDA'S STRATEGIC INTERMODAL SYSTEM

## OVERVIEW

The Florida Department of Transportation (FDOT), in cooperation with its partners and other stakeholders, is developing for the first time a statewide Strategic Intermodal System (SIS). This was a new feature of the 2020 Florida Transportation Plan that was adopted in 2000 following an 18 month facilitated stakeholder consensus building initiative.

The SIS represents a shift in the way the state views the development of and investment in Florida's transportation system. Once established, the system will be used to target expenditures aimed at enhancing Florida's economic competitiveness and will include an increased corridor emphasis in planning and funding projects. The system will be composed of facilities and services of statewide and regional significance for aviation, highway, intermodal rail, seaport, space and transit systems, and accommodations for bicycles and pedestrians.

The overall goal in Phase I was to reach consensus with the Strategic Intermodal System Steering Committee on recommendations to the FDOT Secretary, as well as the Florida Transportation Commission, regarding:

- Policies to guide decisions related to the SIS;
- Designation criteria and the facilities and services to be included in the system; and
- Guidance on project prioritization methods and funding options to implement the system.

In Phase II, FDOT and its partners will determine needs based on criteria established during system development, determine how to best address those needs, and establish priorities for funding them.

Facility and service providers of every transportation mode and other stakeholders worked together to reach consensus on what facilities and services should be included in the system. The Committee worked in plenary and in committees focusing on infrastructure, economic competitiveness, and community and environment issues and recommendations.

## THE COLLABORATION

### The Players

The Secretary of FDOT and the Assistant Secretary of Transportation Policy initiated the process. The Secretary served as the Steering Committee Chair and the Assistant Secretary served as Vice-Chair. Both participated directly

in the substantive process of seeking agreement on recommendations. In recognition of the many "owners" of the facilities to be included in this system, and the diverse stakeholders with an interest in how the system will enhance or impact Florida's economy, communities, and the environment, FDOT invited a wide range of representatives to the table.

The Florida Conflict Resolution Consortium served as neutral third-party facilitators. Cambridge Systematics was hired as an outside technical consultant.

### The Process

The consensus building process was conducted in three stages: an organizational stage, an education and initial development of recommendations stage, and a consensus building and report adoption stage. Between February and December 2002 there were eight one- or two-day SIS Steering Committee meetings. In addition, three SIS member-drafting groups held a total of 23 facilitated meetings, with 15 public workshops convened around the state to review draft recommendations.

#### 1. Getting Organized

The initial organizational stage began with a series of preliminary meetings between the Chair, FDOT staff, the consultants and the facilitators to organize the first Steering committee meeting and meeting process. The Florida Conflict Resolution Consortium produced a situation assessment and an initial process design in cooperation with the State Transportation Planner, FDOT's Office of Policy Planning staff, and consultants that included Cambridge Systematics—retained by FDOT to serve as technical advisors. The preliminary planning meetings were key to developing effective working relationships among the team and agency by establishing a clear understanding of roles and responsibilities during the consensus building process and how those respective roles could best compliment each other.

Prior to the first meeting, the facilitators, in consultation with staff and consultants, developed and sent to members a survey to identify perspectives on the current plan, issues and concerns to be addressed in the update process, and information needed to develop consensus on those issues. The organizational stage concluded with a one-day organizational meeting of the Committee in February, at which members reviewed and suggested refinements to the draft process goals, principles, roles



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# FLORIDA'S STRATEGIC INTERMODAL SYSTEM, CONTINUED

and decision making guidelines<sup>1</sup>, and prioritized key issues identified by members in their pre-meeting surveys.

## 2. Education and Initial Development of Recommendations

The Steering Committee met in April, June, and August to hear informational briefings on the key issue areas of economic competitiveness, infrastructure, and community and environment, and to develop initial recommendations. Following each presentation, members worked in facilitated small groups to review the trends and issues identified, and to discuss potential initial policy statements. In plenary sessions and ad hoc task groups, members worked to review, refine, and adopt the goal statement, principles and assumptions, roles and responsibilities, and consensus-building guidelines.

During the third committee meeting, three drafting groups, chairs and vice chairs were appointed by the SIS Steering Committee and asked to develop draft SIS designation criteria from the three key issue areas. Between the June and August Committee meetings, these facilitated groups met almost weekly either by teleconference or in person.

At the August meeting, a panel of the three drafting group chairs provided background on their groups' draft criteria and maps, and identified unique and crosscutting issues. Consultants from Cambridge Systematic presented a preliminary draft on integrated designation criteria.<sup>1</sup> Drafting groups then met on the second day to address identified concerns and respond to any assignments from the plenary discussion, and to provide technical staff with guidance for the next draft.

## 3. Consensus Building and Report Adoption

The Steering Committee met monthly in one- or two-day sessions from September, through December to refine and adopt a final consensus report.

In September the committee reviewed, refined, and adopted draft workshop materials for presentation at 15 public workshops conducted around the state.

Between the September and October meetings, staff, and consultants conducted extensive public outreach

through the workshops, meetings, an SIS website, and a toll-free comment line. They also conducted a mail-in survey to gather public input on the SIS goal and principles, the draft designation criteria and thresholds, and the facilities that met those criteria and thresholds.

At a two-day meeting in late October, the SIS Steering Committee meeting reviewed comments from the public workshops. By the conclusion of the second day, the Committee unanimously adopted a single text format to serve as the basis for an "amendatory" draft report, which would allow members to submit changes to sections of the text. The primary focus of the November meeting was to refine and adopt the amendatory text. Facilitators used a series of straw polls to gauge the initial support of the committee members for respective sections of the draft report. The poll identified concerns that required further discussion among the members in order to clarify and build consensus before the final vote for adoption. The discussions resulted in refinements that were presented to and unanimously accepted by the Steering Committee. The final amended text was adopted, as revised, with only one member voting no. The amendatory text incorporating November's comments and suggestions, along with change amendment forms, were mailed to members in November. Proposed amendments were then compiled and made available to members for their review four days prior to the final meeting in December.

At that meeting, members reviewed the 28 proposed substantive amendments and seven editorial amendments to the draft report. Both voting and ex officio members participated in discussions of the proposed amendments, but only voting members could approve amendments for inclusion and for final adoption of the report. Final decisions required a favorable vote from at least 80% of present and voting members. If any key issue or package of issues received more than 50% but less than 80% support, documentation of the differences and the options that were considered were to be included in the final report.

The final vote for adoption of the report as amended was 21 in favor, one opposing. The opposing member had attended only the first organizational meeting and the final adoption meeting. Though staff kept that member updated on the progress of the Steering Committee throughout the process, the member had not participated directly in Steering Committee or Drafting Group discussions and the consensus building process.

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<sup>1</sup> Following each section of the presentation of the draft an initial poll was taken, using a four-point consensus acceptability scale, to assess members' level of comfort with the approach presented and to guide discussion toward addressing the most serious concerns.

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# FLORIDA'S STRATEGIC INTERMODAL SYSTEM, CONTINUED

## The Agreement

The final recommendations submitted to the FDOT Secretary contained a detailed list of the designation criteria and thresholds, the facilities that meet these criteria and thresholds, and accompanying maps. The Steering Committee also developed initial guidance on institutional and financial issues related to SIS designation and implementation, but determined it would be more appropriate to consider these issues during the subsequent implementation phase.<sup>2</sup>

## OUTCOMES

Designation of the Strategic Intermodal System in Phase I will be followed by development of a Strategic Plan in Phase II during 2003-04 that will guide future investment in and management of the SIS. The Strategic Plan will include detailed facility maps, identified needs, prioritized improvements, financing strategies, and related policies.

## LESSONS LEARNED

- ✓ **Leadership is critical** to successful consensus building. The fact that the Secretary of Transportation called the parties together with the support of the Governor's office and then served as the Steering Committee Chair was key to ensuring the participation of key partners in designing a new system that would fundamentally shift in the way Florida views development and investment in its transportation system. Participation by these partners was necessary because there will be many "owners" of the facilities on this system.
- ✓ **Consensus building requires time and resources.** By allocating adequate time and resources for this consensus building process, FDOT allowed members to work out their disagreements, engage in substantive dialogue, and find better solutions. Early engagement of

facilitators resulted in an appropriately designed consensus process, and in a collaborative working relationship among the facilitators, staff, and consultants throughout the 11-month process. Facilitators, staff, and consultants held frequent coordination meetings throughout the process and briefed the chair and vice-chair prior to each Steering Committee meeting.

- ✓ **A well designed process is essential.** The FDOT process created a framework for members to develop ownership and to sort out and order the issues so they could understand and discuss them fully. A survey of issues and concerns prior to the first meeting helped educate members about the number and range of issues to be considered during the process. Presentations were made on key issue areas, followed by small group and plenary discussions. Drafting groups that formed around three key issue areas allowed for development of draft criteria that could be refined by the larger group. . Members came to support the process for developing the criteria and expressed strong concerns when new criteria regarding highways were introduced without going through the same process.
- ✓ **Flexibility in the process is important.** Because the FDOT framework allowed for adjustments, the role of the drafting groups could be expanded to include review and revision of criteria to address concerns expressed in plenary sessions and during the 15 public workshops.

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*This case study was developed by Robert M. Jones and Hal Beardall of the Florida Conflict Resolution Consortium <<http://consensus.fsu.edu>>, who designed and facilitated the SIS process. For a copy of the SIS Steering Committee's adopted consensus guidelines see <[http://www11.myflorida.com/planning/sis/steering/consensusguide\\_adopted.pdf](http://www11.myflorida.com/planning/sis/steering/consensusguide_adopted.pdf)>.*

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<sup>2</sup> See the final report at <<http://www11.myflorida.com/planning/sis/steering/report/default.htm#final>>.



# Case Study

## Florida DOT Gains Consensus on State Transportation Plan

### The Problem

Florida is expecting to undergo changes that will have a dramatic impact on the statewide transportation system. Current trends indicate that by 2020,

imports and exports will double, 5 million new residents will call Florida home, and up to 87 million tourists will visit the state each year—an increase of 15 million.

To prepare for such dynamic growth, in 1995 the Florida Department of Transportation

(FDOT) adopted a comprehensive transportation plan called 2020 FTP. Under federal law, within five years the state was required to update the plan and submit it to the US Department of Transportation for approval.

The complex update procedure involved a number of issues, diverse interests, and multiple government agencies. To improve coordination among the various government agencies and to incorporate input from stakeholders, FDOT decided to use a facilitated consensus process.

### The Policymakers

FDOT Secretary Tom Barry initiated the process. As primary convener, he chaired the 2020 FTP Update Steering Committee and appointed committee members.

The committees included a number of elected officials: two state senators, two representatives, the

mayors of Orlando and Gainesville, elected officials from the Municipal Planning Organization, three county commissioners, and representatives from the city and county.

### Other Players

In all, there were 97 participants in the process, each carefully selected to assure a balance of perspectives and varying points of view. In addition to the policymakers mentioned above, the process included representatives from the governor's office, FDOT, the Federal Highway Administration, the chairman of the Transportation Commission, the Environmental Protection and Community Affairs departments, environmental representatives, and other citizen and non-governmental stakeholder groups.

### The Process

In June 1999, FDOT enlisted the assistance of the Florida Conflict Resolution Consortium (FCRC) to help develop and implement a process for revising the 2020 FTP. FCRC Director Robert Jones worked with FDOT staff and senior management to conduct a conflict assessment and design a participatory consensus process.

All committee meetings were facilitated, consensus based, and open to the public. The advisory committees held seven meetings to study and develop consensus recommendations on specific substantive issues. Following the meetings, public input was

continued on reverse

solicited through 12 workshops around the state. Using this input, the committees revised their reports and submitted them to the steering committee for review.

Over a three-month period, the steering committee met to discuss the advisory committees' recommendations and to draft a preliminary proposal. Although the consensus guidelines required that 80 percent of participants concur, the process helped to engender so much trust among the members that they unanimously agreed on a draft and on all major decisions throughout the process. Again, FDOT sponsored facilitated focus groups and workshops to encourage statewide public input on the decisions. The committee incorporated this feedback, revised the proposal, and reached another unanimous agreement on a final report.

## The Product

In December 2000, Secretary Barry submitted the committee's final proposal to USDOT, which subsequently approved it. The update established four goals and associated long-range objectives. The goals were: 1) improving the safety of transportation; 2) preserving and managing existing transportation systems; 3) enhancing economic competitiveness; and 4) ensuring quality of life through livable communities, healthy ecosystems, and a sound economy. The plan also included implementation recommendations. Following USDOT's approval of the plan, the steering committee appointed three drafting groups to develop policy recommendations relating to three key issues: 1) economic competitiveness, 2) infrastructure and

operations, and 3) community and environment. The three groups continue to meet, solicit public input, and report to the steering committee.

FDOT's commitment to collaboration and consensus has enabled the agency to lay the substantive and procedural foundations necessary for reaching the statewide objectives by 2020.

According to Secretary Barry, over the past three years FDOT has been using consensus building to deal with a number of difficult issues. "We find that these processes provide better communication, save time and money, and strengthen important relationships," he said.

For more information about this case contact:

[http://consensus.fsu.edu/transportation/FDOT\\_Report\\_A-8.html](http://consensus.fsu.edu/transportation/FDOT_Report_A-8.html)



★ National  
★ Policy  
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This case study is published jointly by the Policy Consensus Initiative (PCI) and its applied research and development arm, the National Policy Consensus Center (NPCC). PCI is a national non-profit organization that promotes consensus building and effective problem solving in states. NPCC is a center of expertise on consensus building for public leaders.


For other case studies and information about collaboration, consensus and conflict resolution, visit the website: [www.policyconsensus.org](http://www.policyconsensus.org).

# Case Study

## Legislature Uses Mediation to Craft Illinois Telecommunications Act\*

### The Problem

In June 2001 the Illinois Telecommunications Act was set to expire. If the Legislature failed to enact a new law, it would be forced to extend the current legislation or relinquish statutory oversight of the telecommunications industry.



Under the 1994 law, the Illinois Commerce Commission (ICC) was responsible for regulating the rates and services of the different Incumbent Local Exchange Carriers (ILEC). In response to organizational and technological changes in the industry, however, state and federal mandates required deregulation of certain incumbent carriers and encouraged Competitive Local Exchange Carriers (CLEC) to enter the market.

The challenge for the Illinois General Assembly was to design legislation that reflected the current mandates and balanced the interests of both the CLECs and the ILECs. To ensure fair competition, the ILECs would need to share their existing operating systems with their competitors in return for authority to set their own rates free of ICC regulation. The ILECs and the CLECs had struggled to agree on legislation, but with the deadline approaching, both sides were unable to compromise.

### The Players & the Policy Makers

The final decision makers were members of the General Assembly. Other key players included representatives of the CLECs (more than 30 competitors) and the ILEC (Ameritech). A variety of secondary participants also provided information and input that influenced the policy makers' decisions and affected the final bill. These participants included experts from the ICC and telephone companies, as well as citizens, unions, government agencies, business, and university representatives.

House Speaker Michael J. Madigan asked Judge Michael Getty to act as his special assistant and serve as facilitator in a legislative dispute resolution process to rewrite the 1994 law. Judge Getty, a mediator and arbitrator with the Judicial Arbitration and Mediation Services, Inc., is a former legislator.

### The Process

Speaker Madigan's decision to depart from the traditional committee structure and implement a legislative process using a neutral third party was critical to the successful and timely enactment of the telecommunication reform act.

In January 2001, after submitting preliminary proposals, Ameritech and more than 30 competitors began the issue-resolution-process.

continued on reverse

Judge Getty used traditional mediation, alternating between joint sessions and private caucuses. The process worked well and helped to produce initial agreements negotiated between lawyers, with input from technical experts. According to Judge Getty, "...it would have been very difficult for a legislative committee to incorporate the...detail necessary to properly reach agreement between the parties."

Two months before the deadline, Ameritech agreed to meet in a joint session with the association of CLECs. The two groups reached agreement on more than 100 issues, while the technical experts and lawyers began drafting the legislation. The day before the deadline, the parties had resolved all but one of the issues. For the first time in the process, Judge Getty stepped outside his role as facilitator to make a recommendation to the Speaker to resolve the final issue.

## The Product

HB 2900 passed the House and Senate with only one and two respective dissenting votes. Initially, Ameritech opposed the bill because of the single unresolved issue, but under the new law, Ameritech has benefited from deregulation and settled two rate cases before the ICC. Some provisions of the bill include: (1) grants to advance telecommunication service; (2) requirement for carriers to provide three rate packages; (3) service and quality standards set by the ICC; and (4) a \$90 million rebate to Ameritech business customers to settle an ICC case.

While support for the bill was not 100 per cent, months of mediation and negotiation helped to expedite the legislative process and produce a fair, well-balanced bill that sets the foundation for a new telecommunication policy throughout Illinois.

For more information about this case contact  
The Hon. Michel Brennan Getty:  
mbgetty@aol.com

*\*This case excerpted from Dispute Resolution Magazine, published by the American Bar Association Section of Dispute Resolution, Winter 2002: "Legislative Dispute Resolution: Mediation techniques can assist in drafting difficult legislation," by The Hon. Michael Brennan Getty (ret.).*



★ National  
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## **Republican River Negotiations Result in Mediated Settlement**

In 1943, the states of Nebraska, Colorado and Kansas signed the Republican River Compact in an effort aimed at equitably dividing the waters of the Republican River among the three states.

After futile attempts via the Republican River Compact Administration to resolve Kansas' concerns about Nebraska's overuse of its allocations, the two states contracted with Chris Moore and Mike Harty, of CDR Associates, to mediate the dispute. After 14 months of intense negotiation, Nebraska water users rejected a preliminary settlement proposal and negotiations broke off in March 1997.

In 1998, following several more years of Kansas' complaints, Kansas filed suit in the U.S. Supreme Court against the States of Nebraska and Colorado to enforce their compact rights.

One reason for the suit was that Nebraska was not limiting the drilling of new wells within the Republican River basin. A second reason was that Colorado and Nebraska both failed to limit the quantity of

water pumped from wells in the lower two thirds of the basin. Compact records showed that during the 1980s and 1990s Nebraska had frequently exceeded its sub-basin allocations. As a result of the decreased flow during those years, Kansas farmers and water users were unable to satisfy their water needs.

Nebraska filed a motion to dismiss the case, contending that the compact only regulated use of surface flow, and the Kansas suit was related to groundwater use. In 1999, the U.S. Supreme Court assigned Special Master Vincent McKusick to hear the case. While the Supreme Court is the only court that can decide disputes between states, it assigns water rights cases to Special Masters for motions and hearings. Special Master McKusick recommended the Supreme Court deny Nebraska's motion to dismiss because the compact restricts consumption of groundwater to the extent it depletes streamflows in the Republican River Basin. In June 2000, the Supreme Court denied Nebraska's motion to dismiss.

By October 2001—after the groundwater issue had been decided, other preliminary motions ruled on, and discovery nearly complete—confidential mediated settlement talks began among Kansas, Nebraska, and Colorado and U.S. government officials. Each party had sent a team of negotiators. The earlier mediators on the case, Moore and Harty from CDR Associates, were hired to facilitate the negotiations.

In April 2002, an Agreement in Principle was signed by the governors and attorneys general of all three states, and a Final Settlement Stipulation was signed in December, 2002. The following April, Special Master Vincent McKusick



## **Republican River Negotiations Result in Settlement, con't...**

recommend "without reservation" the approval of the Final Settlement Stipulation, which the Supreme Court did in May 2003.

The settlement includes assurances of compact compliance by each state, taking into account the impact of wells on surface flows; providing a moratorium on the drilling of new wells; and protecting the water supply for downstream uses that rely on the Republican River.

The settlement also provides a mechanism for non-binding arbitration to resolve future disputes related to the Republican River

Compact. The states may also go before the U.S. Supreme Court to seek resolution if they are unable to come to agreement through the arbitration process.

An Associated Press article in the *Grand Island Independent*, titled *States Agree to Model for Republican River Usage*, reported: "Officials in all three states said they were pleased the three states settled the case relatively quickly. Water disputes among states can take 15 years or more to resolve."

A number of websites offer in-depth information on this case, including the *Kansas Department of Agriculture's Division of Water Resources* report on the Republican River Compact Settlement.

## Dealing with PCBs in a Storied Harbor

### The Problem

The harbor of New Bedford, Massachusetts is central to the city's renown. It sheltered 330 whaleships in the mid-1800s and novelist Herman Melville noted the city's prosperity from whaling. Fishing boats moored in the harbor in time replaced whalers. For many years, the city was the leading U.S. port in terms of value of the total annual fish catch.

But difficulties were building. For 30 years, well into the 1970s, factories along the Acushnet River emptied waste laden with Polychlorinated Biphenyls (PCBs) that flowed into the harbor. PCBs, once widely used as liquid coolants and insulators in industrial equipment, are dangerous environmental pollutants. "The immediate harbor was an ecological disaster and the contaminated sediment, although concentrated in one area, was migrating little by little into the greater harbor, and then seaward," according to *Environment Newsmagazines*.

The U. S. Environmental Protection Agency declared the harbor a priority site for cleanup under the federal Superfund program. It identified a five-acre segment of the harbor and designated it a Hot Spot. The Hot Spot contained about 45 percent of the PCB-laden sludge in the entire harbor. In 1990, after periods of review and public comment, EPA issued plans to dredge the Hot Spot sediment, store it in a secure container, and incinerate the sediment on site.

But citizens in New Bedford and neighboring communities increasingly came to oppose the use of incineration. There were

fears that air-borne contamination from incineration would spread widely over the New Bedford area.

Acrimony about the proposed incineration grew to the point that in 1993 the Massachusetts Office of Dispute Resolution (MODR) was called in to help create a forum and to assist stakeholders in negotiations. The New Bedford Harbor Community Forum was established. Its members included area citizens groups such as the Downwind Coalition and Hands Across the River, the municipalities of New Bedford, Fairhaven and Acushnet, the EPA and the Massachusetts Department of Environmental Protection, state legislators, environmental activists, and local business representatives.

### The Process

The first phase addressed whether to incinerate the PCBs. The second phase would seek to determine what to do with the contaminated materials. Jane H. Wells, the MODR's deputy director, assisted the parties in selecting J. Michael Keating as mediator, helped design the structure of the mediation, and served as co-mediator throughout the process. A fixed number of 25 representatives of stakeholder groups plus regulators began the difficult task of getting past their positions to find their mutual interests.

The mediation had an uncommon ingredient. The participants believed it necessary to hold all sessions in public so that the entire community would be aware of the proceedings. The sessions were videotaped and broadcast later on cable television to affected communities. "There was work, certainly, behind the scenes .... there were conversations," Wells reports, but "the mediation was done with the public observing."

In 1994, at the end of the first phase of the process, the EPA agreed not to incinerate the sediment. Forum members then turned to evaluating alternative technologies to be used on site to get rid of it. The effort lasted until 1998.



*New Bedford, Massachusetts Harbor*

How were forum members of different, often nontechnical, backgrounds able to evaluate alternative technologies?

Wells says they took several months to develop some competency to make choices. Then they interviewed representatives of companies whose products held out hope that they could successfully treat PCB sediment. Citizen health was one of the most important criterion against which product claims were judged. Forum members chose three companies for purposes of testing their technologies. EPA funded the testing during 1995-97.

“One of the important things about this experience is that these people became unbelievably well informed and sophisticated over the course of the process,” Wells says. “They stayed in the process for five years. It almost never happens. People drop out; people get tired. They got tired, but they stayed the course.”

### **The Results**

The first result of the Forum process, as noted, was EPA’s agreement not to incinerate the polluted sediment. The second result was an agreement in 1996 to store sediment containing significant levels of PCBs from areas less contaminated than the Hot Spot in confined disposal facilities located at intervals along the Acushnet River and the harbor.

**“These people became unbelievably well informed and sophisticated over the course of the process ...(and) they stayed in the process for five years.”**

In 1998, forum members were about to agree that two of the tested technologies — one that dewatered sediment and another that would destroy the sediment on-site — should be used on sediment dredged from the Hot Spot, according to Wells. Then people in the area of the proposed on-site facility raised objections. They had hitherto resisted entreaties to join the forum. Now they turned to the city of New Bedford for help. According to Wells, their message was: “We don’t want anything to happen on site; we just want you to haul the stuff away.”

When the city of New Bedford sided with the objectors, many forum members were “heartsick,” Wells reports. But their final statement agreed that the contaminated Hot Spot sediment be removed in sealed containers to an off-site landfill rather than being treated on site. It concludes: “All the forum members are disappointed that the majority opinion is to use landfilling and urge the EPA and scientific community to use the results of the (forum’s) treatability studies and the results of this forum in their future endeavors.”

Even though the group’s final document demonstrated their disappointment, the forum process itself had many successes. The planned incineration was halted. Participants, once vehement opponents, were able to reach consensus on an innovative resolution to a difficult environmental problem. And even after the forum officially ended, participants from diverse groups continued to meet and work together on community environmental issues.

### **Lessons Learned**

A diverse group of citizens can master scientific and technical information and use it to develop sound policy decisions.

If all stakeholders are not at the table during a negotiation, the agreement that is reached may not be implemented.

# Human Services

*Human services delivery systems are undergoing reform. Over the years, state and local human service agencies have grown compartmentalized, yet have overlapping roles and responsibilities. No single agency is able to serve the needs of the whole child, the whole family or the whole community. In recent years, states have tried various methods to reform their systems to achieve better outcomes for children, youth and families while improving cost effectiveness. Improving operations requires change—change in procedures, practices and performance. Achieving this kind of systems reform requires collaboration among state and local actors.*

*Here is an example of states making significant strides towards reforming their human services systems.*

## Building Consensus On Human Services Reform In Maryland

### Problem

For more than a decade, Maryland struggled to find effective ways to deliver human services. From the Appalachian hills to urban Baltimore to farms on the Eastern Shore, each community in the state has a unique set of human service needs. Because of these diverse needs, boiler plate programs fashioned at the state level rarely turned out to be universally successful. So, while responsibility for services was being pushed from state to local governments, many policy and funding decisions were still made at the state level.

Back in 1988, a grant from the Annie E. Casey Foundation led to the creation of county-level Local Management Boards (LMBs) that brought together state and local government agencies, non-profits, businesses, service providers, advocacy groups, the faith-based community, and private citizens. These groups helped coordinate services at the local level, but did not exist in every county and were unable to achieve systems reform.

In 1996, the Governor's office created a Task Force for Children, Youth and Families Systems Reform to assess the effectiveness of services to children and families and the status of LMB efforts. The Task Force sought to eliminate

duplicate services, establish measurable results, and transfer decision-making authority to LMBs to ensure flexibility to meet local needs. They initiated a state-wide public involvement process to identify the outcome measures that the public wanted for children and families. Through the process they identified simple yet important outcomes, like 'Babies Born Healthy,' 'Children Enter School Ready to Learn,' and 'Stable and Economically Independent Families.'

Under the leadership of Lt. Governor Kathleen Kennedy Townsend, the Maryland Partnership for Children, Youth and Families began working toward achieving these outcomes. This broad-based Partnership wanted to devise a system that was more responsive to local needs while also maintaining accountability for quality services. But how could the need for flexibility in addressing local problems be balanced with the state's need for accountability?

### Process

Prior to the Partnership, the state had invited the LMBs to get involved in an outcome-based budgeting process. At first, the counties didn't respond. They feared the state might provide funding for just a few years, impose regulations, and then take away the funding. The state needed a way to sit down with the counties as partners, to establish trust and verbalize unexpressed expectations.

“Both sides thought the other had all the answers, but they weren’t sharing those answers,” reflects Colleen Mahoney, Partnership Coordinator. “The state kept looking to the locals and the locals kept looking to the state to make the first move. Neither side was accomplishing much on its own. It took working together on a level playing field to realize that we had to jointly develop the solutions.”

So with the help of the Casey Foundation, the state proposed to the counties that they sit down together to negotiate a state-county partnership agreement using an interest-based approach.

Five counties stepped forward to try the new approach. Each county prepared for the negotiations by outlining the critical concerns in their communities. Then, members of the state and county negotiating teams were selected who could address the specific issues. For example, if the community identified juvenile justice as an important area, the state would designate someone from the Department of Juvenile Justice to work on their team.

The teams attended a joint training session in interest-based negotiation. By the end of the training, teams had their workplans and were off and running. The actual negotiations consisted of each team identifying and sharing their interests. The state and county teams worked together to build agreement on desired outcomes, and the necessary budget and resources to achieve them. Then teams designed plans for implementing, managing, and monitoring the programs, giving special attention to ways that different groups could partner together to meet the outcome goals.

The culmination of each state-county negotiation was a Community Partnership Agreement—a legal document that serves as a Memorandum of Understanding between the county and the state. Because many of the state and local decision makers participated in the teams, gaining official approval of the agreement was a simple process.

## Results

The Community Partnership Agreements have spawned several innovative programs at the local level. In Baltimore, they are creating cutting-edge after-school programs. In Montgomery County, they have designed a community-wide integrated strategy to stop juvenile violence. In Western Maryland, where unemployment is a significant concern, they are working with businesses and community colleges to give people the skills they need to find and keep jobs.

After strong successes in the first few counties, other counties have followed suit and are entering the negotiation process to reform their systems. And because of the good working relationships developed during the process, some of the initial counties are preparing to begin a second round of negotiations.

## Lessons Learned

- Commitment from a state leader is essential to ensure that results from informal collaborative efforts get formal endorsement and support.
- State-local negotiations are especially effective when local entities are equal partners in setting the agenda. Locals are much closer to issues and problems and can best frame them.
- Joint training in interest-based negotiation enables both state and local negotiating teams to develop a solid framework for working collaboratively.

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### *For more information on this case contact:*

Mediation and Conflict Resolution Office for the State of Maryland  
[www.courts.state.md.us/adr.html](http://www.courts.state.md.us/adr.html)  
(410) 321-2398

For a training video that highlights this case and provides the details of how to run a collaborative process, contact PCI.



Kathleen Kennedy Townsend  
Lieutenant Governor of Maryland

*“Government, our non-profits, our businesses, our advocacy groups, and our private citizens have tremendous reserves of knowledge and energy. By bringing people together, we can make the most of what we know, and what resources we have, to help our families help themselves.”*



# Case Study

## Minnesota Legislature Collaborates to Reform Long Term Care\*

### The Problem

Long-term care (LTC) is becoming one of greatest policy challenges facing state governments across the nation. With the baby boom generation

approaching retirement, and more people

living past the age of 85, the number of citizens requiring LTC is expected to double by the year 2030. This problem is especially acute in Minnesota, which has the nation's second highest life expectancy and more residents over 85 than any other state.

In the 2000 Legislative Session, the Minnesota General Assembly began to hear public outcry over the state's failing LTC policies. Consumers and providers expressed concerns about shortages of help, declining occupancy rates in nursing homes, increasing gaps between consumer needs and available services, and low reimbursement rates for home and institutional care. The Minnesota LTC system had reached a crisis, and it was time to address the issues and design reform.

### The Policy Makers

In a proactive move to address the public's concern, and to help initiate LTC reform, Department of Human Services' Commissioner Michael O'Keefe approached the leadership of the Legislature and suggested they create a special

Legislative Task Force. The Legislature agreed, and together they convened the Minnesota Long Term Care Task Force. The task force was a bipartisan body composed of 15 members: three Republicans and three Democrats from both the House and the Senate; the Housing Finance Agency Commissioner; the Department of Health Commissioner, and Commissioner O'Keefe from Human Services, who served as Chair.

### Other Players

To help expose the gaps between the current system and the state's needs, the task force relied heavily on stakeholder involvement. Stakeholders included consumers and their families, providers, advocacy organizations, local governments, workers and unions, and citizens.

### The Process

The mission of the task force was to reach consensus on policy strategies that addressed the needs and issues in LTC for Minnesota's older citizens. These strategies would form the foundation of a comprehensive proposal for the 2001 Legislative Session.

From the outset, the task force placed emphasis on stakeholder participation, and to organize this effort they retained a neutral third party with skills in facilitation and expertise in health care issues. The neutral, Michael Bailit, Bailit Health Purchasing, LLC, facilitated discussions and provided an

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essential link between task force members and the stakeholder groups.

The task force began by meeting to discuss options and possible strategies. They reviewed the current system, held public meetings, and spoke with leading health care experts. In conjunction with those meetings, the facilitator established communication with an extensive list of stakeholders and conducted consumer focus groups in communities throughout the state.

Next, the task force formed five working groups in an intensive effort to assimilate the information they received from the experts and the affected communities. The working groups were composed of task force members, stakeholders, legislative staff, and representatives from county and state agencies. Together they worked to identify and analyze a range of strategies designed to narrow the gap between the current policy and the needs of the community. Through collaboration and consensus building, the task force agreed on 48 recommendations. Of those recommendations, 15 strategies were identified that would form the foundation of a proposal submitted in the 2001 Legislative Session.

## The Product

The final proposal passed both houses with only slight modifications, and implementation began immediately. Reshaping the Minnesota LTC system is an ongoing effort, and the remaining recommendations will be implemented incrementally, over time. The collaborative efforts of stakeholders helped to create a new legal

foundation, a vision for the future, and the relationships necessary to sustain the effort for years to come.

State Senator Sheila Kiscaden, task force member, said, "The Minnesota Legislature's Health and Human Services Committees have had a great deal of success using work groups, joint task forces, and facilitated discussions to arrive at decisions on tough issues like long term care, welfare reform, and health care costs. These approaches have enabled us to find common ground, and at the same time, streamline our decision-making process," she said.

For more information about this case contact:  
<http://www.dhs.state.mn.us/agingint/lcttaskforce/reportsum.htm#Intro>



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# Protecting Instream Flows in Montana\*

## The Problem

The allocation of water is one of the most fervently debated issues in the arid American West. The principal areas of debate include offstream use, instream flow, and the doctrine of prior appropriation.



“Offstream” refers to removing water from streams and rivers for domestic and commercial consumption, irrigated agriculture, industry, and mining. “Instream” refers to maintaining enough water in rivers and streams to protect fish and wildlife, recreation, aesthetic and scenic values, and water quality.

In Montana, as elsewhere in the West, the doctrine of prior appropriation, or “first in time, first in right,” is central to debate over water use. It is the basic tenet of water law and policy, adopted to facilitate the settlement and development of the West.

In a growing Montana, the demands for instream and offstream uses have intensified. As Matthew J. McKinney, director of the Montana Consensus Council, reports:

“Although offstream uses of water remain critical to the culture and economy of Montana, there has been an increasing demand and effort since the late 1960s to leave water in many streams and rivers, unavailable for diversion and offstream use, to satisfy fish, wildlife, water quality, and other purposes.”

In 1988, the Montana Department of Natural Resources and Conservation (DNRC) prepared a discussion paper outlining options and possible strategies to protect instream flows. It created a working group representing diverse interests to review the paper. Sensing a threat to their livelihood, many agricultural members of the group were upset about proposed measures that contemplated voluntarily selling or leasing water rights for instream uses.

DNRC incorporated some ideas from the working group and presented all the options to the public at increasingly tense public meetings throughout the state during one of Montana’s hottest, driest summers. “Fish died, and farmers and ranchers had a difficult time getting water for their crops,” McKinney writes. Meanwhile, farmers and ranchers were “furious over the idea of voluntarily selling

### Assessing When to Proceed

Before using a consensus-based process, an assessment first should be made to determine if the situation lends itself to consensus building. Here are key steps in an assessment:

- Identify the stakeholders
- Gather information about the concerns and interests, both common and opposing, that you and other stakeholders have.
- Analyze the alternatives available to stakeholders in the absence of trying to reach a negotiated agreement.
- Identify the constraints or obstacles to using a consensus approach.
- Assess stakeholders' ability to be represented and willingness to come to the table

or leasing their water rights to protect instream flows,” he says. In 1989, Montana’s legislature passed restrictive legislation allowing the Department of Fish, Wildlife and Parks to lease water on a trial basis. “Nobody was happy and the debate continued,” McKinney writes. Two legislative initiatives failed to become law.

### The Process

In 1994, the Montana Consensus Council (MCC) successfully mediated a long-standing dispute between recreationists and ranchers over access to state school trust lands. The main participants happened to be the principal adversaries in the debate over instream uses of water. After participants reached agreement on state lands, MCC suggested that they might want to shift their focus to instream flows. Each side eventually agreed that, as the council puts it, “a consensus process might provide an opportunity to address the issue constructively and reach a mutual gain solution.”

The participants decided that if they were to make progress, the negotiation should include only representatives from key advocacy groups. The parties included the Montana Water Resources Association, the stock growers association, the association of conservation districts, the Montana Farm Bureau, the Montana Wildlife Federation, and the Montana Council of Trout Unlimited.

McKinney comments: “Contrary to conventional theory on negotiating public policy disputes, key decision makers with a potential interest in the issue (representatives of the governor, legislature and state agencies) were not invited to the table.” This was done to keep the process from getting too political. The stakeholders believed that if they, with their divergent views, could reach agreement, the government would accept their solution.

The participants developed ground rules for the negotiation and spent several meetings learning about each other’s needs and interests. They explained how their particular organizations made policy decisions and the internal process they would have to go through to confirm any agreement. “The result of this educational process was to reframe the issue from one of winners and losers to a perspective that the right solution would benefit everyone,” McKinney reports.

*“The result of this educational process was to reframe the issue from one of winners and losers to a perspective that the right solution would benefit everyone.”*

The participants realized that a solution to the instream flow impasse likely would require new legislation. By late October 1994, they agreed on a measure allowing water rights to be bought and sold to protect instream flows. But the proposed bill met firm opposition from some participating organizations. So, at subsequent meetings, the working group focused instead on the issue of leasing existing water rights for instream flows. As the council reports, “they gradually drafted a new proposed bill that satisfied the criteria of each caucus, creating a mechanism that would allow existing water rights to be leased for instream use.”

In drafting the measure, the participants asked for advice from key legislators and representatives from the office of the governor, the Montana Department of Fish, Wildlife and Parks, and DNRC. Eventually the parties and government officials were comfortable with the agreement. “The draft bill would provide a much needed tool to improve instream flow protection, protect existing water rights, and minimize any potential adverse effects to local communities,” the MCC says.

## **The Results**

At the 1995 legislative session, no one opposed the bill as it moved out of committee. The measure passed the House by a 93-6 vote, then won Senate approval and the signature of Governor Marc Racicot. At his request, the MCC convened the same working group to monitor implementation of the law.

## **Lesson Learned**

Consulting with legislators and other officials as an agreement is being developed increases the chances that the agreement will be approved and implemented by governing bodies.

\*This case study is based on a brief report available from the Montana Consensus Council at [www.state.mt.us/MCC](http://www.state.mt.us/MCC) and “Building Agreement on Water Policy,” a chapter written by Matthew J. McKinney, director of the Montana Consensus Council, for the forthcoming book *Finding the Common Good: Case Studies in Consensus Building and the Resolution of Natural Resource Controversies*, edited by Peter S. Adler and G. Kemmery Lowry.



# Case Study

## Montana Legislature Collaborates to Reimburse Liable Parties for Cleanup Costs

### The Problem

Hazardous waste cleanup is a complex, emotionally charged issue that can result in time consuming conflicts and expensive litigation. Often, disputes arise because the laws governing cleanup liability are viewed as unfair by parties held financially responsible. Communities feel threatened and businesses feel stifled, as government agencies struggle to maintain balance and fulfill their mandated responsibilities.



Prior to 1997, Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA) prescribed a strict, "joint and several" liability format. Under this law, any and all parties who were potentially responsible for contamination of CECRA sites could have been held liable for all cleanup costs - whether they were at fault or not.

The law helped secure funds for environmental cleanup, but industry questioned its fairness and fought diligently for reform. Faced with this pressure on one side, and pressure from environmental groups and agencies on the other, the Montana Legislature directed the Department of Environmental Quality (DEQ) to develop recommendations for improving current legislation. Because the issue was contentious and the conflict long-standing, the legislature mandated that DEQ use a collaborative process to determine an appropriate and effective response.

### The Policymakers

The Montana legislature convened the process, directing DEQ to use collaboration to study the provisions of Montana's CECRA liability regulations. DEQ officials contracted the Montana Consensus Council to help design and implement the process.

### Other Players

The Consensus Council did an initial conflict assessment and identified the following stakeholder groups as the primary segments of the population affected by CECRA legislation: potentially responsible parties (business and industry); state and federal agencies; public and environmental interest groups; and local governments. These four groups formed the foundation of the study and were charged with building consensus on recommendations for new CECRA liability and funding laws.

### Process

The process was divided into two segments. First, the four stakeholder groups held separate caucuses to build an understanding of the complex legal, policy, and technical issues. These issues included identifying the concerns and interests of each group, investigating other possible liability schemes, and identifying evaluation criteria for the possible alternatives.

Next, after intensive issue exploration and information gathering, the study group formed a coordinating committee that included representation from each of the

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four caucuses. Over a nine-month period, the committee met and gradually built consensus on recommendations for legislative alternatives.

After months of meetings and methodical consensus building, the group's efforts paid off. The committee signed an agreement and produced two consensus-based documents, one outlining the liability standards and the other describing program funding. Based on those documents, the committee drafted proposed legislation, secured legislative sponsors, and developed a strategy to present the bills to the 1997 General Assembly. From beginning to end, the study group maintained its commitment to the process - reaching consensus at every step.

## The Product

The group fulfilled the legislature's directive and produced two bills, SB 377 and HB 584. Together, the proposed bills provided for an orphan fund to reimburse liable parties for cleanup costs that exceeded their apportioned share, and for a new liability scheme called "controlled apportionment."

Under "controlled apportionment," potentially liable parties would select an "allocator" who would distribute shares of liability according to 12 predetermined factors. Participation in the new scheme would be voluntary, but parties who were unwilling to participate would be subject to the "joint and several" liability laws. Moneys for the orphan fund would come from various mining taxes and environmental enforcement penalties and fines collected by DEQ.

Throughout the consensus process, group members built the trust and developed the relationships necessary to produce a mutually satisfactory solution to an ongoing problem. Unlike previous committee hearings on Superfund legislation, which were characterized by contentious debate and combative dialogue, no one spoke out in opposition of either bill. Both bills received impressive support from the House and the Senate and were enacted into law - a remarkable end to a long-standing conflict.

For more information about this case contact the Montana Consensus Council:

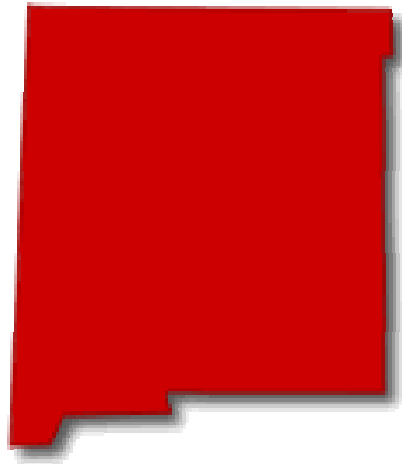
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## **New Mexico Department Mediates Professional Licensing Disputes**

For the past two years, New Mexico's Regulation and Licensing Department—which regulates 39 professions and involves 34 professional licensing and enforcement boards—has been using mediation as an alternative to formal administrative hearings. The licensing boards refer disciplinary matters to mediation, and while not all boards are using mediation, more and more are trying it. Since 2001, 36 disputes have been referred to the Department's ADR Services.

The Department's disciplinary proceedings typically result in suspension or revocation of a business license, and/or fines if the licensee is found to be at fault. In mediated cases, written agreements have been reached 100 percent of the time, with many of the agreements resulting in remediation to the consumer. This is a rare outcome for such disputes, because statutes typically provide only for suspension or revocation of the license and/or fines if the matter goes to hearing.

The Department uses internal and external volunteer mediators who work in pairs. Each mediator receives 40 hours of basic mediation training as well as opportunities to apprentice under more experienced mediators.

According to Administrative Law Judge and ADR Counsel Bill Davis, “The Department has saved tens of thousands of dollars in litigation costs,” and he estimates they could save \$300,000 annually if 100 percent of these kinds of disputes were mediated.

For more information on New Mexico 's approach, contact **Bill Davis** at the New Mexico Regulation and Licensing Department in Santa Fe (505-827-7076).

# Resolving an Endangered Species Conflict in Nevada

## The Problem

The desert tortoise, which is both the Nevada State reptile and the largest reptile in the Mojave Desert, had been around for about one million years when Las Vegas development seemed to threaten its odds for survival. By the late 1980s, Clark County, the cradle of the gambling mecca, thrived with an ever-expanding population and mushrooming suburbs edging relentlessly into the tortoise's hot, dry habitat. Loss of habitat combined with other habitat-degrading factors such as livestock grazing, off-highway-vehicle use, drought, and disease to prompt the U. S. Fish and Wildlife Service in 1989 to list the desert tortoise as endangered.



The action abruptly suspended burgeoning commercial and residential development and forced Clark County to halt work on schools, utilities, and hospitals. A raging battle ensued. There was “tremendous community fear that the county’s vibrant economy and rural culture was on the verge of collapse if a solution to the species’ preservation was not found,” according to a University of Michigan masters project report. “Reactions were vicious and the ‘shoot, shovel and shut-up’ mantra became commonplace among embittered Nevada residents.” Developers and city and state governments sued the U. S. Department of Interior to overturn the listing, but they lost.

## The Process

But even before the lawsuit failed in 1990, the University of Michigan report says that Clark County commissioners and local environmentalists looked to other options “that could preserve the tortoise (endangered) listing without ripping the community apart.” They turned to Habitat Conservation Planning (HCP), provided under the federal Endangered Species Act, that allows for the incidental take of a species in exchange for protection of habitat on nearby lands. The term “take” refers to killing, snaring, or trapping fish or game. To develop the HCP, a steering committee was formed. It included representatives of local and state governments, federal agencies, local environmentalists, the Greater Las Vegas Board of Realtors representing developers, and such diverse interests as the Southern Nevada Off-Road Enthusiasts (SNORE). According to the report, the

early meetings involved considerable shouting from all directions such that Clark County hired Paul Selzer, a veteran facilitator familiar with the HCP processes, to run subsequent meetings. Selzer immediately imposed three rules:

1. No discussion over the validity of the Endangered Species Act
2. No debate over the listing of the tortoise
3. Everyone at the table had to be willing to give up something.

Within these guidelines, the committee's job was to develop an HCP that provided alternative-habitat protection for the tortoise through use of federal lands that made up about 90 percent of the rural landscape in Clark County. Special technical and implementation and monitoring committees were set up to address particularly controversial matters. Argument-filled meetings dealt with such issues as the purchase of grazing rights' allotments from ranchers, location and establishment of reserve areas for the tortoise, road closures, and use designation of public lands.

Committee members faced a tough immediate deadline. During their first year, they had to develop a plan that met U. S. Fish and Wildlife Service standards for protecting the tortoise or the issue would go back to the courts. In fact, they reached agreement on a short-term HCP in 1991 which was replaced with a permanent Desert Conservation Plan in 1995. In all, during nine years of an augmented HCP process, committee members logged 800 hours of meetings, which often became full-day affairs with meals eaten at the table.

Why did the process result in agreement? The University of Michigan report quotes facilitator Selzer: "It was really a matter of not having a better alternative ... and everyone would have lost otherwise. Environmentalists would have lost because the issue would not have been resolved at all ... Builders would have lost because it would have cost them a lot of money to go through another lawsuit and development would have faced a serious setback ... Rural folks knew they would lose access to public lands one way or another. So everyone was better off having at least a say in the matter."

## **The Result**

According to the Fish and Wildlife Service, the settlement means that Clark County, Las Vegas, and companion cities "will be allowed to take, incidental to development activities, desert tortoises on 111,000 acres of non-federal land in Clark County ... over the next 30 years." In return, conservation measures "will minimize, monitor, and mitigate the effects of this take and the associated loss of tortoise habitat in the permit area by enhancing the species' chance for survival and recovery in the wild" on the vast federal lands in Clark County. Fees of \$550 an acre for land under development help to pay for conservation efforts.



The University of Michigan report identifies three major achievements of the Habitat Conversation Planning process:

1. Establishment of a one-year pre-HCP settlement in 1990-91.
2. Development of a 30-year Desert Conversation Plan between 1992-95.
3. Formation during 1995-98 of a multi-species HCP plan which applies excess conservation funds to preventing 200 additional species from becoming endangered while permitting Clark County development to continue. HCP efforts have established more than 800,000 acres of habitat preserve, “implemented monitoring programs, and improved ecological conditions and land use patterns of the Clark County region,” the report says.

### **Lesson Learned**

A few simple ground rules can help move a group from arguing about what they can’t control to focusing on what they can affect and what they agree on.

# Case Study

## Ohio Negotiates Regulations Governing Environmental Impacts of Large Scale Farms\*

### The Problem

In December 2000, Ohio Governor Robert Taft signed SB 141, a controversial act designed to minimize the environmental impact of large-scale livestock and poultry farms by strengthening the state's authority to regulate the industry.

The statute mandated a transfer of authority over the Livestock Waste Permitting Program from the Ohio Environmental Protection Agency to the Ohio Department of Agriculture (ODA). To help ODA administer the statutes' new provisions, the bill created a 24-member Concentrated Animal Feeding Facility Advisory Committee. The group first met in June 2001, when ODA Director Fred Dailey requested a draft of recommendations on how to protect the environment and help Ohio's livestock and poultry industry grow responsibly. Because the provisions of the new bill were so controversial and had been subject to contentious debate between competing environmental and agriculture interests, Dailey encouraged the committee to use negotiated rulemaking to seek consensus on their recommendations.

### The Policymakers

The Ohio General Assembly provided the statutory mandate and guidelines for forming the committee. Dailey followed through by appointing committee members and providing the leadership and impetus for a consensus process.

### Other Players

Following the legislature's guidelines, Dailey selected a committee that represented the full range of community and government interests. The 24 members included representatives from local government, water utilities, environmental organizations, the public, four state agencies, universities, and the livestock and poultry industry.

### The Process

The negotiated rulemaking process was facilitated by Fred Bartenstein (Bartenstein Associates) and Maggie Lewis, Associate Director of the Ohio Commission on Dispute Resolution and Conflict Management. The committee began by establishing a set of ground rules that provided for facilitated meetings, interest-based negotiation, consensus decision making, and provisions for public input into the final recommendations.

The process included 16 meetings over seven months, followed by an exhaustive legal review, a mandatory public hearing, and a series of public information sessions. At its first meeting, the committee reached consensus on a mission statement and a list of rules grouped into three categories: 1) permitting compliance, 2) enforcement, and 3) public participation. The mission statement read, "(to) represent our constituencies by reviewing, discussing options, and seeking consensus to recommend suggested administrative rules to the director of the ODA on SB 141." Over the next seven months, the

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committee members addressed each proposed rule, making incremental changes and reaching consensus on their recommendations.

Unlike traditional notice and comment proceedings, the public actively contributed to the rulemaking process and to the committee's final report. Also, members met frequently with their constituents to inform them of the committee's progress and get feedback. This step was vital to the process because it helped ensure broad support for the final recommendations. By December, the committee had reached final consensus, finalized its report, and presented it to Dailey.

## Product

In June 2002, the 56 new regulations in six chapters of administrative procedure received final approval by the legislative Rule Review Agency. The rules set standards for all aspects of manure storage, handling and transportation; insect and rodent plans; and compliance and enforcement procedures for all large-scale livestock and poultry farms throughout Ohio.

"These new regulations create a strong, clear, predictable program using science-based, best-management practices to protect water and reduce nuisance problems," Dailey said. "The process was successful because it brought parties from all sides of the issue together at one table to draft one set of recommendations. They were asked to build consensus whenever possible - no easy task - but they were successful."

\*This case based on an article by Maggie Lewis, Associate Director of the Ohio Commission on Dispute Resolution and Conflict Management ([www.state.oh.us/cdr/](http://www.state.oh.us/cdr/)). For information, contact: [Maggie.Lewis@cdr.state.oh.us](mailto:Maggie.Lewis@cdr.state.oh.us).



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## Ohio Commission Assists Local Governments in Resolving Disputes

In June 2002, the Northeast Ohio Area-wide Coordinating Agency (NOACA) contacted the Ohio Commission on Dispute Resolution and Conflict Management (the Commission) about a dispute between a city and a township over competing land use development plans and related water and sewer issues.

To assist them in resolving the dispute, the Commission referred a mediator to the parties, who agreed to try mediation. Pittsfield Township Clerk Jim McConnell credits the mediator with getting him and Oberlin City Manager Rob DiSpirito to come to the table. "The mediator helped us acknowledge common ground, and to consider changes we had not previously thought about," he said.

The NOACA case is one example of how disputes in Ohio could be successfully negotiated as part of the Local Government Initiative, a Commission-sponsored program offering conflict resolution services to local government officials. The program—launched by the Commission in 1991 with a grant from the William and Flora Hewlett Foundation—is a joint effort of the County Commissioners Association of Ohio, the

Ohio Township Association, and the Ohio Municipal League. Over the years, more than 195 local officials have been trained through the program.

Today, the parties in the NOACA case are working toward final agreement on a joint plan for future development in the region. According to Oberlin City Manager DiSpirito, it was mediation that kept the matter out of court. "Without the mediation process, the issue would definitely have gone legal," he said.

The Initiative enables cities, townships, and counties to apply for funding for conflict resolution services to address public policy disputes. One requirement of the program is that the parties must apply for assistance *together*. Maggie Lewis, the Commission's Associate Director, said the program requires cities, townships, and counties to be at a point where they are ready to address the key issues in dispute when requesting assistance.

"Often, only one party wants to address the dispute," Lewis said. "Or, the parties want to pursue different avenues for addressing the issues—one through alternative dispute resolution or dialogue and the other through traditional court legal processes. This Initiative is designed for parties who are ready and willing to work together."

The Commission held a workshop on the Initiative for local government officials, and is now accepting applications. Commission staff believe that through the Initiative, more local governmental bodies will have the opportunity to resolve issues without having to rely on the state court system.

For more information on the Initiative, contact [Maggie.Lewis@cdr.state.oh.us](mailto:Maggie.Lewis@cdr.state.oh.us) or call 614-752-9595.

## Reaching Consensus in Ohio on Water Quality Standards

### The Problem

Ohio is rife with water. It has 29,000 miles of streams and rivers, a 451-mile border along the Ohio River, 5,000 lakes, ponds, and reservoirs and, not the least, 236 miles of shoreline along Lake Erie. This latter fact qualifies Ohio as one of the eight Great Lake states and, thus, subject to the Great Lakes Water Quality Initiative.

In 1995, six years after the start of negotiations to create uniform pollution limits in the eight states, the U. S. Environmental Protection Agency issued its far-reaching initiative that caused a great deal of conflict with the Great Lakes governors. EPA gave the state two years to implement rigorous standards for waste disposal and put in place strict limits on what can be discharged into the Great Lakes. In doing so, however, US EPA gave the states flexibility in determining how to meet the uniform water quality standards for the Great Lakes basin.

Ohio's approach to developing standards was to create a 25-member group of diverse stakeholders who would seek to reach consensus on new water quality rules and recommend them to the Ohio Environmental Protection Agency (OHIO EPA). Members of what was designated the Great Lakes Initiative External Advisory Group (EAG) included representatives of statewide and Lake Erie-area environmental groups, business and industry, local government, higher education, and the Ohio EPA.

The EAG had to resolve a total of 99 issues that could potentially divide the group. To make matters even more complicated, the issues were laden with technical complexity, according to Fred Bartenstein, one of two facilitators for the group. They involved establishing numerical levels (parts per million or billion) of chemical and biological agents that could be present in waters discharged into Lake Erie. These levels have to be met by industry and all other waste-



*Dredging on Lake Erie*

water dischargers. Deciding on these parameters involved considering matters such as the relative level of presumed cancer-causing agents in water; the required number of fish or water bugs that would need to be present to determine whether water could support aquatic life; and the rate of water flow in streams and tributaries necessary to dilute pollution from, for example, the outflow pipe of a water treatment or power plant.

### The Process

At its first meeting, Ohio EPA Director Donald Schregardus gave the EAG a powerful incentive to succeed, according to co-facilitator Roberta F. Garber: "If the group achieved consensus on an issue, and if the recommendation was consistent with state and federal law, he would implement it. If the group could not reach consensus, he would make a decision after weighing Ohio EPA staff recommendations and the recommendations of the major interests groups on the EAG."

Garber describes the EAG's work using a four-phase framework developed by G. Aubrey Fisher in his book *Small Group Decision Making*. In the first "forming" or orientation phase, the group adopted ground rules to govern their interactions based on a consensus decision-making model proposed by the two facilitators. Members began their work on water quality rules, but at that point were unwilling to

**"Industry and environmental groups in Ohio reached agreement on 81 of 99 issues involved in setting rigorous water quality rules."**



## When Should Consensus Approaches Be Used

Consensus-based approaches for resolving environmental conflicts are more likely to be successful when the following factors are present:

- The issues are of high priority and a decision is needed.
- Relevant laws are flexible enough to permit a negotiated agreement.
- The outcome is genuinely in doubt and the parties at interest do not have better options for getting the outcome they want.
- The public is frustrated with how government has handled the situation.
- Representatives of all key interests are willing to negotiate.

Even though they can be effective, consensus processes are not always the best choice for every situation. Mediated approaches should not be used when:

- It is important to get legal clarification or set legal precedent.
- The situation does not allow time for negotiation and consensus building.
- The issue is so polarized that face-to-face discussions are not possible, or negotiations will substantially affect parties who cannot be effectively represented.

break into small groups because their “trust level was not high enough to rely on secondhand reports from small groups,” Garber writes.

In the second “storming” or conflict phase, groups typically begin to express strong opinions and feelings. But in the EAG’s third meeting, facilitators observed that none of that was happening because members of the group did not want to speak openly in front of the “opposition.” The facilitators suggested that the group divide into caucuses for facilitated discussions. The caucus groups were able to make progress and when the whole group reconvened, Garber reports, “those issues on which the caucuses agreed with Ohio EPA staff were crossed off the list as areas of group consensus. From then on, group time was spent on the non-consensus areas.”

In the third “norming” or emergence phase, groups typically develop cohesion. At a two-day meeting in August 1996, group members recognized that they had fallen behind schedule if they were to meet a March 1997 EPA deadline for establishing standards. So the group accelerated its efforts and from that time forward the “EAG was making progress in both completing its work and building relationships among group members,” Garber reports.

The fourth “performing” or reinforcement phase is one in which members achieve consensus on decisions. Over the last six months, the EAG achieved consensus on 81 of the 99 issues. For issues on which the group members agreed to disagree, the Ohio EPA staff had the sensitive task of taking the viewpoints of both caucuses under advisement in crafting applicable rules.

## The Result

Garber sums up the outcome of the two-year EAG process:

“When the rules were taken before the Joint Committee on Agency Rule Review for legislative approval, there were no surprises. All perspectives had been thoroughly aired, and the interest groups were

confident that they had been heard.... The groups ultimately determined that it was not in their interest to protest the rules, because a better outcome was not possible.” The legislature has since adopted the new rules.

## Lessons Learned

Participants in negotiations often start off mistrustful and thus unable to collaborate. But with assistance from an impartial, skilled facilitator, they can learn how to work toward achieving mutually agreeable solutions.

The presence of a fixed deadline can promote reaching agreements in a timely fashion.

# Case Study

## State County Collaboration Leads to Successful Wind Farm Siting

### The Problem

All year long, relentless wind coming off the Pacific slices eastward through the Columbia Gorge. Sherman County Oregon, population 1,900, lies directly in the path of the wind. Since 1881, residents have endured these conditions and sustained an economy based primarily on farming. Yet unemployment and low wages plague the region.



In 2001, wind-power developers targeted Sherman County as a potential development site, bringing new hope for the local economy. Vast farm land, constant wind, and an ailing economy made the county ideal for a new, 24-megawatt wind farm.

Wind energy is a growing industry but permitting procedures are slow, complex and prone to controversy. Two-hundred-foot high wind turbines can threaten certain bird populations and sensitive Native American cultural sites, and impact aviation, weed control, and other ecological concerns.

Anticipating conflict, Governor Kitzhaber intervened and initiated a collaborative process in which government, private interests, and the local community could work as a team to address the issues and find a solution. The project is part of Oregon Solutions, a network initiated by the state and comprised of business, non-profit, and government leaders working together to encourage problem solving at the community level.

Oregon Solutions projects involve five elements:

- 1) a problem defined by the community;
- 2) a convener appointed by the Governor;
- 3) a team of stakeholders made up of federal, state, local and other governmental entities;
- 4) a search for a solution that leverages the resources of the team; and
- 5) a declaration of cooperation that commits team members to the agreed action plan.

### The Policymakers

Governor Kitzhaber appointed Judge John Mabrey, a respected local leader from an adjoining county, as Chair. Kitzhaber asked Mabrey to convene a team of stakeholders and implement a consensus-based process to work toward a solution supporting the economic, environmental, and community objectives of Sherman County.

### Other Players

Government participants included representatives of the Governor's office and 12 city, county, state, and federal agencies. Private industry participants included representatives of Northwest Wind Power (NWWP), utilities, permitting specialists, and attorneys. Citizens groups also played a role, with representation from the Audubon Society, local farmers, land owners, and the Warm Springs Tribe.

### The Process

During their first meeting, stakeholders discussed the process, set ground rules, and identified six issues: land use, bird migration, aviation, weed control, cultural concerns, and the National Environmental Policy Act (NEPA) process. Next, the group formed sub-teams to address each issue separately.

continued on reverse

After careful research, NWWP chose a site location and operation size (16 turbines/24 megawatt) that would have minimal negative impact on the community and environment. The process provided a forum in which the developer could explain the precautions, gain confidence and support from stakeholders, and when necessary, alter plans.

The bird migration issue had the most potential for conflict, but parties were able to reach a solution. Traditionally, the Oregon Department of Fish and Wildlife (ODFW) requires a two-year study to determine potential threats to bird populations. After a one-year study showed that "bird kill" was minimal, ODFW agreed to finalize its review if NWWP conducted a "post mortality" study after operations began. NWWP agreed, and this simple compromise advanced the process one year.

The final stage required all participants to agree to the plan and sign a declaration of cooperation. The declaration confirmed each member's full support and commitment of resources to the final plan.

## The Product

Governor Kitzhaber's commitment to the process and decision to implement a collaborative approach was critical. The endorsement from the state and guidance from Oregon Solutions helped the group to expedite the permitting process—traditionally a long and cumbersome endeavor. The wind farm was conceived, permitted, and built in 10 months. Operations began in December 2001, and eight months of "bird kill" studies show minimal impact to bird populations.

Referring to this new form of governance, Kitzhaber said, "There is incredible knowledge in Oregon about the challenges we face and ways to deal with them. What is missing is the place and opportunity to... solve these problems together. It is time to create such a place..."

For more information about this case, contact Abby White, Oregon Solutions Network Manager, at [awhite@pdx.edu](mailto:awhite@pdx.edu).



★ National  
★ Policy  
★ Consensus  
★ Center

This case study is published jointly by the Policy Consensus Initiative (PCI) and its applied research and development arm, the National Policy Consensus Center (NPCC). PCI is a national non-profit organization that promotes consensus building and effective problem solving in states. NPCC is a center of expertise on consensus building for public leaders.

For other case studies and information about collaboration, consensus and conflict resolution, visit the website: [www.policyconsensus.org](http://www.policyconsensus.org).





## Collaboration Results in Sustainable Dredge-Material Projects

In Spring 2002, the governors of Oregon and Washington asked the National Policy Consensus Center (NPCC) to help convene a group of key government, fishing industry, and environmental stakeholders to deal with contentious issues relating to dredge material disposal in the Columbia River.

Among the biggest challenges was finding positive economic and environmentally sensitive ways to dispose of dredge material from the Columbia's shipping channel.

Each year, the Corps of Engineers removes 11 million cubic yards of dredge material from the shipping channel to maintain its 40-foot depth. Additional dredging will occur with channel deepening that is scheduled to begin next year. Many of the stakeholders had concerns about maintenance dredging and channel deepening.

After an initial meeting with stakeholders in March 2002, the Lower Columbia Solutions Group (LCSG) was formed.

LCSG participants include the major ports, the U.S. Army Corps of Engineers, local government representatives, fishing interests, environmental groups, and representatives of the Oregon and Washington governors' offices. The group strives to build relationships through cooperative planning and implementation of sustainable, beneficial-use projects in the lower river.

Operating by consensus, the LCSG adopted an agreement document in December 2002 identifying potential projects and policy issues. Since that time, project teams have been convened to investigate four separate dredge material disposal projects. Each team includes representatives of key stakeholders, a community leader serving as chair, and a staff person to support and guide the process. These collaborative project teams work to develop plans of action that will meet multiple community, environmental and economic objectives. When agreement is reached, a "Declaration of Cooperation" is signed by each member of the team, committing to steps that will be taken to move the project forward. The LCSG monitors the work of the project teams and addresses policy issues that may be barriers to success.

According to Greg Wolf, NPCC Director and facilitator of the Solutions group, "the LCSG and its project teams have improved communication and helped to build trust among the participants." Wolf said he hopes this project will serve as a model for dredging projects in other parts of the country.

To learn more about the project, contact NPCC fellow Susan Brody by email at [sebrody@earthlink.net](mailto:sebrody@earthlink.net).

# Transportation

*Transportation systems determine where people live and work and how communities evolve. Because of these impacts, great controversy often exists around transportation policies and their implementation. Public officials are finding themselves in need of better ways to identify citizens' priorities and preferred approaches to solving transportation problems. They are increasingly using collaborative processes, like those outlined below, to bring diverse groups to the table to work on transportation problems.*

*The following case is an example of how consensus building can be used to work out both transportation policies and their implementation.*

## Negotiating Transportation Policy Rules In Oregon

### Problem

Throughout the United States, the siting and construction of access points to state highways has grown increasingly contentious. Conflicts center on issues like safety, congestion, destruction of natural habitats, and commercial and private property owners' rights.

In Oregon, the Department of Transportation (ODOT) began to see a significant increase in the amount of opposition to the department's "access management" decisions. Access management is a broad set of strategies that balance the need to provide safe and efficient travel with the ability to allow access to individual destinations. Within ODOT, differences arose about the best departmental approaches to access management, and how to deal with the growing external opposition.

Because ODOT had taken different approaches in different places, inconsistencies existed in permit decisions, which led to growing frustration among property owners and developers. Commercial stakeholders were concerned that the state's proposed "alternate access" routes would not serve development adequately. Environmentalists worried that the state would be paved over. Constituents took their complaints to their legislators.

In response to requests from legislators, ODOT agreed to draft new regulations to deal with the access management issue. Their aim was to resolve some of the major conflicts surrounding

access management, while developing a workable plan for siting and building state highway entrances. After an unsuccessful attempt to develop these rules in the traditional way, ODOT decided to try a new approach.

### Process

ODOT sought advice from the Oregon Commission on Dispute Resolution and began exploring 'negotiated rulemaking' as a way to develop the required rules. Negotiated rulemaking is a process by which a government agency works together with interested parties to develop agreement on a proposed rulemaking action. After discussing the process with the Oregon Transportation Commission, the body that would formally adopt the rules, ODOT hired a facilitator to guide the negotiated rulemaking.

More than 30 interest groups were likely to be affected by the rules. These included developers, realtors, the business community, environmentalists, city and county governments, and other state agencies. These parties had been butting heads for years over highway access issues.

ODOT convened an Access Management Advisory Committee (AMAC) that included representatives from each interest group. The broad-based AMAC committee's purpose was to work collaboratively to make written recommendations to the ODOT director on how to best implement access management.

AMAC began by adopting a set of ground rules to guide its process. Then, the committee shared relevant information to develop a full picture of the scope of the issue. Throughout the process,



AMAC also solicited public input regarding specific access management issues.

“This was a very technical issue with lots of pieces to it,” said Peter Fernandez, Transportation Services Director for Salem, Oregon, and AMAC member. “In a standard forum the decision makers, who are not technical people, would have been told by staff what had to be in the rule, and on the other hand, would have been told by various interests why it didn't work for them. We wouldn't have gotten anywhere on this issue in a standard forum.”

The complete process involved 18 daylong meetings of the AMAC committee over a nine-month period. After five months, AMAC agreed to a set of draft rules and circulated them to all interested parties for comment. Following receipt of the comments, AMAC incorporated the necessary changes, agreed to a final draft of the rules, and sent them to the Transportation Commission for adoption.

### Results

Because all the key interests were involved in developing the access management rule, the final draft generated little controversy, and the Oregon Transportation Commission formally adopted the rules.

### Lessons Learned

- When parties have a long, contentious history, a facilitator plays an important role in creating a climate for working together productively.
- When policies are developed openly and collaboratively, they are likely to generate less controversy and move to formal adoption more easily.

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#### *For more information on this case contact:*

The Oregon Dispute Resolution Commission  
[www.odrc.state.or.us](http://www.odrc.state.or.us)  
(503) 378-2877

For a training video that highlights this case and provides details on how to run a collaborative process, contact PCI.



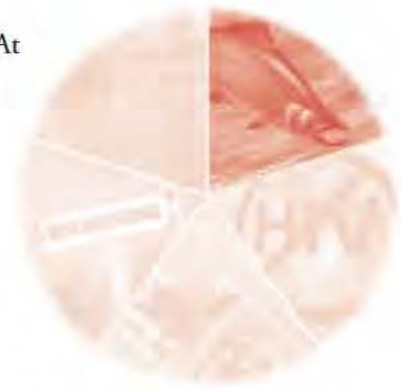
Karl Ohs  
Lieutenant Governor of  
Montana

*“In the early 1990s, a cross-section of Montanans—including ranchers, farmers, environmental advocates, state legislators and federal officials—decided it was time to find a better way to make natural resource decisions. The Montana Consensus Council has stepped in and helped us resolve many controversial issues over the past six years. As a result of the Consensus Council's involvement, opportunities for citizens to be meaningfully involved in making public policy decisions have significantly increased.”*

## Restoring Oregon's Coho Salmon—and Healthy Streams

### The Problem

The run of coho salmon was once bountiful along Oregon's coast. At the turn of the century, coastal coho salmon north of Cape Blanco numbered about 1.25 million adults. From that time through the 1930s, the figure was 900,000. Then annual production declined to about 450,000 in the 1940s and 1950s. In recent years, the annual figure for wild coho in the state's coastal basins has dropped to between 50,000 and 80,000. The cause of the decline was, as a state report put it, "human activities." In 1996, the National Marine Fisheries Service (NMFS) proposed listing two groups of coho salmon in Oregon as threatened under the Endangered Species Act.



Such action would place sanctions on commercial or sports fishermen who caught the salmon. But agricultural and timber interests were the ones most threatened by proposed federal listing. Their upstream actions may affect coho habitat and spawning routes.

Oregon's response was to attempt to develop and fund a salmon recovery plan that satisfied the fisheries agency before it made a final decision to add the salmon to the endangered species list.

### The Process

To get things moving, Governor John Kitzhaber summoned his natural resource agency heads to begin a planning process and assemble key stakeholders to deal with the coastal salmon issue. The stakeholders included sportsmen, commercial fishermen, timber and agricultural interests, public and private agencies, and, not least, conservationists.

Governor Kitzhaber assumed a role that was not traditional for most governors. He acted as convener and mediator. On and off over a six-month period, he met both individually and collectively with stakeholders, sometimes relaying messages back and forth, sometimes facilitating group sessions.

The process led to agreement on a plan—designated the Oregon Coastal Salmon Restoration Initiative. But another environmental factor entered into the equation that eventually melded the salmon plan with a clean water initiative.

At about the same time that the federal government proposed action on salmon, issues surrounding the federal Clean Water Act were coalescing. A total of 870 stream segments in Oregon did not meet water quality standards. In addition, several environmental groups sought a ballot measure that would phase in fencing to exclude livestock in watershed areas.

Once again, the governor convened parties ranging from agricultural and timber interests to environmental organizations to deal with the water issues. The result was the Healthy Streams Partnership Agreement.

During the next year and a half, government agencies worked with stakeholders to develop measures that would restore the coho salmon and improve water quality statewide. In 1997, the legislature provided \$30 million to help pay for the measures. Among other things, the money went to watershed councils, soil and water conservation districts, landowners, and others to enhance watersheds.



*I use consensus process to resolve public policy problems simply because it works. The complex nature of issues today requires an integrated collaborative approach to ensure sound lasting solutions.*

Governor John A. Kitzhaber,  
M.D., of Oregon

In the end, the Healthy Streams Partnership and the coho restoration plan were merged into the Oregon Plan for Salmon and Watersheds.

### **The Result**

The National Marine Fisheries Service took notice of the Oregon Plan's measures and funding and decided not to add coho on the Oregon coast to the endangered species list. It did list as endangered the salmon in a coastal area that Oregon shares with California, mainly, according to Oregon officials, because California did not develop a recovery plan for its part of the shared area.

As to long-term results, it is too early to say if the coho salmon will come back in abundant numbers.



*Utilizing Alternative Dispute Resolution within Maryland's judiciary and state agencies will enable cases to be solved earlier with less cost and, more important, without the animosity that litigation so often produces. (Maryland's Commission on the Future of the Courts found that) agreements reached through ADR tend to hold up better in terms of compliance than do judgments imposed by courts on disgruntled litigants.*

*Governor Parris N.  
Glendening of Maryland*



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# MARTIN LUTHER KING JR. BOULEVARD REVITALIZATION – PORTLAND, OREGON

## OVERVIEW

Highway 99-E, known as Martin Luther King Jr. Boulevard (King Boulevard.), is a major throughway in the City of Portland, providing access to the northeast Portland business district. Until 2002 it was owned and operated by the Oregon Department of Transportation, which was responsible for street operations and traffic control. Designated a district level highway, it is intended to serve primarily local traffic and land access.

In the mid-1990s, despite decades of inconsistent public investment, viable commercial uses along this street were still intermittent and redevelopment had been slow. Many people connected with the district believed that lack of on-street parking and lack of access due to a planted median strip caused businesses to fail and deterred redevelopment.

In mid-1996, a confluence of state and local concerns produced a collaborative effort to revitalize King Boulevard. An interagency collaborative program called Community Solutions was completing its first pilot project and looking to identify a second community-based project. Metro—the regional governing body—was looking to the state for help implementing the Metro 2040 Growth Concept. At the same time, a vibrant coalition of community groups called the North/Northeast Economic Alliance was organizing support for its visionary community plan.

## THE COLLABORATION

### The Players

In 1995, five state agency directors began serving as the Governor's Community Solutions Team (CST). Together they have been actively engaged in developing integrated and collaborative approaches to community development. The standing agencies of the CST include:

- Oregon Department of Transportation (ODOT)
- Oregon Housing and Community Services Department (OHCS)
- Oregon Economic and Community Development Department (OECD)
- Department of Land Conservation and Development (DLCD)
- Department of Environmental Quality (DEQ).

The Community Solutions Team approach focuses on interagency and state/local partnerships, community-based problem solving, and integrated collaborative planning to increase community livability and to maximize the use of limited public resources. On the King Boulevard project the CST served as an organized and focused forum to assist local partners in removing some of the obstacles to redevelopment of the boulevard.

Over the years, there had been many changes in the community around King Boulevard, and there was substantial distrust of government by local residents. The governor wanted to break down barriers between the local community and state government, as well as among state agencies. He wanted to use this opportunity to evaluate how agency processes and programs could be more flexible to help the community address local needs. To this end, the governor directed the CST agencies to provide assistance implementing the local vision for King Boulevard as represented in Metro's 2040 Growth Concept and in the NorthEast Economic Alliance's Community Plan.

### The Process

A CST Advisory Committee provided the substance and inspiration for the King Boulevard project. "Committee members approached their work with passion and discipline," recalls Michael McElwee, a Portland Development Commission staff representative to the committee. "We met twice a month on a regular schedule. People seemed to have a fire under them. We got things done."

The official Community Solutions Team, made up of one local representative from each agency, met weekly while the project was underway. Together they reviewed plans and requests from the larger community committee, sorted out technical details, and identified state resources for implementing the revitalization effort.

### The Agreement

Each of the five CST agencies agreed to provide different resources to the project. In total, investments related to the CST effort included about \$7 million in process, program, and project costs and related investment by other local governments. The following is a summary of the implemented agreements from each agency:

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# MARTIN LUTHER KING JR. BOULEVARD REVITALIZATION, CONT.

## Department of Transportation

- Construction of a pilot project to modify a .5-mile section of King Boulevard median and provide on-street parking. The project was completed in a few months, rather than the 2-year time frame originally estimated by ODOT. The cost of this initial improvement was \$35,000, and it provided a symbolic demonstration of the commitment of the governor and state agencies to invest in improvements in the King Boulevard Corridor.
- ODOT design standards modified to allow 10-foot travel lanes on King Boulevard.
- An additional \$500,000 to the City of Portland provided by ODOT in the form of Immediate Opportunity Fund (IOF) assistance for further modifications of the boulevard.

## Department of Environmental Quality

- A brownfield survey along 2.7 miles of King Boulevard, which provided clarity to property owners and prospective investors about potential environmental liabilities. No significant contamination was found.

## Economic and Community Development

- OECDD worked with lenders on a demonstration program to allow funding of commercial space within residential buildings in distressed areas to encourage mixed-use development. As a result, criteria within the Oregon Business Development Fund loan program have been modified to support this type of mixed-use business in distressed areas.
- \$200,000 in business development incentives provided.

## Housing and Community Services

- OHCS provided \$3.2 million of assistance since mid-1996, \$100,000 in the form of a direct grant and other funding in the form of tax credits and bonds.

The agreements between the CST agencies contributed to substantial ongoing local commitments to revitalizing King Boulevard—commitments that laid a foundation for the CST activities and, in turn, were strengthened and accelerated by the increased attention the CST process brought to the Boulevard. For example, the City of Portland took responsibility for continued improvements to King Boulevard beyond those initiated during the CST involvement. The Portland Development

Commission (PDC) provided several million additional dollars to fund the City's road improvements. Local businesses and property owners took advantage of matching grants and incentive programs offered by PDC, while a network of Community Development Corporations worked with the City's Bureau of Housing and Community Development to build the community's vision of a vibrant, mixed-use affordable housing.

## OUTCOMES

The CST process resulted in more state agency resources dedicated to addressing local issues than would have been applied through a more traditional process. Although the process cost more than a traditional process,<sup>1</sup> the investment of state resources enabled leveraging of additional public and private investment and a change in the nature of the street that will continue to benefit the community into the future.

Positive economic outcomes far outweighed public costs as a result of the efforts of the local community and the CST. A January 2001 study by Community Solutions estimated total public and private investment in housing, commercial development, and road improvements at more than \$46 million.<sup>2</sup> Projects include mixed-use housing developments, relocation of the Nike outlet store, the location of several bank branches, and the expansion of popular restaurants. Employment and property values have both increased as well.

The Community Solutions study estimates that using the CST process created \$21.5 million in public and private investments and 156 jobs that would not have occurred without the collaborative approach.

One of the most significant impacts of the CST process was the speed with which changes were made to King Boulevard. These resulted in innovative residential and commercial improvements, and the change in perception of the King Boulevard corridor from a declining, low-income neighborhood to an expanding economic opportunity for new business.

Facilitated in part by improvements to the roadway and new collaborative relationships, discussions pro-

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<sup>1</sup> For information see Cost-Benefit Analysis: Two Approaches to Community Development, prepared by MW Consulting, HDR Engineering, Inc. and Claritas Consortium. January 2001.

<sup>2</sup> Cost-Benefit Analysis: Two Approaches to Community Development.



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# MARTIN LUTHER KING JR. BOULEVARD REVITALIZATION, CONT.

ceeded between ODOT and the City of Portland on transferring ownership of King Boulevard from the state to the city.

Several local residents noted this was the most collaborative process they had ever seen between the City of Portland, Metro, the State of Oregon, and the local community. Relationships and trust were built where before there had been deep mistrust. The results of this new positive relationship can be seen in new projects being developed in the corridor today.

## LESSONS LEARNED

- ✓ Overall, the CST process provided the framework and forum for state agencies to collaborate on problem solving, and to focus resources on integrated solutions.
- ✓ The local community was organized, committed to moving the process forward, and provided the vision for the project. This was crucial. The fact that the CST process was following the community vision, and not creating one, energized the project from the ground up, and gave it a degree of legitimacy.

- ✓ A representative and diverse Advisory Committee provided a mechanism for directing the community's vision and authority into project implementation. Strong leadership made the Committee especially effective.
- ✓ The importance of high-level political support in the form of a gubernatorial mandate cannot be overstated. The mandate created a sense of urgency, and agency officials were motivated to produce results. As one ODOT official observed, "The higher up the bureaucratic food chain that people get involved, the more effective the process."
- ✓ Metro worked hard to engage the public and members of the Advisory Committee. They presented certificates and awards to dedicated volunteers. When the detested median was removed, Metro presented chunks of the concrete curb to members of the committee in dated and decorated Plexiglas

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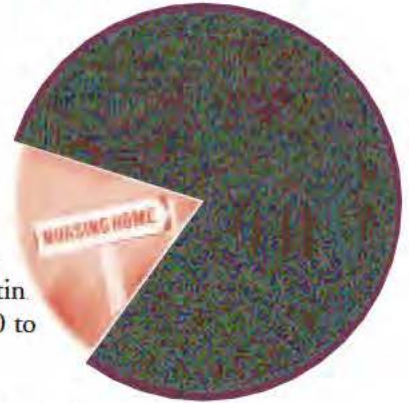
*This case adapted from Cost-Benefit Analysis: Two Approaches to Community Development, prepared by MW Consulting, HDR Engineering, Inc. and Claritas Consortium. January 2001.*

## Negotiating Regulations for Reallocation of Medicaid Beds in Texas

### The Problem

An expose in the Austin American-Statesmen about widespread nursing home abuses prompted the Texas legislature to act. There were reports of egregious negligence. Nursing homes were being investigated across the state. Many suffered disciplinary action.

Legislators wanted to crack down on nursing homes by taking away unused beds that had been allocated for Medicaid patients. It was estimated that of about 115,000 Medicaid beds in Texas, only about 50,000 to 60,000 were occupied.



In 1997, the legislature passed a bill that extensively changed the state's regulatory framework for nursing homes. A section of the bill called for decertifying and reallocating valuable Medicaid beds. The section was brief, with little elaboration. Basically it said that unused Medicaid beds in nursing homes were to be decertified and decertified beds reallocated to other nursing homes.

The measure had significant financial consequences. Nursing homes in Texas held on to as many Medicaid beds as they could get because they could borrow money off projected revenue streams from the beds, even if the beds were unoccupied.

The state agency that primarily regulates nursing homes is the Texas Department of Human Services (DHS). Its challenge was to develop regulations to implement what was the legislature's brief and somewhat vaguely worded action on Medicaid beds.

The department decided that creating these regulations was an apt subject for the first regulatory negotiation (reg-neg) to be convened under a new Texas Negotiated Rulemaking Act. Reg-neg, or negotiated rulemaking, is defined as a form of public policy mediation where parties having a stake in proposed government regulations reach agreement on key provisions through the assistance of mediators and facilitators.

### The Process

The reg-neg process began when Paul Leche, deputy general counsel for DHS, convened the reg-neg and identified key people willing to take part in negotiations. The players included representatives of the American Association of Retired Persons (AARP), Texas Advocates for Nursing Home Residents, Advocates for Nursing Home Reform, the Texas Health Care Association, the Texas Association of Homes and Services for the Aging, the Texas Department of Aging, and the Texas Health and Human Services Commission.

Opposing poles in the reg-neg were the politically influential AARP and the nursing home industry, which was defensive about decertification because of the specter of diminished revenues and borrowing power. DHS worked with the Center for Public Policy Dispute Resolution at the University of Texas School of Law in Austin to get the process underway and select the facilitators.

The reg-neg committee held its first session on October 31, 1997 against a backdrop of skepticism on the part of several stakeholders and DHS personnel that consensus could be reached. Patients'



*Mediation works because it is built on the good sense of the people. People either rise to or descend to the expectations you have of them. I like to expect good sense.*

Governor Marc Racicot of Montana

advocates and nursing home representatives were leagues apart on the pivotal matter of mechanisms governing decertification of Medicaid beds and their reallocation.

The first and perhaps the most important procedural step in the reg-neg was the development of the committee's agenda: What should be the order of issues considered? Decertification of beds was certain to be the most contentious issue because it meant inevitably taking beds from at least some nursing homes. The industry was sure to strongly resist such action, and patient advocates were sure to press hardest on this point. Reallocation, on the other hand, was likely to go smoother because it would be keyed to determining how nursing homes could obtain more beds, or even how they could get decertified beds back.

The facilitators chose to put reallocation of beds first on the agenda. They hoped that if the parties could agree on a reallocation method, then the concerns of the industry on decertification might be allayed. A reallocation system was developed fairly rapidly and the committee moved on to decertification. Assured that lost beds could be recovered, decertification became less contentious.

Over eight sessions that lasted into February, the dozen or so committee members around the reg-neg table found common ground on rules covering Medicaid beds. En route to agreement was a good deal of negotiation, information sharing, and facilitated dialogue—familiar ingredients in the successful resolution of conflicting positions.

All sessions were open to the public. The news media were expected, but never attended. Staffers of various legislators were present as, for several sessions, was a member of the legislature who developed an interest in the dynamics of regulatory negotiation. Representatives of organizations that lend money to nursing homes attended most sessions and communicated their concerns through parties at the reg-neg table.

### The Result

Key to this reg-neg success was hammering out acceptable formulas on bed decertification and reallocation. The new formula for decertifying Medicaid beds involved setting a base occupancy rate of 85 percent.

Nursing homes that wanted more Medicaid beds had to have at least a 95 percent occupancy rate for their current Medicaid beds, according to the reallocation formula devised by the committee. Homes that met this threshold could seek a 10 percent increase over their current number of occupied Medicaid beds.

Another key aspect of the agreement, urged by AARP, was that nursing homes petitioning for reallocation of Medicaid beds had to requalify for receiving them under stricter quality of care standards.

It is difficult to estimate specific savings stemming from the reg-neg's outcome. However, most parties agreed that development of the rule through the traditional process would not have yielded a final rule as rapidly, and that litigation would have been possible with a rule unsatisfactory to either side.

Also important was the legislative scrutiny that was focused on the rule. DHS could have lost legislative support if the rule had been viewed as soft on the industry. The legislative agendas of the other parties might have been hindered if they were seen as bad actors in a traditional rulemaking. By allowing the parties to work together and reach consensus, all interests seemed better off.



*The old approach gave neither side what it wanted. If you involve the people who must live with your policy, there's a decent chance you'll get buy-in and ownership of the process. Based on the progress we've made through a collaborative process, I wouldn't hesitate to use a similar approach to some other area of conflict.*

Governor Tom Carper of Delaware



*Human services delivery systems are undergoing reform. Over the years, state and local human service agencies have grown compartmentalized, yet have overlapping roles and responsibilities. No single agency is able to serve the needs of the whole child, the whole family or the whole community. In recent years, states have tried various methods to reform their systems to achieve better outcomes for children, youth and families while improving cost effectiveness. Improving operations requires change—change in procedures, practices and performance. Achieving this kind of systems reform requires collaboration among state and local actors.*

*Here is an example of states making significant strides towards reforming their human services systems.*

## Mediating Child Protective Service Cases In Texas

### Problem

Child Protective Services (CPS) litigation in Texas had a history of being emotional, hostile, time-consuming, and costly. Cases involved difficult issues like the removal of a child from a home, the determination of conservatorship, and placement in foster care. Many children spent four to five years in foster care and may have experienced as many as six placements before their adoption was finalized. In the mid-1990s, court dockets were overcrowded and CPS was struggling to find workable solutions for these extremely difficult cases.

New state legislation in 1997 put time limits on temporary foster care in an attempt to streamline the judicial process and handle child custody cases more quickly. In response, a statewide Task Force made up of a multi-disciplinary group of professionals involved in the child protection system recommended that counties use mediation for custody cases. Mediation, they believed, could provide a faster, less expensive, and more humane alternative for neglect and abuse cases.

### Process

The Department of Protective and Regulatory Services (DPRS) launched a mediation pilot project and contacted the University of Texas Center for Public Policy Dispute Resolution to help design and evaluate the project. The pilot design included training and technical assistance for judges, mediators, court administrators, attorneys, and child advocates, and incorporated evaluation mechanisms. Six counties

volunteered to be a part of the pilot project to develop court-based mediation programs. Because Texas is a large state, and because of differences in the way each county court operates, the individual projects developed their own unique implementation strategies.

All sites reported initial resistance to mediation. CPS workers suspected that mediation would be a waste of time. Some felt their professionalism was being challenged. Others were concerned that the mediator would be making decisions, and CPS would be undermined. Parents worried that prosecutors might use mediation to get information that could be used against them if their case subsequently went to litigation. Some prosecutors were concerned that settlements would not be binding and that parents would refuse to come to mediation.

However, this resistance was short lived. Once they tried mediation, most caseworkers and attorneys supported the process. The mediation brought a combination of relatives, service providers, legal representatives, court volunteers, and law enforcement officials to the table. Relatives and potential caretakers, who would not ordinarily have been involved with a court hearing, attended the mediations. They contributed important information about what was in the child's best interest. With the increased information sharing, mediation meant fewer contested court hearings and more effective treatment plans.

Caseworkers noted that in court, the agency often becomes "the enemy." In mediation, the more informal setting and the absence of a judge seemed to open up channels of communication. "Mediation provides a forum

for discussion versus hard-line confrontation,” said one district attorney. “I have an opportunity to say, ‘I don’t want your kids; we don’t have enough room in the county for them and it is not in their best interests anyway.’ That is something the D.A. cannot say in the courtroom. The D.A. can’t even talk to the defendants except on the witness stand.”

Each county’s court system uses a different approach and mediates cases at various stages of the CPS case timeline. Mediations have produced settlements at all stages in case processing, although it appears that the earlier the mediation occurs, the more likely it is to reach agreement.

## Results

At the conclusion of the pilot, the Center for Public Policy Dispute Resolution’s evaluation identified factors that contributed to the pilot projects success. For example, with mediation, parents indicated they had an opportunity to be heard and to understand what was expected of them. In a court hearing, attorneys often fail to take the time to answer questions and ensure that clients fully understand the situation.

Mediation also turned out to be more efficient and cost effective. Ninety percent of the pilot mediations were completed in less than three hours, and nine percent in four to six hours. Professionals involved in the cases saw that mediation produced cost savings. Galveston County estimated that its pilot project saved \$4 million in litigation costs.

The pilots were so successful that CPS extended the use of mediation to a number of additional counties. DPRS provided training for all involved court and agency personnel on

how to initiate a mediation program. The training incorporated evaluation findings about successful practices that were identified during the pilot phase.

## Lessons Learned

- Pilot projects are an effective way to introduce mediation on a system-wide basis. Evaluating the pilot helps identify the factors that will lead to successful implementation.
- Government employees can be resistant to using new procedures. Yet once they experience the benefits of a successful mediated process, they often prefer to work collaboratively.

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### ***For more information on this case contact:***

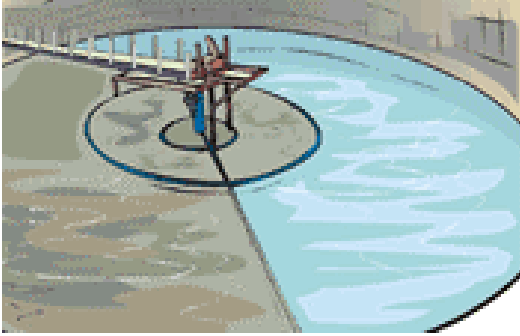
The Texas Center for Public Policy Dispute Resolution  
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(512) 471-3507



Robert Duncan  
Texas Senator

*“Mediation has been proven effective in resolving a variety of disputes in the legal system. Now Texas is making important strides in incorporating mediated approaches to resolving public policy issues. And this case illustrates how we are using mediation to make government services more effective.”*





## Regional Conflict Leads Utah Legislature to Consensus Building

*The following case, excerpted from an article by Utah State Representative and PCI/NPPC Board member **Ralph Becker**, sheds light on how circumstances compelled the State Legislature to employ a consensus process with surprising results. The case illustrates how consensus building can be successfully applied to a controversial issue.*

In 2003, a dispute between the City of Draper and the Metropolitan Water District of Salt Lake City was brought to the General Session of the Utah Legislature. The Water District had acquired property to build a regional water treatment facility. Draper had recently completed a General Plan and zoned the property for future commercial use; a water treatment plant was not a permitted use in the commercial zone.

Located near an interchange along I-15, Utah's busiest highway, the property was considered a key parcel to provide commercial activities and a tax base for fast-growing Draper. Yet the two governmental entities had not coordinated their planning.

Because the property was not zoned for a water treatment facility, the Water District could not build the facility without Draper's approval through a zoning change. Draper refused to make the zone change.

The Water District, believing it did not have a viable alternative to the site it had acquired, went to the Utah Legislature to seek exemption from zoning requirements.

The Legislature became the forum for a lobbying blitz and arbiter for the dispute. Hours of legislators' time were consumed listening to both sides of the issue in committees and floor debates. The bill crawled through the legislative process until both sides blinked and—outside the halls of the Capitol—agreed on a settlement that would rezone the property in exchange for hefty payments to Draper City for infrastructure improvements and the dedication of ground to public purposes.

Throughout the Session, tempers flared on both sides and legislators felt trapped in a fight that all acknowledged they were poorly equipped to address. As the Session drew to a close, the subject of critical regional facilities was slated for study during the interim between legislative sessions.

That set the stage for an alternative approach to addressing this regional planning issue. At the request of the sponsor, House Committee Chair Kory Holdaway (R-Taylorsville) agreed to support a working group to address the issue.

Four legislators, two from each party, set up a working group of representatives from cities, counties, special districts, private utilities, associations of government, the Utah Transit Authority, the State Planning Coordinator, Utah's Geographic Information System (UGIS) agency, and a Utah intergovernmental advisory group. Other interested parties were also welcome. The effort was staffed by the Utah Office of Legislative Research and General Counsel.

The working group met four times over the following four months. In each meeting, discussions evolved toward reaching an objective: how best to address conflicts among local governmental entities over regional facilities. Issues were identified, options explored, approaches accepted and revised, and consensus was finally achieved. Ideas came from all participants.

For all the working group members, the ideal was to avoid the conflict. Notification and communication became the focal point for prevention. But who should be notified, and how would notification occur?

In the course of several meetings, an approach was agreed upon by all parties. Notice would be given to all "affected" parties planning and acquiring property for regional facilities. The responsibility would be placed on each entity to make the other aware of the proposal. In addition, a clearinghouse maintained by the UGIS agency would contain notices of all activities, and interested parties could go to the clearinghouse website to find out about proposals for planning or facilities. All

cities, counties, school districts, public utilities, and special districts would provide the clearinghouse with a contact person for the information. The clearinghouse would ultimately serve as the notifier.

All parties agreed that leaving resolution of these kinds of disputes to the legislature wasn't desirable, and that the court system was too slow, costly, and unpredictable. Yet finding an acceptable dispute resolution approach took considerable thought and discussion. The working group decided to create a dispute resolution commission for conflicts about regional facilities, modeled on the Utah Boundary Commission, whose duties are to resolve boundary disputes.

Even though consensus appeared to be reached on the package, concerns grew about the mechanism for addressing disputes over regional facilities. The tentative agreement wasn't reduced to legislative language for months. In the meantime, concerns about a power grab and the creation of a 'regional authority' that could gain a foothold multiplied. As the 2004 General Session of the Utah Legislature convened, the future of regional facilities legislation was in doubt.

It was clear to the sponsors that if the bill was going to move forward without major opposition, the dispute resolution commission would have to be dropped. A substitute bill with the notice provisions was introduced and ultimately passed both the House and Senate.

The bill may have far-reaching implications for local governments, special service districts, school districts,

and investor-owned utilities. For the first time, all these entities must provide notice at the front end of their intention to prepare a plan. Prior to introduction of the bill, Utah statutes did not require any public notice to affected entities until a plan was being considered for adoption. Special service districts, school districts and investor-owned utilities were not required to notify local governments or others of their planning activities.

This bill was particularly challenging because so many interests were affected, and they all had their power bases in the legislative process. It's

doubtful that the parties would have come to the table and that legislators would have taken on an issue with so many parties in dispute without the dispute fresh in legislators' and affected parties' minds. Further, the ogre of "regional planning" would likely have emerged and undermined an effort to address the issues. Creating a work group to develop a consensus was critical, and made passage of the bill possible.



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# UTAH 3500 SOUTH PARTNERING AGREEMENT

## OVERVIEW

The 3500 South Corridor Project is a transportation study and Environmental Impact Statement (EIS) to evaluate transportation needs for 8.5 miles of state highway outside of West Valley City, a large southern suburb of Salt Lake City. The project is considering multi-modal alternatives and is being coordinated with a transit corridor study currently being managed by Wasatch Front Regional Council. It is a collaborative effort by the Utah Department of Transportation (UDOT), West Valley City (WVC), Wasatch Front Regional Council (WFRC), and the Utah Transit Authority.

The objectives of the project include: 1) Identify needs; 2) Develop and evaluate alternatives; 3) Prepare a draft EIS; 4) Prepare a final EIS; and 5) identify a preferred alternative. The process includes public and agency coordination, data collection, developing and evaluating alternatives, environmental analysis, EIS preparation, and concept-level design II.

## THE COLLABORATION

### The Players

UDOT officials played an instrumental role in putting together a collaborative process around the 3500 South Corridor Project. Angelo Papastamos, who is now director of an innovative program called Context Sensitive Solutions, and UDOT's Regional Manager initiated discussions with West Valley City stakeholders about transportation alternatives in the corridor. Over several weeks they engaged transportation engineers, planners, politicians and others. It was clear from their discussions that WVC stakeholders felt a lot of ownership in the corridor, and any UDOT process addressing the future of the corridor would have to be collaborative.

The Utah Transit Authority and Wasatch Front Regional Council were already involved in the planning of a transit project with WVC, and made an obvious addition to the collaborative effort. Through a series of discussions between UDOT and UTA the agencies came to some shared understandings and agreed to participate in each other's processes as well as work together on a collaborative 3500 South Corridor project. FHWA and FTA's participation rounded out the agency players on the project.

Once the agencies decided to work together they contracted with Carter & Burgess, Inc., to guide the project and prepare the EIS.

### The Process

After agreeing to work together, it took the agencies and the consultants another three to four months to "decide how to decide" on the structure of their collaborative effort. The participants spent much of this time simply getting to know one another. They spent a full day at a nearby ski resort going through facilitated team building exercises, sharing perspectives, and strengthening personal relationships. They agreed to have breakfast every other week, partly to talk about the project, but mainly to keep in touch.

They also spelled out the logistics of their partnership. They discussed roles and responsibilities and the best way to organize their work. When they finally brought in a nationally known facilitator to guide them through the collaborative process of drafting a Partnering Agreement, they got it done in a single day. The six to eight months of informal discussions and team building exercises laid the foundation for a smooth and speedy consensus on the formal agreement.

### The Agreement

The 3500 South Partnering Agreement creates a team structure to organize the participation of each agency in the project. Roles and responsibilities are spelled out for each of the following groups:

1. The Sponsor Team – Consists of the four sponsoring agencies. This group is represented by the agencies that will likely be contributing financially to the implementation of improvements in the corridor. This team makes decisions, provides a big-picture view, forwards proposed actions to FHWA and FTA, develops funding strategies, and acts as implementers.
2. Project Management Group – Tracks progress of the project and facilitates coordination with all key groups and project participants. The Project Management Group interacts with the Sponsor Team by providing information and recommendations for making key decisions at project milestones.
3. Technical Advisory Committee – A resource for the Project Management Group. It provides guidance on the scope of the technical analysis, performs quality control oversight of the technical process/product, and assists with Regulatory/Standards/Plan compliance. The Technical Advisory Committee is not a policy group; it is advisory only. Its main role is to bring issues out for further analysis.

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# UTAH 3500 SOUTH PARTNERING AGREEMENT, CONTINUED

4. Public Advisory Committee – Provides a “sounding board” function and the opportunity to discuss public input through various outreach activities. The committee works with the consultant to keep the public informed, and to bring the public’s perspective in to the other committees. The Public Advisory Committee is also not a policy setting or decision-making group.

In addition to agreeing on a structure for their collaboration in the Partnering Agreement, the agencies also agreed to continue to use collaborative practices and respectful communication in their dealings.

The Partnering Agreement explicitly states, “Participants are committed to mutual respect and having trust in each other, which includes respect for the value of each other’s opinions and trust in the process. The participants are committed to working in a collaborative manner in order to bring the project to completion in a timely manner.”

The Agreement goes on to elaborate effective communication methods, communication protocol, ground rules for meetings, use of particular meeting facilitation techniques, and a detailed process for developing consensus.

## OUTCOMES

After the Partnering Agreement went into effect, member agencies began an extensive public outreach effort over the next 6-8 months. The outreach effort included getting the community and school children involved in identifying the needs and values of the community. They worked collaboratively to form and incorporate input from the Technical Advisory Committee, the Public Advisory Committee, a visioning workshop, several community outreach meetings, and several public meetings. In a December 2002 facilitated meeting that lasted nearly 5 hours, the parties all agreed on language for the “Purpose and Needs” chapter of the EIS.

Again, the formal agreement process was relatively quick and easy due to the relationships and the process the partners already had in place. In addition, the “Purpose and Needs” chapter incorporated some unique elements that demonstrate the extent to which the collaborative process allowed the parties to think creatively. For example, in addition to identifying needs for traffic mobility and safety, the chapter also sets a course for creating a corridor that reflects the cultural and community character already in place, and that enhances mobility for a variety of modes of travel.

## LESSONS LEARNED

- ✓ **Relationships are key.** The ongoing breakfast meetings every other week, along with other team building activities, contributed to creating the shared understandings that allow the participants to function as an effective interagency team.
- ✓ **The early contact and informal discussions among the stakeholders** allowed them to create group ownership of the collaborative process from the beginning.
- ✓ **Community outreach was extensive.** Early community outreach facilitated an understanding of the communities’ needs and efforts. The project involved school children by having them contribute pictures, plans, and visions for the corridor. This and other outreach activities were instrumental in building trust with community.
- ✓ **A professional facilitator brought in at key junctures** helped the group come to formal agreement. The facilitator also introduced communication, collaboration, consensus, and facilitation techniques that worked well enough for the parties to institutionalize them in their Agreement.

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*This case was adapted in part from the 3500 South Partnering Agreement.*



# BRYAN PARK INTERCHANGE – RICHMOND, VIRGINIA

## OVERVIEW

This case involves a challenging two-year public involvement and consensus building process convened by the Virginia Department of Transportation (VDOT) in 1997 to seek agreement between the agency and citizens concerned about traffic congestion, safety, and the impacts of interstate traffic on Bryan Park and adjacent neighborhoods. The process resulted in consensus recommendations by a citizen advisory committee that were endorsed by VDOT. As with most long-term processes, the effort included a distinct set of challenges, innovations, and lessons learned.

The precipitating issue was an “in-house” proposal in 1996 by a VDOT engineer to construct a fly-over on I-95 that would encroach on Bryan Park’s Azalea Gardens, a 285-acre public park on Richmond’s north side. The proposal, which also entailed removal of a small pedestrian access bridge to the park, aroused significant concern among area residents, who feared the project would harm the park and nearby neighborhoods. In response, VDOT dropped the fly-over proposal and entered into broader discussions with the community about the Bryan Park area in general.

## THE COLLABORATION

### The Players

Several meetings between VDOT officials and citizens made it clear that a more intensive and deliberate effort was needed to exchange views, to analyze information, and to identify needs, concerns, and options. In spring 1997, VDOT initiated a formal public involvement process by inviting concerned citizens and organizations to create a Bryan Park Interchange Advisory Committee. A group of about 30 citizens, representing a variety of park advocacy, civic, and business groups, began meeting in September 1997 with mediators from the Institute for Environmental Negotiation at the University of Virginia. The process was developed in conjunction with a *Feasibility Study for the I-95/I-195/I-64 Study Area*, conducted by a transportation engineering firm, Michael Baker Jr., Inc. (the consultants).

To convene the citizen advisory committee, VDOT placed advertisements in the city newspaper, as well as in smaller neighborhood newspapers. Nearly 70 people showed up at the first meeting. Overwhelmed with the response and feeling that the group would be unmanage-

able, VDOT asked the citizens to return to their respective interest organizations and identify only one or two persons who could serve for each organization. Individual citizens were told they could continue to participate as well. Significantly, while many different neighborhood and civic organizations were represented, more than one-third of the people were also members of the same interest group, Friends of Bryan Park. Following VDOT’s request, the group was thus pared down to about 30 citizen members composed of a mix of individuals and citizens representing a variety of local interests.

### The Process

The process was driven to a large extent by VDOT’s goals for the advisory committee, as well as by the engineering feasibility study. The Advisory Committee completed its four phases of facilitated work over the course of two years, in 22 facilitated meetings and three formal public workshops of about three hours each.

The Advisory Committee members decided at the outset that they would operate on a consensus basis. They recognized that while consensus would be difficult, consensus recommendations would carry more weight with local and regional decision makers. Consensus was defined as a decision that could be supported by *all* members of the group, with the understanding that on any given decision, a member might have reservations or hesitations but must at least be able to go along with the decision. If one person could not live with a decision, consensus would not be reached.

**Phase One:** In its first phase of work, from September 1997 through January 1998, the Advisory Committee members achieved consensus on their overall purpose, group protocols, and guidelines for group behavior. In tandem with these efforts, members also created a detailed list of concerns and a detailed list of information needs, both of which were provided to the consultants and to VDOT. Lastly, members developed four goals that they would later use to evaluate options and to guide their final recommendations. The goals were:

1. Maintaining the existing boundaries of Bryan Park and preserving a Bellevue pedestrian and vehicular bridge.
2. Preserving the adjoining neighborhoods by protecting them from physical, environmental and aesthetic encroachments.

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## BRYAN PARK INTERCHANGE (RICHMOND, VA)– CONTINUED

3. Maintaining a southbound access ramp and a northbound exit ramp with relocation of these ramps a consideration; eliminating tractor-trailer traffic; and minimizing other commercial traffic at the northbound Exit 80 ramp.
4. Relieving congestion in the study area.

When developing protocols in Phase I, the Advisory Committee was unable to resolve issues related to the media, including whether the media should be able to attend the meetings and who from the Advisory Committee should be allowed to speak to the media. The issue was extremely emotional and divisive; some people threatened to drop out if the media were allowed to observe, while others argued forcefully for an open process. A subcommittee that formed to address this issue proposed that the mediators should be the sole spokespersons for the group, while individuals would speak for themselves. However, the issue of whether the meetings should be open or closed to the media was left unresolved.

**Phase Two:** The Committee's second phase of work, from February to July 1998, involved intensive learning about the complexities of the transportation planning process, multi-modal transportation, and design and aesthetic considerations. Members also received detailed information about current and projected traffic conditions in the interchange area.

**Phase Three:** The third phase of work, in September and October 1998, generated potential ideas for study by the consultants which would possibly resolve or ameliorate the previously identified issues and problems.

The challenge of phase three was to devise a way in which citizens not trained as traffic engineers could address traffic congestion and safety issues in a meaningful and realistic way. To meet this challenge, the mediators introduced a game called the "Traffic Diet Exercise." Advisory Committee members were divided into four teams and asked to come up with a package proposal that would reduce the number of overall traffic trips by the prescribed amount, as well as "social policy" proposals that might accompany the package. At the end, the four teams shared their proposals and identified common elements. The game helped elicit ideas, although some—who thought it covered old ground—found it frustrating.

**Phase Four:** In its fourth phase of work, from February to September 1999, the Advisory Committee worked closely with the consultants to evaluate the ideas generated.

The engineering firm narrowed the list of ideas and conducted an initial analysis to determine which were practical enough to merit more in-depth study. The consultants next conducted a cost-benefit analysis of the remaining set of ideas/alternatives, and used this cost-benefit analysis (along with the decision criteria established by VDOT) to determine which ideas they felt would best resolve traffic problems in the study area.

### The Agreement

Throughout the entire fourth phase, Advisory Committee members provided the consultants with their views and recommendations. The consultants reported that these views were taken into consideration to the extent possible in development of the firm's final recommendations and report. As the last step in the process, the Advisory Committee both evaluated the firm's recommendations and developed its own complementary set of consensus recommendations.

## OUTCOMES

VDOT has promised to take the recommendations of the Advisory Committee into consideration. VDOT and representatives from the Advisory Committee presented the report to the Commonwealth Transportation Board, and VDOT declared their support for the recommendations endorsed by the Committee. As the recommendations were intended for VDOT's 20-year plan, it is still too early to tell whether the recommendations will be fully implemented.

## LESSONS LEARNED

- ✓ **Effective processes require time.** This was a unique situation with considerable antagonism and distrust, not only between citizens and VDOT but also among citizens. Those conditions necessitated a substantial amount of time for group members to develop trust and a sense of responsibility. A process like this could not be used in situations with tight time pressures.
- ✓ **Identify the full range of stakeholders.** Representation from the study area was not full and balanced, with insufficient participation by some stakeholders such as commuters not living in the area, commercial interests,

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## BRYAN PARK INTERCHANGE (RICHMOND, VA)– CONTINUED

and members of the African-American community. The process would have benefited greatly from seeking a more deliberative way of identifying the full range of stakeholders and achieving representation that remained fair but ensured accountability, equity, balance of diverse interests, competency to mediate, and demographic and geographic diversity. Mediators can help with that task, if they are selected at the front end of a process. If selected after the group has been convened, mediators should explore the question of appropriate representation immediately, before the first meeting.

✓ **Clearly define desired outcomes and expectations.**

VDOT asked citizens to invest a great deal of time without full clarity about how their final recommendations would actually be used. This was in part because VDOT had no equivalent prior experience and was not sure itself how the final recommendations would be used.

The process would have benefited from VDOT laying out general expectations about meeting dates and times, participants' responsibilities, protocols, and desired outcomes for participants at the beginning of the process, while retaining flexibility to allow for member input in setting ground rules. Also, some Committee members expressed frustration that their ideas and suggestions were not being considered or given adequate weight in the feasibility study. The process would also have benefited from a mechanism to document and verbally acknowledge the extent to which citizen input would impact the feasibility study.

- ✓ **Some citizens reported that their trust in VDOT increased** because they felt VDOT convened and conducted the Advisory Committee process in good faith and persisted with the process despite sometimes feeling unheard, misunderstood, and misrepresented. Their consistent representation at meetings enabled them to answer important questions quickly. **Citizen trust of the engineering consulting firm also increased** among some participants because the consultants invested considerable time, effort and financial resources in the process.
- ✓ The impact of the consensus recommendations on VDOT and others making transportation decisions is still uncertain. However, **many of the participants most critical of VDOT and most skeptical of the process strongly endorsed this process** in their final evaluations.
- ✓ In addition, several key members of the Advisory Committee reported that **positive encouragement from the mediators during rough spots in the process was crucial** to their continued involvement. The process taught them a great deal about the complexity of transportation decision-making and the wide range of differing interests impacted by transportation decisions; that they made long-lived friendships where once there was mistrust and even hostility; and that they learned that collaboration among people with differing views and needs is not only possible, but can also be a productive and ultimately positive experience.

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*This case was adapted from Opening Transportation Planning To Community Involvement: Challenges and Lessons Learned, by Tanya Denckla, Institute for Environmental Negotiation, University of Virginia.*

# Case Study

## Washington Adopts Collaborative Governance Structure for Salmon Recovery

### The Problem

In 1999, federal officials listed Puget Sound Chinook salmon under the Endangered Species Act. Throughout the Sound, 22 populations of Chinook were at “high risk” of extinction and between 11 and 15 populations have already disappeared.

### Initiating a Structure for Collaboration

Shared Strategy for Puget Sound was conceived after the ESA listings. The organization and the concept were created by a group of civic leaders including former EPA chief William Ruckelshaus, former Governor Dan Evans, former Washington Secretary of State Ralph Munro, and Indian leader Billy Frank.

Shared Strategy grew out of an informal consensus among these regional leaders that a new collaborative approach was needed for salmon recovery. This is unlike how recovery plans have been written in the past where the federal government makes natural resource decisions and prescribes local actions.

Shared Strategy believes that local stakeholders are in the best position to find lasting solutions for their communities. They provided leadership and a framework for salmon recovery planning that is an

important departure from what has been done in the past. They produced a regional plan developed by hundreds of stakeholders in 14 watersheds extending from Mount Rainier to the Canadian border. Local governments, farmers, tribes, environmentalists and developers — groups that are often on the opposite sides — came together to develop something that would work for them all.



The “shared strategy,” a 4,000-page plan, will help restore salmon runs by protecting wetlands and flood plains, retooling hatcheries and dams, and restoring feeding grounds. The plan, which would cost \$ 120 million a year for the next decade, will require changes in development, agriculture, fishing, logging, and just about every other aspect of life in the 14 watersheds. The plan has been adopted as the federal plan.

Once the plan was approved, Shared Strategy began working toward finding a permanent mechanism and funding to support the implementation of the plan.

## Permanent Structure for Collaboration Grows Out of the Shared Strategy



Gov. Chris Gregoire signs SB 5372, creating the Puget Sound Partnership, in a ceremony at Des Moines Beach Park

In 2007, Governor Chris Gregoire and the Washington Legislature worked together to enact legislation and provide funding that will help restore and protect Puget Sound. The centerpiece of the initiative is a bill (SB 5372) establishing the Puget Sound Partnership. The Partnership will be a new state agency with cabinet-level status. It will be governed by a Leadership Council made up of seven civic leaders. The Council and its staff will collaborate with governments, tribes, businesses and the environmental community to create and implement an action plan to restore the health of Puget Sound by 2020. This action plan will set measures and priorities to guide all protection and restoration programs in the region.

Shared Strategy achieved its goals of developing a regional salmon recovery strategy, getting it adopted as a federal plan and finding a successor organization to carry out the program. Shared Strategy's staff functions will transfer to the Partnership. Shared Strategy's grassroots effort moved the region toward a broad and workable collaborative structure to manage salmon recovery on an on-going basis.

For more information, visit Shared Strategy's website  
<http://www.sharedsalmonstrategy.org>



This case study is published jointly by the Policy Consensus Initiative (PCI) and its applied research and development arm, the National Policy Consensus Center (NPCC). PCI is a national nonprofit organization that promotes consensus building and effective problem solving in states. NPCC is a center of expertise on consensus building for public leaders.

For other case studies and information about collaboration, consensus and conflict resolution, visit the website: [www.policyconsensus.org](http://www.policyconsensus.org).



*Environmental and natural resources problems rarely respect political boundaries. Pollution, for example, effects whole ecosystems—not just a single jurisdiction. Different levels of government need to work together across jurisdictional lines to address these kinds of problems, and they need processes to do so. Environmental and natural resources issues also effect the health and well-being of all citizens. Collaborative processes provide effective ways to include citizens voices in forming and implementing public policies.*

*Below is a case that illustrates different ways collaborative approaches can be used to address environmental issues.*

## Negotiating to Meet Water Quality Standards for a Washington River

### Problem

When the Puyallup River Watershed in Western Washington began experiencing economic growth, water quality issues became a key concern for the region. Primary polluters in the region included cities—whose wastewater treatment plants and street runoff affect the river—and industries such as microchip processors and paper mills. Under the federal Clean Water Act program, these entities held discharge permits allowing for specific amounts of pollutants.

In 1994, the Department of Ecology (Ecology) prepared a Total Maximum Daily Load (TMDL) assessment for the Puyallup River. TMDL calculations determine the maximum amount of pollution a water body can receive and still meet water quality standards. The TMDL assessment concluded that the river had surplus, or 'reserve capacity.' In other words, the river could withstand additional pollution and still be considered safe under U.S. Environmental Protection Agency (USEPA) regulations.

After USEPA's approval of the TMDL assessment, several permitted dischargers learned of the reserve and came to Ecology to request portions of it. Ecology realized that allocating portions of the reserve would be a highly contentious issue. Rather than making unilateral decisions, Ecology decided to try mediation.

### Process

Ecology hired an independent mediator who began the process by determining whether mediation was appropriate. During this assessment, the mediator learned that USEPA had previously delegated to the Puyallup Tribe the authority to adopt water quality standards in the stretch of the Puyallup River within the tribe's reservation. The state already was in the process of negotiating a Memorandum of Understanding with the tribe on water quality issues. (Their cooperative relationship was confirmed in a MOU signed in January 1997.)

Based on the assessment, the mediator reported that in order to be successful, the mediation would have to be sponsored jointly by Ecology, the Puyallup Tribe, and USEPA, since they held final decision making authority to allocate the reserve. After some deliberation, the parties agreed to this approach.

The three sponsors convened a mediation committee made up of stakeholders from along the watershed. These included representatives of two tribal governments, federal and state agencies, local governments, municipal and industrial discharge permittees, conservation, agriculture, and business interests.

The Committee's purpose was to determine whether the reserve capacity existed and, if it did exist, to seek consensus on how to manage it in the future to both protect water quality and address the needs of the watershed's inhabitants.

The first step in the mediation process was to develop a common base of information. This entailed a review of the TMDL process and the



Christine O. Gregoire  
Attorney General, Washington

*"State government needs to take the lead in the use of creative problem solving and dispute resolution. These tools, used appropriately, have proven to be more effective and efficient ways to address many of the difficult issues that citizens and government face."*

1994 Puyallup River TMDL. An armchair tour of the watershed proved to be an effective way for parties to educate one another about their respective needs and interests. Other information included the history and uses of the river, treaty rights, legislative mandates, natural river processes and hydrology, background water quality, and point and non-point sources of pollution.

At the end of this phase, the Committee agreed there was reserve capacity that could be allocated. The process then shifted to negotiating agreements on which entities should be eligible to receive a portion of the reserve capacity, what size allocation each should receive, for what purposes, and under what circumstances.

### Results

After more than a year of negotiations among the caucuses, who worked in both full and small group sessions, the Committee reached consensus on allocation of the reserve and established processes and principles to guide the use of reserve capacity in the future.

In June 1998, the agreement was signed by all the parties to the mediation. In addition to the specific allocations to permittees, at the suggestion of the tribes and environmentalists, five percent of the TMDL reserve capacity was set aside as a water quality buffer to demonstrate the parties' commitment to water quality and habitat enhancement. This amount was in addition to the margin of safety used in the TMDL, and the two tribes' commitments to set aside 10 percent of their portion of the TMDL reserve for fish habitat and water quality enhancement.

The group acknowledged that with the reserve capacity allocated, future demands for handling municipal discharge, direct industrial discharges, or other discharges to the river would have to be met in other ways—i.e., improving water treatment, reducing other loads, or trying effluent trading models.

### Lessons Learned

- It is important to identify and recruit ALL potential stakeholders involved in an issue and make sure that they are willing and able to participate.
- Collaborative processes take time, but the agreements that are reached are often enduring and can help parties form relationships that are essential for working together in the future.

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### *For more information on this case contact:*

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# WASHINGTON-OREGON STRATEGIC PLAN FOR I-5 CORRIDOR

## OVERVIEW

The I-5 Partnership Planning Process brought together Washington and Oregon leaders and citizens to respond to concerns about growing congestion on Interstate Highway 5. As the only continuous Interstate on the West Coast, I-5 is critical to the local, regional, and national economy. At the Columbia River, I-5 provides a critical connection to two major ports, deep-water shipping, up-river barging, two transcontinental rail lines, and much of the region's industrial land. In addition, for residents in the Portland and Vancouver area, I-5 provides one of two crossings of the Columbia River for automobiles and transit. An average of 125,000 trips are made across the I-5 bridge every day.

In 1999 a bi-state leadership committee considered the problem of growing congestion on the highway and rail systems and recommended that the Portland/Vancouver region initiate a public process to develop a plan for the I-5 corridor. In January 2001 the I-5 Transportation and Trade Partnership was initiated with the overall goal of producing a strategic plan that would determine the overall level of investment needed in the corridor for highways, transit, and heavy rail, and to determine how to manage the transportation and land use system to protect investments in the corridor.

## THE COLLABORATION

### The Players

Washington's Governor Locke and Oregon's Governor Kitzhaber jointly initiated the planning partnership in 2001. The 26-member Task Force established to guide the development of the strategic plan included state elected and appointed officials from both Oregon and Washington, business representatives, neighborhood associations, land use and environmental justice advocates.

The Task Force had equal representation from Oregon and Washington. Key members of the Task Force were the mayors of both Portland and Vancouver, who made a commitment to attend all the meetings. The Bi-State Task Force was co-chaired by Ed Barnes, a member of the Washington Transportation Commission, and Henry Hewitt, the chair of the Oregon Transportation Commission. A neutral facilitator, Sam Imperati with the Institute for Conflict Management, Inc., was hired to assist the

collaborative effort. Staff from the various agencies provided technical support along with a number of consultants.

### The Process

The Task Force met over an 18-month period, with four-hour meetings held once a month. The Task Force hosted seven rounds of public meetings to get ideas and feedback from the community. In addition, a Community Forum made up of interested stakeholders from both states was invited to closely follow the strategic planning process and to provide input at each milestone.

The process had five basic components:

1. Visioning and Development of Options
2. Evaluation of Option Packages and Land Use Analysis
3. Draft Recommendations
4. Re-evaluation and Additional Draft Recommendations
5. Development of Final Recommendations

The Task Force adopted ground rules at the beginning to guide the conduct of the meetings. One of the co-chairs set the stage by noting it was unlikely that anyone would get 100 percent of what he or she wanted, and that compromises would need to be made to reach a regional agreement. His goal was to have a plan that satisfied everyone at least 80 percent. A staff person noted that on each of the plan elements, the Task Force generally achieved this 80 percent agreement and that there appeared to be nothing in the plan that the members "could not live with". A key to the process was making sure the recommendations struck a balance among the competing perspectives.

Public involvement was a key element in the process and was encouraged through a variety of tools including: advertisements in newspapers; door-to-door delivery of project information; billboard and bus advertisements; a project website and web-based survey tools; a toll-free telephone line; and presentations to 275 business, community, and neighborhood groups. Outreach efforts resulted in participation by nearly 1,700 people.

The multi-modal option packages were based on ideas and comments from the public and consistency with the problem, vision, and values statements. The option packages that were analyzed all included new river

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# WASHINGTON-OREGON I-5 STRATEGIC PLAN, CONTINUED

crossing capacity across the Columbia River for transit and vehicles. The option packages also included a substantial increase in basic transit service levels and implementation of a strong transportation demand management program.

After adopting draft recommendations for the corridor in January 2002, the Task Force asked for additional evaluation and design work on the bridge and its influence area. The plan also has a component that focuses on the needs of the freight and passenger rail system.

An additional feature of the process was that two work groups of community stakeholders, one in Oregon and one in Washington, were invited to help the Task Force develop findings and recommendations around the area of environmental justice.

The strategic planning process was aided by a new land use and transportation model called Metroscope, which was used to conduct an analysis of the implications of making or not making improvements in the I-5 corridor.

## The Agreement

The Task Force adopted the final plan by a vote of 25 to 1. The recommendations included the following components:

- Three through-lanes in each direction on a segment of I-5;
- A phased light rail loop in Clark County ;
- An additional span or a replacement bridge for crossing of the Columbia River, with up to two additional lanes for merging and two light rail tracks;
- Interchange improvements;
- Capacity improvements for freight rail;
- Bi-state coordination of land use and management of the transportation system to reduce demand and protect corridor investments;
- Community involvement along the corridor to ensure that the final project outcomes are equitable.

## OUTCOMES

When the Task Force completed work on the plan, it was presented to state and local government agencies in Washington and Oregon for formal endorsement. The Southwest Washington Regional Transportation Council; the Ports of Portland and Vancouver, Washington; the

Oregon Transportation Commission; Metro; Multnomah County; City of Portland; and the transit agencies in Portland and Vancouver all endorsed the plan. Clark County, Washington, and the City of Vancouver, Washington have also endorsed it.

As a follow up to the work of the Task Force, a process to develop a Bi-State Land Use Accord is now underway. It is anticipated that this will be adopted in 2004.

The states of Washington and Oregon, along with the Portland/Vancouver region, are also working together to fund the widening of a segment of I-5 to 3 lanes. This project is anticipated to be ready for construction by June 2005. In addition, the bi-state region will be initiating an Environmental Impact Study for a new river crossing and potential improvements in the bridge influence area. This effort will include an Environmental Justice Working Group, which will participate in all projects in the I-5 Corridor to ensure adequate emphasis is placed on the potential impacts and benefits to low-income and minority communities.

## LESSONS LEARNED

- ✓ **The inclusive Task Force composition** helped produce recommendations that reflected a range of interests. Having business and community leaders involved in the decision making, not just elected and appointed government officials, helped generate better recommendations.
- ✓ **Commitment by both governors made a difference.** Having the governors appoint the task force members, and then staying informed about the process, helped emphasize the critical importance of this effort. In addition, the key elected leaders who served on the task force made it a high priority to attend the meetings.
- ✓ **Community outreach was an important part of the process.** Early on in the process a decision was made to conduct an open process that paid close attention to the opinions of people in the community. The Task Force explored all reasonable ideas and used feedback forms at public meetings to help focus the comments. Even more outreach would have been beneficial.
- ✓ **Involving Environmental Justice advocates in the process** helped ensure that these issues received adequate attention. The Environmental Justice Action Group was included as a member of the Task Force, and a series of special meetings around this subject was

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## WASHINGTON-OREGON I-5 STRATEGIC PLAN, CONTINUED

convened to flesh out potential impacts of some of the recommendations. In addition, activist groups were paid to distribute information door-to-door about the project at key decision points.

- ✓ **Hiring a skilled neutral facilitator/mediator was a key to success.** This was a complex negotiation and the mediator helped ensure that all voices were heard and recommendations were worded in a way that encouraged buy-in.
- ✓ **A jointly owned and managed project was sometimes difficult to conduct.** Although there are clear benefits in sharing ownership and responsibility, it can be challenging to have two jurisdictions in charge.
- ✓ **Close working relationships among the staff** from the various jurisdictions supported the process. The project advisory committee of state and regional government agency staff provided input on key project decisions including the development of Task Force agendas. It was a critical factor in bringing many of the elected Task Force members along as the project progressed.
- ✓ **Balancing the varying needs of Task Force members for information was a challenge.** One of the challenges of the process was meeting the needs of all the Task Force members for information and discussion. Some members felt they needed more information, while others felt they already understood the issues. To bring all members to the same level of understanding about the problems and potential solutions for the corridor required that a significant amount of time be spent on education.

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*This case was adapted from the I-5 Corridor Final Strategic Plan (June 2002) and from interviews with project staff.*





## Wisconsin DNR Facilitates Habitat Protection Plan

The Karner blue butterfly was listed on the Federal Endangered Species List in December 1992. Although the species is rare nationwide, it is relatively common in central and northwestern Wisconsin, especially where pine barrens, oak savannas, and mowed corridors support wild lupine, the only food of the Karner blue caterpillar.

Shortly after the Karner blue was listed as endangered, the U.S. Fish and Wildlife Service approached the Wisconsin Department of Natural Resources (DNR) about how the state would respond to the listing in light of widespread distribution of the species across the state and the large number of landowners affected. With ongoing conflicts over the listing of other species around the country, both federal and state agencies were eager to avoid similar problems in Wisconsin. DNR responded by developing a statewide Habitat Conservation Plan

(HCP) that would maintain Karner blue habitat while allowing continued forestry and highway maintenance activities. The concept of a statewide HCP was revolutionary; to date, almost all HCPs had been limited to a small geographic range and one or two landowners.

DNR distributed information throughout the state explaining the listing and the statewide HCP concept, and conducted a series of public meetings. Through this process they identified the major land managers who would need to be involved as partners in developing a statewide HCP. In all, the process involved 28 full partners, nine limited partners and 23 participants and cooperators. The group included federal, state and local government officials; the forest product industry; utilities; and representatives of environmental groups.

After the first several meetings of heated debate among stakeholders, DNR contracted with a facilitator (David Lentz) to ease tensions, identify common goals, and help the group work collaboratively toward developing the HCP.

The group agreed to create several committees and task forces to address specific issues and iron out differences. For example, a biological committee was formed to assemble scientific research on the Karner blue, and to share relevant research findings with the rest of the group.

Throughout six years of plan development, every decision of the group was reached through consensus. The public comment period generated

## **Wisconsin DNR Facilitates Habitat Protection Plan — continued**

only seven comments, none of which opposed the HCP.

The Wisconsin HCP, approved in September 1999, was the first of its kind in the United States. It covers 250,000 acres of partner-managed land in central and northwestern Wisconsin. While the national recovery plan for the Karner blue focuses on growth and maintenance of populations, Wisconsin's HCP stipulates no net loss of butterfly habitat in the state.

A source of pride for many of the stakeholders involved in its development, the HCP provides for voluntary participation for small landowners (under 1,000 acres), prescribes land use limitations on habitat land, and employs adaptive management techniques to deal with changing conditions affecting the butterfly in Wisconsin. Incorporation of adaptive management helps make the plan dynamic and flexible. Should numbers of the species decrease due to lack of habitat conservation on the part of small landowners, the exemption can be modified or deleted from the plan.

Among the innovative outcomes of the process was approval of in-kind contributions for HCP funding. These contributions include hours spent on surveys and management activities, as well as outreach efforts such as brochures and videos produced by partners. In the end, the success of this approach to managing the Karner Blue habitat depends on the strength of continuing relationships among local, state, and federal agencies, private companies, and the non-profit groups and individuals who use and manage the land.

*For more information on the statewide Habitat Conservation Plan, visit the Wisconsin Department of Natural Resources web site.*

*Environmental and natural resources problems rarely respect political boundaries. Pollution, for example, effects whole ecosystems—not just a single jurisdiction. Different levels of government need to work together across jurisdictional lines to address these kinds of problems, and they need processes to do so. Environmental and natural resources issues also effect the health and well-being of all citizens. Collaborative processes provide effective ways to include citizens voices in forming and implementing public policies.*

*Below is a case that illustrates different ways collaborative approaches can be used to address environmental issues.*

## Collaborating on Flood Mitigation Plans on the Northern Plains

### Problem

In 1997, a devastating flood struck the Red River basin. The flood caused severe damage along the river, which flows north along the Minnesota-North Dakota border into Manitoba and empties into Lake Winnipeg. Since the '97 catastrophe, three consecutive years of spring and summer tributary flooding left weary residents and communities throughout the Red River Basin in dire need of flood control measures.

In a context where repetitive flood disasters have put local economies, individual livelihoods, whole communities, and natural resources at risk, basin-wide flood mitigation makes economic, social, and ecological sense. But in a region that spans so many jurisdictions, how could such a diverse group find a common forum and methods for addressing their divergent needs?

### Process

To plan for future floods, and address the damage already done, the Federal Emergency Management Agency sponsored an International Flood Mitigation Initiative (IFMI). The Canadian Province of Manitoba provided additional funding for the initiative. Because the basin spans two nations, three states, a province, and hundreds of municipalities, the effort had to be coordinated across all these jurisdictions.

The repeated flooding and mounting damage gave each jurisdiction a strong incentive to work together. The entire watershed needed ways to coordinate their efforts, because each section of the River basin affects the others. And any good plan would have to encompass not only the whole geographic area, from upper to lower basin, rural to urban, and tributary to mainstem of the Red River, but also the entire spectrum of damage mitigation, from economic development to environmental dimensions of the problem. The Consensus Council was asked to design and facilitate a collaborative process to bring the various actors together to develop plans for addressing future flooding.

An IFMI group was formed, representing the provincial government of Manitoba, the states of Minnesota, North Dakota, and South Dakota, the Canadian and U.S. federal governments, and the business and nonprofit sectors. IFMI took a grass roots approach, holding community meetings to solicit public comments on values and priorities.

The IFMI group met 14 times over a span of two years. Each meeting was held at a different location in the basin and consisted of an evening meal and discussion followed by a full day of meetings.

To begin the process, IFMI participants developed a shared understanding of the problem. They agreed that the area constitutes one transboundary watershed community. New partnerships between the public and private sectors and nonprofit groups would need to be forged to reduce future flood damages.

Based upon these shared understandings and input from community meetings, IFMI participants developed a vision, mission, and goals to guide their work together. This helped them stay focused on their larger objectives. Participants realized that to address flood resilience for communities, it would also need to consider economic development, social, and ecological opportunities.



Roger Moe  
Minnesota Senate  
Majority Leader

*"Legislating has never been easy, and it's getting much more difficult as issues become more complex. These complex emerging issues require new skills to operate effectively in the legislative environment. Legislators need resources like the Policy Consensus Initiative to help teach us the skills of consensus building so we can deal with these issues more effectively."*

The IFMI group moved on to build agreements on strategies, policies, projects, and partnerships for mitigating potential damage from future flooding. After IFMI had done the bulk of its work generating possible actions for flood control, a second round of community meetings was held to allow citizens to review and assess the tentative IFMI agreements.

### Results

Fourteen distinct initiatives, affecting institutions from schools to legislatures, have sprung from the IFMI agreement.

The governors of Minnesota, North Dakota, and South Dakota and the Canadian Province of Manitoba signed a Memorandum of Understanding to meet regularly and develop joint transboundary management of the Red River basin.

Legislators from all four jurisdictions met to explore joint legislative efforts to mitigate flood damage and enhance the economic development and the environment of the Red River basin.

Public and private media have coordinated a central shared public media information system for local leaders and citizens about flooding and preparation, response, and recovery processes.

All basin school systems—in both countries—now share a public education process regarding flooding and the environment of the Red River basin.

The Red River Institute, a shared research facility, coordinates technical research among the colleges and universities in the Red River Basin and orchestrates full basin mapping.

So far, a total of \$2 million has been raised to implement IFMI initiatives.

### Lessons Learned

- Public involvement during a collaborative process can be important to identifying public issues and priorities and to gaining input and support for solutions.
- A crisis creates a sense of urgency that can be an opportunity to bring people together from across political boundaries to collaborate to address the crisis and benefit their communities.

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### *For more information on this case contact:*

The Consensus Council, who designed, convened, and facilitated the process.

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## Mediating the Use of Lake Michigan's Waters

### The Dispute

For most of this century, other Great Lakes states and the federal government have been in a recurrent dispute with Illinois over the use of Lake Michigan's waters. The lake is Chicago's primary source of water, and many of the region's sanitary sewer systems use its waters.

Various studies over the years show that taking too much water from Lake Michigan in the Chicago area could lower water levels on all the Great Lakes, affecting navigation, locks, ports, and hydroelectric power development at Niagara Falls.

Between 1906 and 1979, the Great Lakes states were a part of at least four Supreme Court suits against Illinois on the matter. In the 1920s, for example, the states brought an action challenging the right of Illinois and Chicago to take any water out of Lake Michigan. At about the same time, the federal government filed suit to stop Chicago from obtaining more water from Lake Michigan than allowed under limits established by the U.S. Corps of Engineers.

Interstate suits go directly to the Supreme Court. The high court eventually limited the amount of water that Chicago could take from Lake Michigan after 1938 to 1,500 cubic feet per second (CFS) in addition to domestic pumpage.

The case was reopened in 1959 on questions of municipal use and in 1967 the limit was raised to 3,200 CFS for all purposes—municipal use, navigation of Illinois waterways, and water quality matters. In the 1970s, Wisconsin reopened the case, seeking a new way to account for Illinois' diversions of the lake's waters. A decree amendment in 1980 set in motion new accounting procedures that gave the Corps of Engineers some responsibilities for measuring diversions.

By the 1990s, the new accounting procedures showed that Illinois was exceeding the set limitation of 3,200 CFS. In 1995, Michigan spearheaded new legal action. It wrote the clerk of Supreme Court that it would soon reopen the case. Michigan's attorney general asserted that Illinois, Chicago, and Metropolitan Water Reclamation District of Chicago had been diverting more than 3,200 CFS. The stage was set again for years of litigation and the expenditure of millions of taxpayer's dollars.

### The Process

At this point, a U.S. Justice Department lawyer, Andrew F. Walch, contacted the states about the possibility of mediating the latest incarnation of the dispute. Officials in charge of alternative dispute resolution at the Justice Department and from the Solicitor General's office convened meetings of attorneys representing the Great Lakes states. Besides Illinois, Michigan, and Wisconsin, Indiana, Minnesota, Ohio, New York, and Pennsylvania had an interest in the negotiations. Some of the initial meetings were described as acrimonious.

Eventually the eight states agreed to try mediation and they and the U.S. government agreed to share the cost of the mediator.

The mediator later summed up what happened: Initially, several parties expressed skepticism that a non-binding, voluntary mediation would produce a durable solution that had previously defied resolution. Nonetheless, they all agreed to try. In less than a year, they produced a framework to permanently settle the dispute.



*During my eight years as governor of Wyoming, working with state policy issues and with other Governors, I became a true believer in the necessity of governors, their staffs, and other public officials operating as consensus builders. Given the complexity of the issues, the speed of change, and the diversity of the many constituencies, new tools and skills are required to forge lasting agreements on public policy. What PCI is about, therefore, is essential to enhancing government effectiveness and efficiency.*

*Former Governor Mike Sullivan of Wyoming  
Chair, Board of Directors  
Policy Consensus Initiative*





Representatives from Canada and the Province of Ontario observed the negotiations and took part in discussions.

### **The Result**

In the mediator's words, the solution the eight states devised "affirms Illinois' right to use Lake Michigan water, but within bounds acceptable to the other Great Lakes states."

The agreement, in the form of a memorandum of understanding signed by the eight states, was announced on Oct. 9, 1996. "By choosing to mediate instead of litigate, these states did the right thing," said then-Associate Attorney General John R. Schmidt, who oversaw the Justice Department's ADR program. "This agreement will save millions of taxpayer dollars. Another trip to the Supreme Court wouldn't have done anybody any good."

The Memorandum of Understanding created a process and set key benchmarks for the states to achieve over a three-year period during which no litigation is to be initiated. Among other things, Illinois agreed to comply with earlier court decrees limiting the amount of water it can take from Lake Michigan and to restore excess water that it took. The system for measuring diversion is to provide almost instantaneous estimates. Illinois is to take steps to prevent leakage.

If Illinois makes clear progress in meeting its obligations and an independent panel accepts the lakefront measuring system, the parties are to ask the Supreme Court to incorporate their agreement in a final decree.



*State government needs to take the lead in the use of creative problem solving and dispute resolution. These tools, used appropriately, have proven to be more effective and efficient ways to address many of the difficult issues that citizens and government face.*

*Attorney General Christine O. Gregoire of Washington*