

A Stepped Approach to Successful NRD Alternative Dispute Resolution

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NRDA Screams For Mediated Settlement

- **Huge Size & Scope**
- **Technical / Scientific /Legal Complexity**
- **Strong Motivation to Avoid Non Technical Trier of Fact with Limited Environmental Experience**
- **Enormous Transactional Costs**
 - **Multiple Trustee Studies**
 - **RP Shadow Experts and Studies**
 - **Expensive and Protracted Agency Actions and Litigation**
- **All While thePublic Waits for Restoration of Injured Resources**

So, Why Isn't ADR SOP for NRDA?

- **For ADR to be Successful**
 - **All Parties and Neutrals Need to Identify the Impediments to Settlement**
 - **And Use the ADR Process to Overcome Those Barriers**

Impediments to NRD Settlement

- **Overall Intellectual and Multidisciplinary Complexity**
(Or why NRDA is different from commercial litigation)
 - **Need to Grasp the Totality of Environmental Issues -- Past, Present & Future**
 - **Neutrals With Appropriate Background and Experience**

Impediments to NRD Settlement

Multiple Parties, Motivations & Actions

- **Intertwined and Conflicting**

RPs

- **Cartel / Group Dynamics**
- **Inter RP Liability**

Multiple Trustees

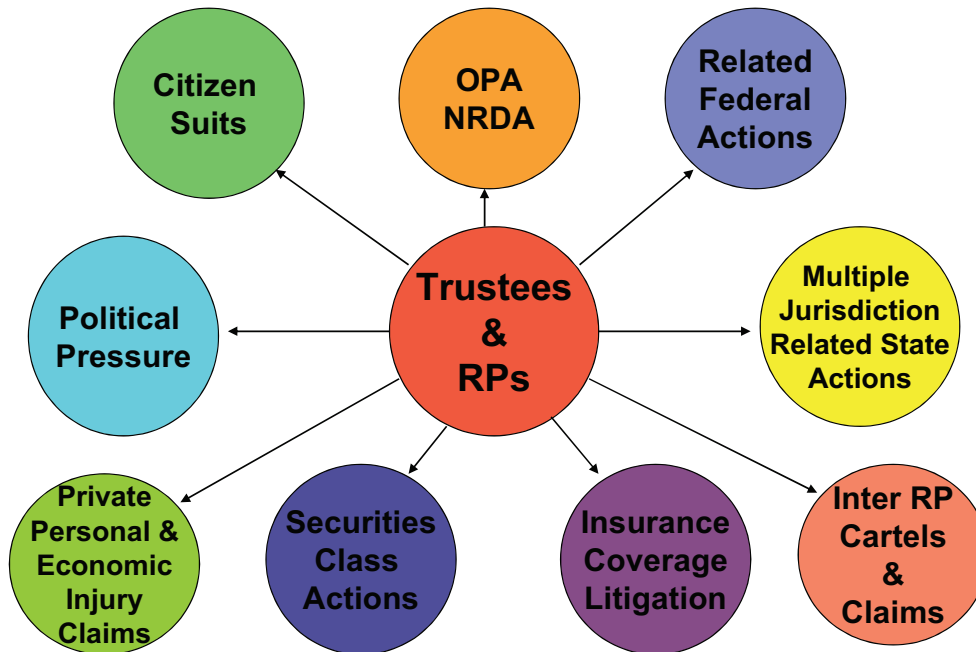
- **Maximizing Return to Individual States, Jurisdictions or Constituencies**

Impediments to NRD Settlement

Indirect Parties and Interests

- **Political Pressure on Trustees and Agencies**
- **Public Environmental Interest Groups**
- **Private Environmental Advocacy Organizations**
- **Economic Development Interests**
 - **Jobs and Growth**

The Whack-A-Mole World of Environmental Disputes



Technical and Scientific Complexity

Legions of Experts

- Trustee Experts, Agency Experts, RP Shadow Experts, RP Testifying Experts, etc.
- Studying Complex Environmental Systems
- Using Wide Variety of Methods from Direct to Ethereal
- All Looking at Broad Questions of Injury, Restoration and Compensation
- Results in a Wide Range of Conclusions and Opinions

Government Inertia and ADR / Settlement Paralysis

Virtually All Agencies Operate Under a Direct or Indirect Mandate to Use ADR, But the Process Often Discourages Actual Application:

- Perceived Need to Adhere to Policy and Check All of the Regulatory Boxes
- Precedent -- Develop, Bolster, Protect
- Inter Agency Bureaucracy & Conflicts
- Political Pressure -- Lawmakers, Constituents & Interest Groups
- All of Which May Conflict with Public Interest in Expedited Resource Restoration

Government ADR Proclamations and Limitations

15 CFR Section 990.25

Trustees may settle claims for natural resource damages under this part at any time, **provided that** the settlement is adequate in the judgment of the trustees to satisfy the goal of OPA and is fair, reasonable, and in the public interest, **with particular consideration of** the adequacy of the settlement to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and services.

Government ADR Proclamations and Limitations

APA 5 USC 572

- General authority
- (a) **An agency may use a dispute resolution proceeding** for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.
- (b) **An agency shall consider not using a dispute resolution proceeding if--**
 - (1) a definitive or authoritative resolution of the matter is required for **precedential value**, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
 - (2) the matter involves or may bear upon **significant questions of Government policy** that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
 - (3) **maintaining established policies is of special importance**, so that variations among individual decisions are not increased and such a proceeding would not likely reach **consistent results** among individual decisions;
 - (4) the matter significantly **affects persons or organizations who are not parties to the proceeding**;
 - (5) **a full public record of the proceeding is important**, and a dispute resolution proceeding cannot provide such a record; and
 - (6) **the agency must maintain continuing jurisdiction over the matter** with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.
- (c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

A Stepped Approach to Successful NRDA ADR

The Formula:

- **Identify Parties, Impediments and Motivations**
- **Embed Experienced and Knowledgeable Neutrals into the Process**
- **Use Multiple ADR Processes and Techniques**

A Menu of ADR Techniques

- **Group Mediation / Facilitation / Participation**
- **Identify Agreed Upon Decision Points**
- **Focused Mediation for Specific Issues**
- **Expert Meetings and Examination**
- **Arbitration and Mini Trials**
- **All to Seek Agreement on as Many Issues and as Much of the Process as Possible to:**
 - **Narrow Contested Issues**
 - **Reduce Transaction Costs**
 - **Expedite Restoration of Injured Resources**

Step 1: Preassessment Phase and Early RP and Neutral Involvement

ASAP, and Before Required by the Regs . . .

- **Trustees should:**
 - **Coordinate with Other Trustees**
 - **Identify and Involve RPs**
 - **Pull in a Mediator or Team of Mediators**
- **All to Pursue the Goals of:**
 - **Collaborative Selection of Assessment Methods**
 - **Avoidance of Duplicative and Wasteful Transaction Costs**
 - **Expedient, Efficient and Cost Effective Restoration**

Preassessment Role for Mediator

- **Meet Separately with Trustees, RPs and Interested Constituencies**
- **Identify Key Issues, Motivations and Goals**
- **Stress Need for Inclusion, Cooperation and Collaboration**

Preassessment Collaboration

Why Should the Parties Care?

- **RPs**
 - Escalating, Unpredictable, Runaway Costs
 - Litigation Vagaries and Risks
 - Investor Concerns
 - Public Relations Image
- **Trustees**
 - Expedient Restoration
 - Political Responsiveness and Accountability
- **Public Interest Constituencies**
 - Effective Response
 - Corporate and Governmental Accountability

Injury Assessment: The Role for ADR

Trustee Discretion -- Injury Assessment

- **What is the Injury?**
 - From Concrete to Ethereal

- **Choice of Quantification Methods?**
 - From Established to Experimental
 - Hard v. Soft Damages

- **All Central to NRD Valuation**

Assessment - Mediation - Consensus

Embedded Mediation and Collaboration:

- **Bringing Interested Parties Together**
 - » PLUS

- **Open, Collaborative Sharing of Information**
 - » PLUS

- **Mediator Facilitation and Negotiations**
 - » EQUALS

- **Focused, Nonduplicative, Efficient Process**
 - » PLUS

- **Lower Probability of Subsequent Challenge**

The Problem With Experts “I’m Smarter Than You Are”

Experts are the Heart of NRDA

- and Can Be a Major Barrier to Successful ADR

Legal Positions Grounded in Scientific or Technical Fact

- Carry a Sense of Righteousness and Entitlement

The Neutral Must be Prepared to

- Confront Them
- Use Them
- Neutralize them
- Work Around Them

Wrangling the Experts

ADR Options When Opposing Expert Opinion Stands in the Way of Settlement

- **Traditional Mediation**
 - Requires an Astute Mediator Who Can Examine and Test the Expert Opinions
- **The Expert Meeting**
 - A Facilitated Meeting of the Experts During Which the Opinions are Tested and Debated
- **A Technical Mini Trial**
 - Focus on the Narrowed Technical Issues
 - Decision Maker Could be a Lawyer or Technical Expert
 - Problem with a Technical Expert as Decision Maker
 - He Will Want to Prove He is Smarter than the Other Technical Experts

Restoration Alternatives Development and Selection

Once ADR Has Been Embedded Into The Assessment Process

- **The Interested Parties Will Understand the Issues and be Accustom to the Approach**

As a Result, From An ADR Perspective

- **Many of the Central Issues Will Already be Resolved or Narrowed**
- **Application to Restoration Alternatives Development and Selection Will Be a Natural and Seamless Continuation of the Process**

The Final “Cleanup”

“And in the end”

If ADR is Systematically Embedded as a Stepped Process, Remaining Unresolved Issues Will Have Been Sufficiently Narrowed to Allow for Treatment Through Arbitration

Likewise, Additional Issues That May Arise During the Actual Restoration Can Be Efficiently Addressed By The Same Techniques That Will Now Be Familiar to the Interested Parties.

NRD Articles by Robert F. Copple

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Contingent Valuation Methodology, Public Choice and the Embedding Phenomenon in Natural Resource Damage Assessments, 35 Natural Resources Journal 443 (1995).

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