

Finding Middle Ground:

For most of the twentieth century, Everglades National Park in Florida suffered the effects of not-so-benign neglect. But as more and more people have jumped on the “save the Everglades” bandwagon in the last two decades, the good intentions of one group have often conflicted with those of others. The result has been an agonizingly complex legal quagmire as well as widespread doubts whether all the various Everglades stakeholders would ever resolve their differences on how best to protect and restore the land.

It was the prospect of sorting out just this sort of thorny dilemma that led Senator John McCain (R-Arizona) to propose the creation of the U.S. Institute for Environmental Conflict Resolution (USIECR) under the auspices of the Morris K. Udall Foundation. This foundation, an Executive Branch agency, was created in 1992 and named for the Arizona Democrat who distinguished himself on Capitol Hill as an effective consensus builder, able to forge legislative agreements across party lines and competing interests.

The foundation itself is dedicated to educating Americans on preserving and protecting their national resources through studies in the environment, Native American health and tribal policy, and effective public policy conflict resolution. McCain’s bill, which became the Environmental Policy and Conflict Resolution Act in 1998, provided the Udall Foundation with an active component to step in and try to unsnarl environmental disputes like the one in Florida.

A Mission to Assist

USIECR was charged by Congress with assisting parties in resolving environmental conflicts that involve federal agencies or interests. As USIECR director Kirk Emerson points out, the value of environmental alternative dispute resolution (ADR) had already been established in recent years as a good way to produce effective outcomes.

Confronted with the long delays and high costs that are typical of litigation, disputing parties often choose to settle their differences via ADR outside court—to achieve solutions faster and to save money. “The [environmental ADR] field had been proving that mediating and assisting parties

created better and more timely solutions,” Emerson says. “It’s not just a way of eliminating court delays, but also reducing the costs of environmental litigation and the unsatisfactory conclusions of litigation. Also, in complex environmental cases, often the real issues aren’t what comes out in court—and the parties that can really solve the problem often aren’t at the table.”

In the last 20 years or so, ADR has become a virtual legal industry of its own. There are private ADR companies and ADR services that are attached to courts. ADR entities provide facilitators chosen by mutual accord of disputing parties. These mediators and facilitators are almost always lawyers, usually solo practitioners who have their names on a variety of ADR lists. Often, they are retired judges who have taken up ADR as a part-time post-bench career.

One of the people on the USIECR roster, attorney Howard S. Bellman of Madison, Wisconsin, mediates in a variety of other dispute categories, such as labor. To him, USIECR is strongly characterized by the fact that it is actually part of the federal government. “If I’m on a labor mediation panel, the government is just one more employer, and often not a very important one,” he says. “But in the environmental world, the government is a regulator, and it’s often a party to disputes. So the idea of having a roster that has a sort of government support is more notable. The theory of [USIECR] is to give the roster sort of an inside endorsement. It provides someone who can market the idea of mediation among government agencies through the credibility of being a sister agency.”

The facilitators’ role depends on what the parties agree to do. On one end of the spectrum is binding arbitration, where parties agree that the arbitrator’s finding is final. But in most ADR cases, the arbitrator is brought in to provide experienced and neutral third-party assessments of legal claims and counterclaims. Once the parties have that assessment in hand, they can choose whether to pursue legal action.

The Environmental Policy and Conflict Resolution Act states that any federal agency may use USIECR to assess or mediate any conflict related to the environment, public lands, or natural resources. According to Emerson, many agencies are taking advantage of this resource. Since its inception in



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Environmental Conflict Resolution



1999, USIECR has handled between 75 and 100 cases and projects per year with its staff of 15 and a national roster of mediators and facilitators that has grown to 220. Emerson says the matters handled by USIECR have ranged widely in scope, including mediator and stakeholder training sessions and administrative appeals, in addition to its broader litigation-alternative activities.

William Hall, a conflict resolution specialist with the U.S. Environmental Protection Agency (EPA) Conflict Prevention and Resolution Center, says that agency uses internal neutral third parties and also has a contract it can use to acquire those services from outside professionals. In some cases, Hall says the center consults USIECR's roster or requests neutral third-party services from USIECR. The EPA center was established under the Administrative Dispute Resolution Act of 1996, which requires each federal agency to have a dispute resolution specialist on staff and to develop an ADR policy.

The McCain law requires that any agency that uses USIECR's services must notify the President's Council on Environmental Quality (CEQ), which watches for conflict among the agencies it monitors. But Emerson says that her office's relationship with the CEQ has been so good that the council often takes a more proactive role than the law requires, actually referring matters to USIECR. It was the CEQ, in fact, that provided the stimulus for USIECR's involvement in the Everglades in January 2001.

A Case in Point: Pulling Together in the Everglades

For many years, the Everglades suffered from the effects of canals and levees that had been built to divert water out to sea to drain adjacent lands for agriculture and development. In 1983, Congress authorized the Experimental Water Deliveries Program, which was intended to improve water movement into and out of Everglades National Park. But the U.S. Fish and Wildlife Service determined that the program's water management practices threatened the endangered Cape Sable seaside sparrow. The local Miccosukee Indian tribe further challenged the program on a number of grounds, including claims that high phosphorus content in the agricultural runoff was endangering water quality.

Other farmers, closer to the Everglades, had concerns of another sort. Some had compensated for the drier conditions and lower water tables—a result of the program's lower canal levels—by replacing row crops with better-adapted fruit and avocado trees. Restoration of the original water levels would ruin their investment.

USIECR senior program manager and Everglades project manager Michael Eng says the U.S. Army Corps of Engineers, the lead federal agency involved in trying to map out an Everglades restoration plan, had been instructed by the CEQ to complete an environmental impact statement for revising operations of the experimental program. All the while, a total of four agencies—the Army Corps of Engineers, the National Park Service, the U.S. Fish and Wildlife Service, and the state's South Florida Water Management District—continued to work on developing a longer-term structural and operational plan that would address all the stakeholder concerns. But progress was slow.

It was at this point, Eng says, that the CEQ called the Army Corps of Engineers, strongly suggesting that the corps request the services of USIECR. "You had four agencies



that had to agree or they weren't going anywhere," he says, "and . . . they couldn't agree. The local water management district was saying, 'One of our primary local constituents is the agricultural folks, and we're not going to do something that floods them out.' And Fish and Wildlife was saying, 'If you put this species in jeopardy, we can take you to jail.' That was the situation that was handed to us when we got involved. There were very low levels of trust between the agencies." USIECR lacked roster members in Florida, so they recruited two professional mediators in the area: Analee Mayes, president of the Tampa-based Consensus Builders, and Carlos Alvarez, a Tallahassee lawyer.

Eng says that the first step was to gain the commitment of the four agencies to proceed with a new attempt to negotiate.

Emerson says the USIECR assisted in gaining this commitment by mediating scientific disputes that involved disagreements over hydrological monitoring and modeling, facilitating meetings, and helping to develop a memorandum of understanding and a procedure for working through an interim operating plan. "We end up being a convener and manager of the communications," Eng says, "and developing more cooperative ways of working together."

Following these efforts, the mistrust eased, Eng says, and the effort moved forward. An interim water management plan has been implemented to provide "breathing room" to operate some aspects of the plan that had been stalled, and work on longer-term solutions proceeds. The next step is for the four agencies to collaborate in developing an environmental impact statement for the original program, which has been targeted for completion in 2005. Eng says, "The [agencies have] made tremendous progress."

Kimberley Taplin, a regional project manager for the Army Corps of Engineers in West Palm Beach, agrees and speaks glowingly of USIECR's effect on the Everglades planning process. "We had multiple agencies with jurisdictional requirements and missions that were sometimes in direct conflict with those of other agencies," she says. "[USIECR's] facilitation really helped all of us get down to what the specific problems and interests really were. They helped facilitate getting to the meat of the issues—more what the interest of the agency is, as opposed to a position the agency had taken."

Ongoing Activities

In addition to its case- and project-specific services, USIECR has launched a variety of new programs designed to be ongoing. These initiatives include building up a network of Native American dispute resolution practitioners who can assist with government disputes involving Native American tribes, and a program evaluation system designed to improve future efforts by giving individual activity managers, as well as upper management, the ability to assess and report on programs and projects.

"There is nobody like [USIECR]," says Robert C. Fisher, a roster member and senior mediator and general counsel at RESOLVE, a nonprofit dispute-resolution organization based in Washington, D.C. "In this field, they are an important source of helping stakeholders and federal agencies to develop an awareness about how you can use these processes. The institute is an important component to the field of environmental dispute resolution and how it's evolving."

Richard Dahl

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